Waiving the Effectiveness of the FMLA: The Anti-Waiver Approach to Enforceability of FMLA Severance Agreement Waivers

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"*Employees cannot waive, nor may employers induce employees to waive, their rights under [the Family and Medical Leave Act].*"[1]

I. INTRODUCTION

Although the language in the above regulation appears to prohibit employees from waiving their rights under the Family and Medical Leave Act (FMLA), state and federal courts have recently wrestled with the meaning of the phrase. Some courts have come to the conclusion that it *allows* employee waivers in severance agreements.[2] The Fourth Circuit and Fifth Circuit Courts of Appeal are currently split on the issue of FMLA waivers, and debate continues over the exact meaning of the phrase and what interpretation best serves the purposes and goals of the FMLA.[3]

1. 29 C.F.R. § 825.220(d) (2007) (implementing regulations under the Family and Medical Leave Act of 1993 pursuant to 29 U.S.C. § 2654 (2000)).

2. *See, e.g.*, Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321 (5th Cir. 2003) (finding that 29 C.F.R. § 825.220 does not prohibit waiver of FMLA rights); Schoenwald v. ARCO Alaska, Inc., No. 98-35195, 1999 WL 685954, at *1 (9th Cir. Aug. 30, 1999) (holding FMLA claim foreclosed due to employee's ratification of a release); Simonton v. Am. Express Travel Related Servs., No. 05-6123-CV-SJ-FJG, 2006 WL 3386564, at *3 (W.D. Mo. Nov. 21, 2006) (finding no impediment to a release agreement).

3. *See* Taylor v. Progress Energy, Inc., 415 F.3d 364, 375 (4th Cir. 2005), *aff'd on reh'g*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539); *Faris*, 332 F.3d at 321 (holding waivers enforceable).

In the FMLA, Congress enacted the first national family and medical leave legislation in the United States.[4] It was passed in response to both the increasing number of households in which single parents or both parents worked, and the lack of employment policies to accommodate the parents.[5] This reality put parents in the undesirable position of a forced choice between job security and parenting.[6] Thus, the Act requires employers with over fifty employees to provide eligible employees[7] up to twelve weeks of unpaid leave per year (1) to care for a newborn, a newly adopted child, or a newly placed foster child; (2) to care for a child, spouse, or parent who has a serious health condition; or (3) to treat one's own serious health condition.[8] Along with these substantive leave rights, the Act also created proscriptive rights prohibiting employers from discriminating or retaliating against employees when they return from leave or otherwise exercise their substantive FMLA rights.[9]

The text of the FMLA does not explicitly permit or forbid employees to waive their rights to pursue or settle potential claims under the Act.[10] Congress has, however, directed the Secretary of Labor to issue regulations necessary to carry out the statute,[11] which the Department of Labor (DOL) promulgated in 1995 in section 825 of the Code of Federal Regulations.[12] Section 825.220(d) in the Regulations addresses protection of employees who requested leave or asserted rights under the FMLA, stating that "[e]mployees cannot waive, nor may employers induce

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4. Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys*, MONTHLY LAB. REV., Sept. 2001, at 17, 17.
5. 29 U.S.C. § 2601(a) (2000).
6. *Id.*
7. An "eligible employee" is generally one who has been employed for at least twelve months by the employer from whom leave is requested, and has worked at least 1250 hours for that employer during the previous twelve-month period. The Act does not cover certain federal officers or employees, or employees at a worksite at which the employer employs less than fifty employees if the total number of employees employed by the employer within seventy-five miles of that worksite is less than fifty. *Id.* § 2611(2).
8. *Id.* § 2612(a)(1). Additional substantive rights also include the right to take leave on an intermittent basis or to a reduced work schedule when medically necessary, and the right to reinstatement. *Id.* §§ 2612(b), 2614(a).
9. *Id.* § 2615.
10. *Id.* §§ 2601–54; Taylor v. Progress Energy, Inc., 415 F.3d 364, 369 (4th Cir. 2005), *aff'd on reh'g*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539).
11. 29 U.S.C. § 2654 (2000) (authorizing the Secretary to prescribe such regulations as are necessary to carry out the FMLA).
12. 29 C.F.R. §§ 825.100–825.800 (2007).

employees to waive, their rights under [the] FMLA."[13] As previously noted, judicial interpretations of the regulation have been inconsistent.[14] The Fifth Circuit allowed such a release in *Faris v. Williams WPC-I, Inc*., distinguishing FMLA "rights" from "claims,"[15] while other courts have drawn no such distinction and allow employees to pursue redress for alleged violations despite agreeing to not do so as part of a severance agreement.[16] As the United States Supreme Court and Congress have not yet spoken on this issue, the enforceability of FMLA waivers in employee severance agreements will continue to be questioned and litigated, and will lead to uncertainty in the context of employer-employee rights under the Act.[17]

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13. *Id.* § 825.220(d).

14. Dougherty v. Teva Pharm. USA, Inc., No. 05-2336, 2006 WL 2529632, at *7 (E.D. Pa. Aug. 29, 2006) (holding waivers of rights to sue for FMLA violations are unenforceable), *vacated*, 2007 WL 1165068, at *7 (E.D. Pa. Apr. 9, 2007). *But cf.* Halvorson v. Boy Scouts of Am., No. 99-5021, 2000 WL 571933, at *3 (6th Cir. May 3, 2000) (enforcing general release of FMLA, Employee Retirement Income Security Act, and Americans with Disabilities Act claims).

15. 332 F.3d 316, 320–22 (5th Cir. 2003) (holding prohibition on waiving "rights" refers to prospective substantive rights under FMLA, not to causes of action for exercising those rights or for money damages).

16. *See, e.g.*, *Dougherty*, 2006 WL 2529632, at *7 (denying motion for summary judgment on grounds that FMLA rights are not waivable in a severance agreement); Dierlam v. Wesley Jessen Corp., 222 F. Supp. 2d 1052, 1056 (N.D. Ill. 2002) (invalidating severance agreement waiver of FMLA rights).

