

# New Rehabilitation Act Regulations For OFCCP

The Office of Federal Contract Compliance Programs (OFCCP) is responsible for enforcing Executive Order 11246, the Vietnam Era Veterans Readjustment Assistance Act (VEVRA), and the Rehabilitation Act of 1973. However, the regulations implementing Executive Order 11246 and VEVRA were different than the regulations governing enforcement of the Rehabilitation Act. Under Executive Order 11246 and VEVRA, the OFCCP was able to use a combination of investigative methods, including an off-site review of records, a compliance check, and focused review. In contrast, the OFCCP was much more restricted in how it was required to investigate complaints brought under the Rehabilitation Act.

Effective July 22, 2005, the new regulations allow OFCCP to use the same investigative techniques under the Rehabilitation Act as they can use for the other laws that the OFCCP enforces. The changes in the OFCCP regulations closely follow a proposal published for public comment almost five years earlier! The change in regulations is not likely to greatly affect the result of OFCCP investigations. Its greater significance is the mere fact that the OFCCP is still looking for ways to strengthen its arsenal.

Steven H. Adelman | 312.443.0405 | [sadelman@lordbissell.com](mailto:sadelman@lordbissell.com)

## Fourth Circuit Invalidates Employee's Waiver Of FMLA Claims In Separation Agreement

Can an employee waive claims under the Family and Medical Leave Act ("FMLA") in a standard separation or settlement agreement? The Fourth Circuit Court of Appeals gives a resounding "no" to that question, agreeing with a Department of Labor ("DOL") regulation that prohibits such waivers absent DOL or court approval. *Taylor v. Progress Energy, Inc.*, No. 04-1525.

Barbara Taylor worked for Progress Energy as a data management assistant. In 2000, she began experiencing health problems and periodically missed work for medical tests or other health-related issues. Taylor inquired whether these absences qualified under the FMLA, and she was apparently told (erroneously) that they did not qualify because each absence did not exceed five consecutive days. Later in 2000, Taylor missed six weeks of work due to an operation, but Progress considered only four weeks of her six-week absence as excused under the FMLA.

In early 2001, Taylor received a poor performance evaluation that was due, in part, to her numerous health-related absences. In May 2001, the company instituted a reduction in force and selected employees for termination based partly on their recent performance evaluations. Progress selected Taylor for termination as part of the RIF. Upon terminating Taylor, Progress presented her with a separation agreement. The separation agreement released Progress from all claims relating to Taylor's employment, in exchange for a payment of approximately \$12,000. Taylor signed it.

In May 2003, almost two years after signing her separation agreement, Taylor sued Progress for violating the FMLA. She

alleged that Progress improperly penalized her for absences that should have been excused as FMLA-qualifying. Progress moved for summary judgment, arguing that Taylor's claim was barred by the release agreement that she signed in 2001. The district court agreed with Progress and dismissed Taylor's claim. But, on appeal, the Fourth Circuit reversed and reinstated the case.

The Fourth Circuit found that the release agreement could not validly waive claims under the FMLA. The Court pointed to a DOL regulation specifically stating that employees cannot waive their rights under the FMLA—at least not without approval from the DOL or a court.

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The basis for the Fourth Circuit's ruling—and the DOL regulation on which it relied—is the Fair Labor Standards Act ("FLSA"). The DOL and the courts have long held that claims under the FLSA cannot be waived without DOL or court approval. According to the DOL and the Fourth Circuit, the enforcement scheme under the DOL is the same as under the FMLA. Therefore, unless the Fourth Circuit is overturned by the Supreme

Court—or the Court of Appeals in the Circuit in which your employees work goes a different way—even the most artfully worded general release may not release FMLA claims.

This does not mean that separation agreements are not useful tools. Rather, it means that employers must recognize the limitations of these agreements and understand that releases—even if worded broadly—do not always guarantee freedom from all employee lawsuits.

Kevin D. Kelly | 312.443.0217 | [kkelly@lordbissell.com](mailto:kkelly@lordbissell.com)