Like a driver negotiating merging highways, today’s workers’ compensation practitioner seldom travels far down the road toward settlement before having to maneuver cautiously to avoid colliding with intersecting employment law issues. In fact, achieving a satisfactory settlement often requires resolving employment issues that may even relegate the workers’ compensation claim to the background. Our General Assembly recognized the importance of this in the recent amendments to the North Carolina Workers’ Compensation Act when it added subsection (e) to N.C. Gen. Stat. § 97-17, noting that “[n]othing in this section prevents the parties from reaching a separate contemporaneous agreement resolving issues not covered by this Article.” N.C.G.S. § 97-17(e) (2011).

Unfortunately, navigating the association between workers’ compensation and employment law is complicated by the tripartite relationship formed between the employer, the injured worker, and the workers’ compensation insurance carrier. For example, in many workers’ compensation settlements, the employer’s primary interest is staving off future claims by obtaining the claimant’s resignation—to ensure that the injured worker no longer dons its doorstep—and a release—to prevent the need to address any other claims. In contrast, the insurance carrier’s primary interest is settling the contemporaneous claim, and the carrier may even be unwilling or unable to handle the employment issue because the policy covers workers’ compensation claims to the exclusion of employment matters. When the injured worker has no intention of returning to work for the employer, the parties’ interests align, making way for a mutually beneficial settlement. In contrast, when the injured worker values his or her pre-injury job highly and does not wish to resign as part of the settlement, this may set the insurance carrier’s interest and the employer’s interest on a collision course that stymies optimal settlement for any of the parties involved.

A crash of this sort occurred in Lilly v. Mastec North America, Inc., where the plaintiff was unaware that the defendant-employer had conditioned the settlement of his workers’ compensation claim on his voluntary resignation with a “general release” of all potential employment claims until the day of mediation, which the plaintiff refused to do. 302 F.Supp.2d 471, 474-75 (M.D.N.C. 2004). The adjuster eventually settled the claim without an accompanying resignation and release, so when the defendant-employer later terminated the plaintiff’s employment, the plaintiff sued under the Retaliatory Employment Discrimination Act (N.C.G.S. § 95-240-245) arguing that the employer had unlawfully retaliated against him for filing a workers’ compensation claim. Id.

Like an alert traveler who must be mindful of the obstacles on the road in front of her as well as those merging from intersecting roads, Lilly demonstrates that the workers’ compensation practitioner would be well advised to anticipate potential conflict of interests that arise from the convalescence of workers’ compensation and employment related issues. This will require at least a working knowledge of related employment laws and an understanding about which claims under those laws can, in fact, be released.

To that end, the next few sections of this article provide an overview of the legal
standards used to evaluate the validity of waivers for some of the most common statutory causes of action, and though this short article cannot fully evaluate waivers under every statute discussed herein, it is intended to provide you with a starting point for your own research.

I. THE GENERAL RULE: AN EMPLOYEE MUST “KNOWINGLY AND VOLUNTARILY” RELEASE HIS OR HER CLAIM.


This general rule has been tweaked by statute in some cases and by the common law in others. For example, a release under the Age Discrimination in Employment Act (“ADEA”), as amended by the Older Workers Benefit Protection Act, requires that the agreement be made “knowingly and voluntarily,” but that determination hinges on compliance with specific statutory requirements. Among others, the release must be written in an understandable manner, specifically refer to claims arising under the ADEA, include written advice to consult an attorney prior to execution, provide the employee 21 days to consider the agreement, and allow the employee 7 days to revoke. 29 U.S.C. § 626(f)(1).

Similarly, the National Labor Relations Board (“NLRB”) imposes additional requirements on settlement before it will recognize a valid waiver of the employee’s right to pursue a private suit under the National Labor Relations Act: (1) the alleged discriminatee must voluntarily agree to release personal claims and agree to be bound by the Board’s decision not to pursue a claim; (2) settlement must be “reasonable” in light of the violations; (3) settlement must be untainted by fraud, coercion, or duress; and (4) the defendant-employer must not have a history of violating the Act or breaching previous settlement agreements. BP Amoco Chemical-Chocolate Bayou, 351 NLRB No. 39 (2007) (citing Independent Stave Co., 287 NLRB 740, 743 (1987)).

Moreover, as a corollary to the general rule, waivers are usually only valid as to claims which accrued prior to the waiver (retrospective claims) as opposed to claims that accrued thereafter (prospective claims). See, e.g., Reighard v. Limbach Co., Inc., 158 F.Supp.2d 730 (E.D. Va. 2001) (noting that prospective waivers are almost always “void”). For example, waivers of prospective claims are specifically forbidden under the ADEA and the Family Medical Leave Act (“FMLA”). 29 U.S.C. § 626(f)(1)(C); 29 C.F.R. § 825.220(d) (as amended 2009); Whiting v. Johns Hopkins Hosp., 680 F.Supp.2d 750 (2010), aff’d at, 416 Fed.Appx. 312 (4th Cir. 2011).