17. In response to various concerns, in February 2006 the DOL requested public comment regarding the effectiveness of the FMLA implementing regulations. Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg. 69,504, 69,504–05 (Dec. 1, 2006). The nonexhaustive list of issues for which the DOL sought comment included "whether a limitation should be placed on the ability of employees to settle their past FMLA claims," or the waiver issue. *Id.* at 69,509–10. Comments were initially due February 2, 2007. *Id.* at 69,505. In February 2008, the DOL proposed new FMLA rules and again requested public comment. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876 (Feb. 11, 2008); *see also infra* note 118.

One of the most hotly debated issues included in the notice was the meaning of a "serious health condition," which is required to take leave under the Act. *See* 29 U.S.C. § 2612(a)(1) (2000). The U.S. Chamber of Commerce wants to narrow the eligible medical conditions and require more documentation regarding the health condition. Molly Selvin, *Family Leave Act Being Reviewed*, L.A. TIMES, Feb. 6, 2007, at C1. As one lawyer put it, some employees view the FMLA as a "'get out of jail free' card on attendance issues." *Id*. The National Partnership for Women and Families, on the other hand, believes that toughening the law will make it harder for people with legitimate medical needs to take leave. *Id.* The group cautions that "[w]e need to be careful not to address discipline problems through regulation." Cindy Skrzycki, *Door Opens to Changes in Family Leave*, WASH. POST, Dec. 12, 2006, at D01. For more on the argument that changing the regulations is unnecessary, see John E. Matejkovic & Margaret E. Matejkovic, *If It Ain't Broke . . . Changes to FMLA Regulations Are Not Needed; Employee Compliance and Employer Enforcement of Current Regulations Are*, 42 WILLAMETTE L. REV. 413 (2006). The DOL may or may not take any action in response to the public input. According to Victoria Lipnic, Assistant Secretary for the

While various arguments suggest that FMLA waivers are best analyzed as valid private contracts,[18] many public policy concerns caution against this blanket enforcement.[19] Employees asserting their FMLA rights are often facing family or medical crises, which may make them particularly emotionally and financially vulnerable.[20] Studies also show that many employees are not familiar with their FMLA rights, and may, to their detriment, waive rights to pursue claims they did not realize existed.[21] Also, allowing employers to purchase waivers of their past violations, which were possibly flagrant and harmful, only encourages employers to ignore the Act and fosters a contentious workplace.[22] After years of congressional debate and overcoming two presidential vetoes, Congress surely did not intend to allow employers to systematically violate FMLA provisions intended to aid the nation's families.[23] Prohibiting private employee FMLA waivers in severance

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Employment Standards Administration of the DOL, "The point is to force some critical thinking on a lot of issues." Skrzycki, *supra*.

18. See *infra* Part III for discussion of arguments in favor of FMLA waivers, including "freedom of contract" principles and a general preference for dispute settlement rather than litigation.

19. Examples of these concerns include the high risk of employees' unequal bargaining power as to their employer, coercion of employees by employers, and encouraging employers' noncompliance with the FMLA.

20. For instance, an employee who requests leave to attend to a child's serious medical condition has likely been juggling doctors' appointments, hospital visits, and around-the-clock care with work responsibilities for some time prior to the request for leave. Doctor and hospital bills have likely accumulated, and the employee fears the impact of lost wages during leave. The employee is also emotionally drained from worrying about the child's medical problem, and from constant pressure to maintain acceptable performance levels at work.

21. *See infra* Part III. This is contrary to freedom of contract principles which require "perfect" information, as discussed in Part III.

22. Consider the situation where an employer illegally refuses to reinstate an employee returning from leave to a position comparable to the one previously held. The employer instead persuades her after two months to accept a severance agreement in which the employer pays her two months' salary in exchange for a contractual promise to not pursue any claims against the employer. After obtaining the waiver, the employer is emboldened in realizing it can easily purchase waivers of FMLA liability from its employees. The employer no longer intends to comply with certain provisions of the Act which the employer believes are too favorable to employees. Other employees in the workplace witnessed the employer's FMLA violation, and empathized with the former employee as she complained for two months of her maltreatment. These employees now have a growing hostility toward the employer because they blame it for the employee's departure, as well as for their own reluctance to now assert FMLA rights for fear of being "pushed out" of their job. The result is tension in the workplace.

23. The Act was vetoed twice by former President George H.W. Bush, but signed into law by President Clinton. Charles L. Baum, *Has Family Leave Legislation Increased*

agreements allays concerns of employee coercion and exploitation by employers, encourages FMLA compliance, and promotes the stability and economic security of families by enabling employees to reap the benefits of the Act.

This Comment addresses whether a waiver of rights in an employee severance agreement which bars an employee from pursuing FMLA claims against an employer should be a valid and enforceable contract provision. Part II examines the history and purposes of the FMLA, which give rise to public policy arguments against FMLA severance agreement waivers. Part III explores some of the arguments that have been offered in support of FMLA waivers, and the various shortcomings of these purported justifications. Part IV turns to the many arguments against enforceability, and principally the "anti-waiver approach" which would make FMLA waivers illegal. Finally, Part V concludes that the anti-waiver approach should be adopted, or, in the alternative, that waivers should be enforceable only after the agreement is scrutinized by a court or the Secretary of Labor, or the waiver meets heightened and explicit waiver requirements. The FMLA reflects that it is "neither fair nor necessary to ask working Americans to choose between their jobs and their families."[24] The approaches offered in this Comment would encourage FMLA compliance by not allowing employers to easily contract around their obligations under the Act—obligations which are vital to ensuring that employers do not force employees to make unfair and unnecessary choices between what are often the two most important aspects of their lives.

II. HISTORY AND PURPOSES OF THE FMLA

The enactment of the FMLA in 1993 brought the United States "up to speed" with the many other industrialized nations which already had national family and medical leave programs.[25] The Act reflected

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Leave-Taking?, 15 WASH. U. J.L. & POL'Y 93, 94 (2004).

24. Statement on Signing the Family and Medical Leave Act of 1993, 1 PUB. PAPERS 50, 51 (Feb. 5, 1993) [hereinafter Clinton Signing Statement].

25. *See* Waldfogel, *supra* note 4, at 17 (noting that pre-FMLA, the United States was an outlier among industrialized countries in that it had no national family and medical leave legislation). President Clinton welcomed the legislation in his signing statement accompanying the FMLA and noted that it was "long overdue": "Now, with the signing of this bill, American workers in all 50 states will enjoy the same rights as workers in other nations." Clinton Signing Statement, *supra* note 24, at 51. However, the United States may still be an outlier in the international community because over 120 countries provide *paid* parental leave, whereas the FMLA does not. Press Release, Int'l Labour Org., More than 120 Nations Provide Paid Maternal Leave (Feb. 16, 1998), *available at* http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_008009/index.htm.

congressional findings that the number of households in which the single parent or both parents worked was significantly increasing.[26] Congress was particularly concerned with these societal changes given that "it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions."[27] Congress found that the lack of adequate employment policies to accommodate working parents forced a choice between job security and parenting, and that primary caretaking responsibilities often fell upon women, thus affecting the working lives of women more so than those of men.[28] As for individuals, it was noted that employees who were temporarily prevented from working due to serious health conditions also faced inadequate job security.[29] In light of these findings, Congress set out to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity" through the provisions of the FMLA.[30]

As of 2000, the FMLA covered 10.8% of private businesses in the United States and more than half of the country's employees.[31] In addition, 16.5% of all employees took leave in the eighteen months prior

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26. 29 U.S.C. § 2601(a)(1) (2000).
27. *Id.* § 2601(a)(2).
28. *Id.* § 2601(a)(3), (a)(5).
29. *Id.* § 2601(a)(4).
30. *Id.* § 2601(b)(1). Many stories show the extent to which the FMLA helps families. For example, Patti Phillips was able to accompany her eighteen-year-old daughter through years of treatment for bone cancer, and was able to sit by her daughter's bedside the day she was going to go to sleep for a little while but never awoke. "You want to be there with your child, especially when it's terminal, and you don't want to worry about your job. . . . The law gives you peace of mind," she said. Stephanie Armour, *Family, Medical Leave Act at Center of Hot Debate*, USA TODAY, May 26, 2005, at B1. A columnist also enjoyed the benefits of the Act and said that taking leave to care for his newborn son was:

> [T]he most rewarding month of my life. . . . [M]y son had a healthier and happier start in life because of it.
>
> . . . [E]very working parent should have the right to bond with a child when it counts most, when they need help with everything from feeding to learning how to grasp a pacifier.

Daniel Vasquez, *Parents, Let's Fight to Preserve the Family Medical Leave Act*, S. FLA. SUN-SENTINEL, Feb. 11, 2007, at 10A, *available at* 2007 WLNR 2710499.

31. Waldfogel, *supra* note 4, at 19. This is consistent with the fact that "far more employees work for large businesses than small ones." Mary E. Forsberg, *Perspective on Family Leave*, N.J. POL'Y PERSP., Jul. 2001, http://njpp.org/rpt_familyleave.html.

to the 2000 DOL survey, as did a near equal percentage in 1995.[32] The data shows that the FMLA has an expansive reach, and resolution of the waiver issue posed by varying interpretations of section 825.220(d) could potentially affect a majority of the employees in the country. Furthermore, if judicial enforcement of releases is contrary to the public interest, the aggregate effect on the public would be considerable given the large numbers of employees covered by the FMLA.[33]

III. The Case for Enforcing FMLA Severance Agreement Waivers

A. Faris v. Williams WPC-I, Inc. *and the Fifth Circuit's Interpretation of the Plain Language of Section 825.220(d)*

In holding waivers enforceable, the Fifth Circuit was the first federal appellate court to assert a position on the FMLA severance agreement waiver issue.[34] In *Faris v. Williams WPC-I, Inc.*, a former employee unsuccessfully challenged a post-termination release of claims under section 825.220(d).[35] Faris, an occupational health specialist, had worked for a company for over a year and a half when her supervisor fired her, citing poor performance.[36] That same day she was offered

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32. Waldfogel, *supra* note 4, at 20.

33. While the FMLA covers eligible "employees," like many antidiscrimination and labor statutes, it does not cover independent contractors. This leaves a large portion of the workforce uncovered. *See* Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 179–80 (2006). Tarantolo notes that the lack of coverage of independent contractors in antidiscrimination statutes such as Title VII is particularly troubling because the contingent workforce is lower paid and therefore more at risk of falling into poverty if they lose their jobs. *Id.* at 173–74. It is also worrisome because contingent workers are more likely than traditional workers to be female and black or Hispanic, making them more likely to be targets of workplace discrimination. *Id.* at 174. The prevalence of women might be explained by women choosing more flexible schedules to accommodate their family caretaking responsibilities, or because women have been segregated into the lower-skilled and lower-paying jobs of the contingent workforce. *Id.* at 178. Regardless of the reason, the fact that Congress enacted the FMLA after finding that family caretaking responsibilities often affect the lives of working women more so than those of men suggests that a definition of eligibility that includes independent contractors may be appropriate to serve the FMLA policy goals. For more on the "black hole" of regulatory protections for contingent workers, see Stephen F. Befort, *Revisiting The Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003).

34. *See* Faris v. Williams WPC-I, Inc., 332 F.3d 316, 322 (5th Cir. 2003).

35. *Id.* at 318. As previously noted, section 825.220(d) states that "employees cannot waive, nor may employers induce employees to waive, their rights under [the] FMLA." 29 C.F.R. § 825.220(d) (2007).

36. *Faris*, 332 F.3d at 318.