II. EXCEPTIONS TO THE GENERAL RULE:

There are many exceptions to the general rule with some statutes absolutely forbidding any waiver of claims, others requiring independent approval of any purported waiver, and, in some instances, it remains unclear whether a claim may be waived at all.

An employee may not waive his or her right to any of the following, regardless of whether the waiver was “knowing and voluntary”: (1) unemployment benefits, N.C.G.S. § 96-

Some caveats worth mentioning here are that, even though the individual cannot waive the right to file a charge with the EEOC or the NLRB, he or she may waive the right to recover in any lawsuit brought by the EEOC on the individual’s behalf, EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987), or the right to pursue a private suit under the National Labor Relations Act as discussed by BP Amoco, supra.

Other statutes allow waivers but require that they be reviewed by a third-party. For example, claims arising under the FLSA may not be released without approval of the Department of Labor or a court’s determination that the release is fair and reasonable. See 29 U.S.C. § 216(c); Taylor v. Progress Energy, Inc., 493 F.3d 454, 460 (4th Cir. 2007). Similarly, although the Sarbanes-Oxley Act does not prevent a release of potential claims, once a complaint has been filed, any settlement or waiver would require the approval of the Assistant Secretary of Labor, an administrative law judge, or the administrative review board. See generally 29 C.F.R. § 1980.111.

Furthermore, there is still lingering uncertainty as to whether some employment claims can be waived at all. For example, the North Carolina Wage and Hour Act prohibits an employee from waiving the right to earn wages for his or her labor and states that any settlement for “partial payment” of those wages is “void.” N.C.G.S. § 95-25.7A(b). A strict reading of that provision would forbid any wage-dispute settlement because it is difficult to conceive of a situation where an employer would settle for anything other than “partial payment.” On the other hand, a more comprehensive reading of the statute would allow settlements subject to Department of Labor approval as is the case under the FLSA. After all, the Act specifically sanctions supervised releases for unpaid wage claims. See id. at § 95-25.22(e). No court has resolved this ambiguity to date.

In light of this ambiguity, it would be prudent to specify whether there are any outstanding wage disputes in the employment release and stipulate whether the claimant agrees to release those particular claims. Understanding that even a specific release may not be valid under the Wage and Hour Act, you should also consider having the parties stipulate that the settlement and release can be submitted to the Department of Labor for approval with both parties agreeing that the settlement is fair and reasonable.

prohibit an employee from waiving accrued and vested pension benefits. Compare Lynn v. CSX Transp., Inc., 84 F.3d 970, 975 (7th Cir. 1996) and Esden v. Bank of Boston, 229 F.3d 154, 173 (2d Cir. 2000) with Finz v. Schlesinger, 957 F.2d 78, 82 (2d Cir. 1992); District 29, United Mine Workers v. New River Co., 842 F.2d 734, 737 (4th Cir. 1988); Rhoades v. Casey, 196 F.3d 592, 598-99 (5th Cir. 1999); Lumpkin v. Enviroydne Indus., Inc., 933 F.2d 449, 455 (7th Cir. 1991) and Fair v. International Flavors & Fragrances, 905 F.2d 1114 (7th Cir. 1990).

This issue has become even less certain in recent years, despite attempts to resolve the controversy. Treasury regulation § 1.411(d)-4, Q&A (3)(a)(3) was amended in 2007 to read that “a participant may not elect to waive [accrued-vested] protected benefits…,” which many thought would have settled the matter, but in 2009 the Supreme Court pronounced that a beneficiary always has the power to disclaim benefits despite ERISA’s anti-assignment and anti-alienation rules. Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan, 555 U.S. at 294-5, 129 S.Ct. 865, 873 (2009).

Recent decisions have rejected any distinction between a beneficiary and a participant in light of the Supreme Court’s decision in Kennedy and held that ERISA plan participants may also waive their benefits. See, e.g., Boyd v. Metropolitan Life Ins. Co., 636 F.3d 138, 143 (4th Cir. 2011) (noting the absurdity of requiring a participant to accept benefits he or she wishes to disclaim). Nonetheless, this area is constantly evolving and highly complex, which behooves advocates to research the validity of a specific type of waiver before relying on the general principles applicable to other statutes if he or she knows that a specific issue might arise.

In conclusion, understanding what causes of action may be waived is certainly an integral aspect of properly handling the closure of any workers’ compensation claim with a related employment release, but Lilly provides one final lesson worth heeding. Understanding the relationship between workers’ compensation law and employment law is necessary but not sufficient. The lawyer must also timely analyze and discuss the effect of this relationship with his or her client prior to sitting down at the negotiation table. Otherwise, as the case was in Lilly, it may already be too late to maneuver and avoid a costly collision.

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