$4,063.32 to sign a release of "all other claims arising under any other federal, state or local law or regulation."[37] She received a memorandum stating she had forty-five days to consider the release and seven days to revoke it if she signed.[38] She signed the agreement and accepted the money, but later sued her former employer alleging that she was fired in retaliation for asserting her FMLA rights.[39] Following discovery at trial, the defendants moved for summary judgment as to the enforceability of the release.[40] Faris moved for partial summary judgment on whether the release was per se unenforceable under section 825.220(d).[41] The district court denied the defendants' motion and granted Faris's, holding that the plain language of section 825.220(d) forbade waiving FMLA rights.[42]

On appeal to the Fifth Circuit, the defendants argued that the plain language of section 825.220(d) did not apply to post-termination FMLA claims.[43] They argued that the term *employee* in the regulation implicitly refers only to current employees, not to former ones, and also that the regulation applies only to substantive rights and not to causes of action.[44] Alternatively, they argued that if section 825.220(d) is ambiguous, then "relevant law under similar statutory schemes" and the "common law presumption of and favor toward waivability" support a narrow reading of the regulation.[45]

The Fifth Circuit agreed with the defendants that the proper reading was that the regulation does not apply to post-dispute claims for damages

37. *Id*. This was the equivalent of one month's salary.

38. However, demonstrating the possibility of coercion that will be discussed *infra*, Faris claimed she was pressured into signing the release when she was confronted by her supervisor and another employee and told, "This is your last opportunity to sign the release if you expect to get compensation for it." *Id.* at 318 & n.1.

39. *Id.* at 316, 318.

40. *Id.*

41. *Id.*

42. *Id.* The district court certified the questions of law addressed in its summary judgment order, and the Fifth Circuit granted the defendants leave to bring the interlocutory appeal. *Id*.

43. *Id.* at 319.

44. *Id.* at 319–20.

45. *Id.* at 319. The defendants also argued that the regulation was invalid under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Fifth Circuit declined to consider this argument as it was not presented to nor passed on by the district court. *Faris*, 332 F.3d at 319 n.2.

under the FMLA.[46] The court reasoned that the phrase "rights under FMLA" in section 825.220 only limited prospective waivers of *substantive rights* such as FMLA leave and reinstatement.[47] The court did not believe that the phrase applied to the FMLA *cause of action* for prior violations.[48] The court noted that the statute and regulation consistently use the phrase "rights under the FMLA" and "rights under the law" to refer to statutory rights of leave and reinstatement under 29 U.S.C. § 2612 and 29 U.S.C. § 2614, respectively.[49] It also explained that although the requirements constituting the cause of action in § 2615(a) are detailed in section 825.220, the regulation never "refers to the cause of action for damages as a right under FMLA," and the regulation itself is titled, "How are employees protected who request leave or otherwise assert FMLA rights?"[50] Concluding that the text need be responsive to the title, the court found the plain language of section 825.220 to not ban FMLA prospective claims waivers. In other words, the court asserted that the cause of action is merely a *protection* for FMLA rights.[51] Despite this semantics-driven analysis, the court's reasoning is weakened by its omission of the fact that section 825.220 also addresses nonsubstantive provisions that give rise to causes of action.[52] There are also probable shortcomings in the court's suggestions

46. *Faris*, 332 F.3d at 319. The court also found that the term *employee* within § 825.220 does not unambiguously refer to former employees, and likely only extends to current employees. *Id.* at 320. The court noted that the term is used in various contexts in the statute to refer to only current employees, while in other situations it refers to former employees. *Id*. However, other courts have found the FMLA does apply to former employees. *See, e.g.*, Dougherty v. Teva Pharm. USA, Inc., No. 05-2336, 2006 WL 2529632, at *7 (E.D. Pa. Aug. 29, 2006) (stating that the court "cannot fathom the Fifth Circuit's narrow construction of § 825.220(d)"), *vacated*, 2007 WL 1165068, at *7 (E.D. Pa. Apr. 9, 2007). The issue of whether or not the FMLA applies to former employees remains in dispute, partially due to the Act's unhelpful definition. The Act defines *employee* by referencing the FLSA definition: "the term 'employee' means any individual employed by an employer." 29 U.S.C. § 203(e) (2000). In *Nationwide Mutual Insurance Co. v. Darden*, the United States Supreme Court described this definition, as applied under the Employee Retirement Income Security Act, as "completely circular and explain[ing] nothing." 503 U.S. 318, 323 (1992).

47. *Faris*, 332 F.3d at 320.

48. *Id.*

49. *Id.* For example, FMLA "rights" are associated with leave and reinstatement in section 825.220(b), which states that "'[i]nterfering with' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. § 825.220(b) (2007).

50. *Faris*, 332 F.3d at 320–21.

51. *Id.* at 321. The Secretary of Labor recently adopted this view of a "rights" and "claims" distinction in its brief arguing for rehearing of a Fourth Circuit decision which held waivers unenforceable. *See infra* note 118.

52. *See infra* note 110 and accompanying text discussing 29 C.F.R. § 825.220(c).

that public policy, freedom of contract, and the validity of ADEA and Title VII waivers also supported its position.

B. Public Policy and Market Principles

In isolation, certain aspects of public policy and market principles may seem to support FMLA waivers. The court in *Faris*, for example, claimed its holding was "bolstered by public policy favoring the enforcement of waivers," though it did not elaborate on the assertion.[53] The court was likely referencing the fact that public policy generally favors settlement of disputes without litigation, and allowing an employer and employee to resolve a FMLA claim through a private severance agreement serves this end in some circumstances.[54] The court also presumably endorsed a freedom of contract approach to the analysis of waivers. According to freedom of contract principles, courts should enforce private contracts between parties, including severance agreements and waivers, as they promote individual autonomy and the efficiency of labor markets.[55] However, applying strict freedom of contract principles may "destabilize personal, social, and community relationships and networks" because the approach focuses on individual preferences rather than societal needs.[56] A strict freedom of contract approach, therefore, may be contrary to public policy.

1. Freedom of Contract and Rational Choice

Freedom of contract rests on the notion that an individual's autonomy and preferences deserve recognition.[57] This parallels the theory of

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53. *Faris*, 332 F.3d at 321.
54. *See, e.g.*, Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir. 1976) (stating that public policy strongly favors settlement of disputes without litigation).
55. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984).
56. MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 2 (1993) (noting that market economies actually "depend on significant degrees of inequality to give effective reign to individual incentives, . . . and thus may generate higher degrees of inequality" than other modes of social organization); *see also* Deborah Zalesne, *Enforcing the Contract at All (Social) Costs: The Boundary Between Private Contract Law and the Public Interest*, 11 TEX. WESLEYAN L. REV. 579, 595–601 (2005) (discussing possible negative effects on third parties when contracts are enforced in the name of freedom of contract, and that various contract defenses such as unconscionability inadequately mitigate these effects).
57. *See* TREBILCOCK, *supra* note 56, at 19–21.

rational choice, in which individuals are viewed as rationally self-interested and having "complete, transitive, and reasonably stable preferences."[58] They learn and compute the costs and benefits of various courses of action, seeking to maximize as many of their preferences as feasible.[59] After considering their options, they are then presumed to choose the option that maximizes their subjective utility.[60]

Viewing employers and employees as autonomous individuals capable of making rational choices in their best interests would seemingly support enforceable FMLA waivers. For example, an employer may execute a cost-benefit analysis that takes into account the time, expense, publicity, and unpredictability of litigating an employee's claim of denial of adequate FMLA leave. The results may lead the employer to conclude that it is in its best interest to "purchase" the employee's release from liability for these prospective claims. The cost of the waiver may be rationally justified even when the employer knows the employee is an "unlikely plaintiff," given that the employer may know of or fear unrevealed inculpatory information, an office full of potential witnesses exists, and the employer enjoys future savings in not paying the employee's benefits.[61] For her part, the employee may well think it in her best interest to receive an immediate cash payment, rather than incur the time, expense, anxiety, and uncertainty of litigation.[62] Freedom of contract suggests that courts should not interfere with the efficient market and should hold these parties accountable to their contract. The limits of this argument may quickly be reached, though. Whether the employee's decision is actually rational depends on whether the employee has *perfect* information, as well as the abilities to process the information, calculate consequences, and recall the information, which she often does

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58. Thomas S. Ulen, *The Prudence of Law and Economics: Why More Economics Is Better*, 26 CUMB. L. REV. 773, 794 (1996); *see also* Edward L. Rubin, *Rational Choice and Rat Choice: Some Thoughts on the Relationship Among Rationality, Markets, and Human Beings*, 80 CHI.-KENT L. REV. 1091, 1091–92 (2005). Rational choice theory argues that people use instrumental reasoning to achieve their pre-established ends. The theory holds that individuals will choose the best means to achieve their ends, and so their choices are rational. *Id.*

59. Ulen, *supra* note 58, at 794.

60. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995). *See infra* note 63 for limitations on employees' abilities to make choices that achieve their best interests.

61. Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 HOFSTRA LAB. & EMP. L.J. 479, 492–93 (2001). Employers are also "repeat players in these situations. Through experience or counseling they have learned that lawsuits are expensive, emotionally draining, and time-consuming—whether or not the underlying complaint has merit." *Id.* at 492.

62. The employee's choice is essentially "between guaranteed compensation and a contingent right to additional payment if she is able to prove [her claim]." *Id.* at 492.

not.[63] The argument also fails to consider situations where employees underestimate risks of the agreement due to ignorance of their FMLA rights. Finally, employee waivers of their rights to pursue claims under the FMLA have an additional negative impact in that waivers remove the incentive for an employer to comply with the legal requirements of the FMLA.[64] For these reasons, complete freedom of contract may not be well-suited to the employer-employee relationship.[65]

2. *The Agreement Timing*

Waiver proponents can also argue that severance agreement waivers are not problematic because, at the time of severance, an employee's focus is squarely on the realities of the agreement, which decreases the likelihood of an involuntary or unknowing waiver.[66] A comparison of a

63. Eisenberg, *supra* note 60, at 214. Eisenberg explains this concept, referred to as "bounded rationality," and argues that actors often imperfectly process their options due to limited information, and to limited abilities to process information, calculate consequences, and utilize memory. *Id.* See *infra* text accompanying notes 155–56 for discussion of imperfect information as related to FMLA rights.

64. For example, consider an employee who makes a valid request to care for his ill wife. The employer refuses and tells the employee he will be fired if he misses work. Months later the employee is fired for "poor performance," and the employer offers him a severance agreement on the condition that he waive his right to pursue the denial of his leave request. By this time, the employee faces mounting medical bills, and he is exhausted from working and caring for his wife over the past months. He takes the money because he "could use it," and he wants to focus on caring for his wife, although when his wife recovers he may wish he could pursue litigation instead. The employer now realizes it has no absolute need to comply with the FMLA because it felt little impact from the recent violation. In the future, the employer plans to comply with the Act for the most part, but recognizes that at some point its interests in productivity or other business desires may lead it to deny leave or reinstatement. The employer will "purchase" a waiver at severance in those instances.

65. As Catherine L. Fisk puts it: "In short, contract law has never been a perfect fit for employment." Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 769 (2002). Fisk notes that the long-term and informal nature of the employment relationship is at odds with the traditional understanding of contract formation. The unequal information between the parties and social norms "that make it difficult for employees to negotiate for the right to keep their job unless they really screw up or for employers to announce to prospective employees that they would like to be free to fire them arbitrarily" hamper negotiation. *Id.* The risk of opportunistic behavior by both employees and employers is high, and "devastating social policy consequences occur when one party can exploit its superior market power at the expense of the other." *Id.*

66. *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1207 (2003) (noting that when a

waiver at severance to one earlier in the employment stage illustrates this point. Protectionist motives counsel against allowing employers to secure, at hiring, prospective waivers of liability for all FMLA violations the employer may commit in the future. Waivers in this context ask employees to anticipate conflicts that have not occurred and to "evaluate workplace practices in light of technical, perhaps unknown, standards."[67] It would be nearly impossible for an employee to know at hiring if the employer is apt to violate FMLA provisions, or even if the employee will need to take advantage of its entitlements. A new employee is also optimistic at hiring and is unlikely to forecast what would seem to be distant and abstract FMLA violations. However, at severance the employee is more likely to focus her attention on the employer's incentives, the gamut of possible claims she may have, the likelihood of proving her allegations, and the realistic consequences of a waiver.[68] Additionally, at severance an employer likely can draft a more detailed agreement with more specific terms and provisions, thus reducing both the risks associated with an imperfect contract and reasons to be hesitant to enforce it.[69]

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contract term is salient, the "market can be trusted to provide an efficient version of the term").

67. Silverstein, *supra* note 61, at 487 (contrasting waivers conditioned on increased benefits, such as severance agreements, with settlement waivers made after legal action was instituted where employee has had adequate time to "identify and analyze the wrong done to her, assess the damage and calculate the money needed to speed recovery").

68. An employee's consideration of possible claims is relevant to the "totality of circumstances" test used by most federal circuits to determine whether a waiver of federal employment claims was "knowing and voluntary." *See* Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty" Test*, 58 FLA. L. REV. 305, 307–08 (2006). The factors dependent on the employee include:

> [T]he employee's education, background, and business experience; whether the employee actually consulted with an attorney before signing the waiver; the role that an employee played in deciding the terms of the agreement; whether the employee actually knew or should have known of his or her employment rights at the time of signing the waiver; and whether the employee actually read and considered the waiver before signing it.

Id. at 308.

69. The specificity of the agreement is also relevant to the totality of circumstances test discussed *supra* note 68. The employer-controlled factors of the test include: "using clear, understandable waiver language; providing valuable consideration to the employee in exchange for the waiver; affording the employee adequate time in which to review and consider the waiver; and advising the employee to consult with an attorney prior to signing the waiver." *Id.* For example, the Older Workers Benefit Protection Act (OWBPA) of 1990, an amendment to the Age Discrimination in Employment Act (ADEA) of 1967, includes among the express requirements of an enforceable waiver of rights or claims under the Act that an agreement specifically refer to the rights or claims arising under the chapter, not waive rights or claims that may arise after the waiver is executed, and be written so that the individual and employer both understand it. 29

Although waiver proponents could thus argue that an agreement at severance ensures that employees have had sufficient time and information to assess the waiver benefits and risks, this reasoning generally fails to consider the effects on third parties. For one, the goals of encouraging FMLA compliance are not adequately considered. The reasoning also fails to take into account the impact of the waiver on remaining employees who may then be less willing to assert FMLA rights.[70] Therefore, even a knowing and voluntary waiver likely disserves the FMLA goals of providing leave time to promote the stability and economic security of families.[71]

3. Autonomy

At first glance, autonomy and empowerment may also support waivers. These characteristics are purportedly acquired when an individual evaluates the worth of her claim and prefers and chooses an immediate gain. In analyzing waivers from an autonomy framework, Jessica Wilen Berg argues that waivers should be enforced when there is an overall gain of autonomy, taking into account the autonomy lost from giving up a right or claim.[72] She submits that government interference is permissible only when individuals' autonomous actions infringe on the autonomy of others, or when government rules will result in greater overall autonomy.[73] In the FMLA context, there may be an overall gain

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U.S.C. § 626(f)(1) (2000). For example, the Ninth Circuit held that an OWBPA release was not knowing and voluntary because it was not written in a "manner calculated" to be understood by parties where a provision stated that "[t]his covenant not to sue *does not apply* to actions based solely under [ADEA]." Syverson v. IBM Corp., 472 F.3d 1072, 1083–87 (9th Cir. 2007) (emphasis added by the court). It was unclear whether ADEA claims were covered by the release or excepted from it. *Id.*

70. *See infra* notes 76 and 131 and accompanying text.

71. Making rights less waivable, such as the "knowing and voluntary" requirements, may also be insufficient to protect even the individual employee. According to Cynthia L. Estlund, "[T]hose who are skeptical of employees' ability to protect their interests through contract find little comfort for employees—other than a modest gain in transparency—in rights that can be waived and default rules that fill contractual gaps, for employers often have little difficulty exacting waivers and filling gaps when it behooves them to do so." Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 390 (2006).

72. Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 289 & n.32 (2003).

73. Berg, *supra* note 72, at 288–89. For example, government regulations on maximum weekly work hours limit individual employees' ability to "opt-out" of the

of autonomy after the autonomous act of relinquishing rights.[74] An employee who appraises a potential claim against her employer and thoughtfully decides to waive her rights to pursue it in exchange for compensation may well feel triumphant when she receives a check for payment. Extracting money from her employer may make her feel significant in the eyes of her employer, as she did not let it "get away" with what she saw as an FMLA violation.[75] From an employee's perspective, the loss of autonomy in surrendering rights to pursue claims is potentially overcome by the reaped monetary and self-worth rewards, and the fact that whatever redress the employee envisioned as a remote possibility in the court system is already achieved. However, the employee will feel less autonomous if she later learns that she undervalued a possible FMLA claim, or she learns after she signed a waiver that her FMLA rights were violated. Government involvement is then justified if the autonomy of a majority of employees who individually agree to waivers is actually diminished, and illegalizing waivers would increase overall autonomy. Furthermore, illegalizing waivers is possibly justified because the effect of an individual employee waiving rights to pursue FMLA claims likely extends beyond the "individual sphere" and infringes on other employees' autonomy.[76] This consequence occurs when coworkers are less willing to assert their own FMLA rights because they are unaware that an employee, whose rights they saw violated, received compensation as part of the waiver agreement.

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protections, but do so because an "across-the-board-rule" is the only way to protect the interests of all workers. *Id.* at 298–99. Individual exceptions are not permitted because they would either undermine the purpose of the rule, which would implicate others' autonomy, or because power inequities prevent the employee from making a truly autonomous decision to waive the protections. *Id.* at 299.

74. This argument assumes that the employee believes that the money received is payment for FMLA claims and not, for example, past wages or bonuses.

75. Autonomy is also an important aspect in other contractual contexts. For example, premarital agreements serve the goal of increasing autonomy because "[a]llowing couples to make marital contracts encourages them to think realistically about the marriage, to anticipate and plan for contingencies, and to form relationships on their own terms." Rebecca Glass, Comment, *Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California*, 92 CAL. L. REV. 215, 250 (2004). Concerns of infringement on individual autonomy also plague class action and mass tort class action lawsuits in which plaintiffs relinquish individual decisionmaking authority to bring an action as a class member. *See* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002).

76. Berg, *supra* note 72, at 289–90 (recognizing that state interference is justified to ensure that individuals have "freedom to act within the private realm" where one individual's autonomous action has implications beyond the "individual sphere").

Although public policy may favor settling disputes without litigation,[77] it does not favor settlements or enforcing waivers at all costs. Strictly following freedom of contract principles and enforcing waivers in the name of efficiency and individual autonomy likely creates more costs than gains to the public. Permitting what may be a rational choice of one employee to waive violations of FMLA rights removes an incentive to the employer to abide by the Act, which is detrimental to other employees.[78] In turn, the autonomy of other employees and their willingness to assert their FMLA rights is lowered by individual employee waivers.[79] As this public policy argument for enforcing settlements ultimately fails as to FMLA waivers, so too do attempts to extend other policies to the FMLA.

C. ADEA and Title VII Expressly Allow Waiver of Claims

Additional reasons suggested for allowing FMLA waivers have included that both the Age Discrimination in Employment Act (ADEA) and the civil rights protections under Title VII protect individuals from unlawful discrimination in employment, and each provide for potential claimants to waive their rights under the respective acts.[80] It is important to note that these similarities "[are] not necessarily dispositive" of the waiver issue,[81] and also that distinguishing features exist between these Acts and the FMLA.

The ADEA makes it unlawful for an employer, employment agency, or labor organization to discriminate against an individual on the basis of age.[82] The Act expressly allows "knowing and voluntary" waivers that

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77. *See supra* note 54 and accompanying text. A severance agreement also differs from a settlement in that the employee may have no knowledge of a dispute when signing a severance agreement.

78. *See infra* note 131 and accompanying text, discussing the effect of waivers on remaining employees and the effect on employer FMLA compliance.

79. *See supra* note 76 and accompanying text, discussing how an employee's waiver is apt to lower other employees' autonomy and decrease their assertion of FMLA rights.

80. Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)–(c) (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2000); *see, e.g.*, Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321 (5th Cir. 2003) (stating that the court's allowance of FMLA waivers is supported by the existence of similar waivers in other regulatory contexts, including ADEA and Title VII).

81. *Faris*, 332 F.3d at 321.

82. 29 U.S.C. § 623(a)–(c).

meet explicit statutory requirements.[83] For an agreement to qualify as "knowing and voluntary," it must be written in a manner calculated to be understood by the employee, and specifically refer to rights or claims arising under the ADEA.[84] The employer must allow the employee at least forty-five days to consider signing the agreement, and provide that the agreement is revocable within seven days of signing.[85] Employers must also advise employees to consult an attorney before making a decision.[86]

Title VII, similarly, makes it unlawful for an employer to "refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[87] Public policy favors voluntary settlement of Title VII employment discrimination claims, so knowing and voluntary general releases of claims arising from discriminatory incidents that occurred during employment before execution of releases are typically valid.[88] Whether a Title VII release is knowing and voluntary is "not lightly to be inferred," and presumably requires a degree of specificity in the waiver.[89] Given the similarity in protections and interpretations of the FMLA, Title VII, and ADEA employment statutes, the court in *Faris* found "no good reason . . . why the government would proscribe waiver for FMLA retaliation claims and yet favor waiver of claims for age discrimination under ADEA and for civil rights violations under [T]itle VII."[90] However, "good reasons" to proscribe FMLA waivers may include that the FMLA has a unique purpose as compared with the other statutes and that some of its protections *do* differ, which the court did not examine.

The Equal Employment Opportunity Commission (EEOC), which enforces the federal laws prohibiting job discrimination,[91] also gave its approval to settling discrimination claims through post-dispute agreements

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83. *Id.* § 626(f).

84. *Id.* The agreement in *Faris* would not have met these requirements as the waiver did not specifically refer to FMLA rights. *See Faris*, 332 F.3d at 318.

85. *Faris*, 332 F.3d at 318.

86. *Id.* *See infra* note 240 for all requirements.

87. 42 U.S.C. § 2000e-2(a) (2000).

88. *See*, *e.g.*, Rogers v. Gen. Elec. Co., 781 F.2d 452, 454 (5th Cir. 1986) (enforcing prospective waiver where woman knowingly and voluntarily agreed to accept $800 in release of pursuing what she believed to be a valid discrimination claim).

89. Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5th Cir. 1976).

90. *Faris*, 332 F.3d at 322.

91. 42 U.S.C. § 2000e-4; *see also* U.S. Equal Employment Opportunity Comm'n, Federal Equal Employment Opportunity (EEO) Laws, http://www.eeoc.gov/abouteeo/overview_laws.html (last visited Feb. 17, 2008). The EEOC is not involved in the enforcement of the FMLA.

entered into knowingly and voluntarily.[92] In a formal notice, the EEOC made clear that it appreciated employees' rights and its role in vindicating the public interest in eradicating employment discrimination.[93] The Commission emphasized that employers may not interfere with the protected rights of employees under Title VII, ADEA, the Americans with Disabilities Act (ADA),[94] or the Equal Pay Act,[95] as such interference is contrary to public policy and is guarded against in the anti-retaliation provisions of the statutes.[96] The Commission also recognized that "individuals possess a non-waivable right to file charges with the EEOC."[97] With this in mind, the EEOC then stated that it supported employer and employee efforts to voluntarily resolve employment disputes, and that "[n]othing in this enforcement guidance diminishes the Commission support for post-dispute agreements entered into knowingly and voluntarily to settle claims of discrimination . . . ."[98] It is important to note, though, that the focus of the EEOC notice is on "post-dispute" agreements, which require that a dispute exist. FMLA severance agreement waivers, on the other hand, are not limited to situations where a dispute has arisen.[99]

Several arguments appear to support enforcement of FMLA waivers. First, the language of the Department of Labor regulation section 825.220, referring to "rights," and not "claims," could be interpreted to permit waiving a specific cause of action. Secondly, freedom of contract principles generally favor enforcement of private agreements. Finally, the similarity between the FMLA and other antidiscrimination employment statutes which allow waivers ostensibly support judicial enforcement of

92. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) ENFORCED STATUTES § III(C) (Apr. 10, 1997), http://www.eeoc.gov/policy/docs/waiver.html [hereinafter EEOC NOTICE].

93. *Id.*

94. Americans with Disabilities Act, 42 U.S.C. § 12101 (2000).

95. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2000).

96. EEOC NOTICE, *supra* note 92.

97. *Id.* Employers, therefore, would be "shielded against" any further recovery by an employee where a valid waiver agreement or settlement exists. *Id.*

98. *Id.*

99. In other words, an FMLA waiver cannot be knowing and voluntary where no dispute has arisen because "[t]he only way an employee can know the facts and circumstances of the dispute, in order to make a knowing waiver, is after the dispute has arisen." Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317 (2003).

employees' prospective waivers of FMLA claims. Despite these conceptions, however, strong countervailing interests and opposing arguments weigh against interpreting section 825.220(d) to allow waivers. In fact, enforcing FMLA waivers may contravene public policy and may undermine the purposes of the Act by giving employers incentives to violate its provisions.

IV. THE FMLA ANTI-WAIVER APPROACH

The FMLA anti-waiver approach would make illegal all severance agreement waivers of FMLA rights. Some courts already emphatically refuse to recognize a FMLA severance agreement waiver as a valid contractual abrogation of rights to sue under the Act.[100] Support for this approach is found in the language, regulations, and administrative history of the FMLA.[101] This approach also serves congressional goals of achieving work and family life balance during times of need, while avoiding problems of employee coercion. A discerning comparison of the FMLA to other antidiscrimination legislation also reveals that the similarities the statutes share do not compel enforcement of FMLA waivers.

A. Plain Language

While the *Faris* court drew a distinction between "claims" and "rights" in section 825.220(d), other courts just as confidently assert that the phrase "[e]mployees cannot waive . . . their rights under [the] FMLA" does not implicitly allow claim waivers, because the terms *claims* and *rights* are interchangeable in this context.[102] These courts view the right to seek redress for retaliation and discrimination as just as much a right

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100. *See*, *e.g.*, Taylor v. Progress Energy, Inc., 415 F.3d 364, 375 (4th Cir. 2005), *aff'd on reh'g*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539); *see also* Richardson v. Sugg, 448 F.3d 1046, 1056 (8th Cir. 2006) (extending the *Taylor* rationale for invalidating prospective FMLA waivers to Title VII prospective waivers); Brizzee v. Fred Meyer Stores, Inc., No. CV04-1566-ST, 2006 WL 2045857, at *11 (D. Or. July 17, 2006); O'Brien v. Star Gas Propane, L.P., No. L-680-03, 2006 WL 2008716, at *8 (N.J. Super. Ct. App. Div. July 20, 2006).

101. *See* 29 U.S.C. §§ 2601–2654 (2000) (including in text of FMLA no explicit allowance of waivers); 29 C.F.R. § 825.220(d) (2007) (stating that "[e]mployees cannot waive . . . their rights under [the] FMLA"); The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2218 (Jan. 6, 1995) (rejecting request to permit FMLA waivers in preamble to the FMLA implementing regulations).

102. *See, e.g.*, *Taylor*, 415 F.3d at 375. In *Taylor*, even the employer apparently did not distinguish between "claims" and "rights" in the "General Release and Severance Agreement" in which the employee purportedly signed away her rights under the FMLA.

under the FMLA as the right to leave and reinstatement.[103] Furthermore, the definitions of *waive* and *waiver* apply as much to prospective contexts, such as the right to pursue a claim, as they do to substantive contexts, as in the leave and reinstatement provisions.[104] This undermines the *Faris* court rationale, for which the term *waiver* would have to apply only to prospective uses and not retroactive uses for ripe claims.[105]

While the court in *Faris* tried to decipher the meaning of the regulation through its own means, the United States Supreme Court has developed a test for judicial review of an agency's construction of a statute rendered by the agency in charge of administering it, such as the DOL, for the FMLA.[106] According to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, courts must first determine that Congress and the statute itself are silent on the particular question at issue, for if congressional intent is ascertainable, that intent governs and "is the law" despite any differing administrative construction.[107] Because no such intent can be gleaned from the FMLA statute itself, the question then becomes whether the agency's construction is "based on a permissible construction" of the statute.[108] The meaning of the DOL construction of the statute must first be established before attempting to answer this question.

The court in *Faris* placed much emphasis on the word *rights* in the title of section 825.220, and relied on the tool of statutory construction

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103. *Id.* After all, the right to leave and reinstatement is of questionable value if there is not a commensurate right to seek redress for denial of those rights.

104. *See* BLACK'S LAW DICTIONARY 1611 (8th ed. 2004) (defining *waive* as "[t]o abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily"); *see id.* (defining *waiver* as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage; FORFEITURE"). While not dispositive as to the meaning of section 825.220, the term *waive* is also often used in reference to post-dispute settlement of claims. *See, e.g.*, Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426–27 (1998) (discussing how the OWBPA limitations on "waivers" are applicable to ADEA releases of "claims").

105. *See* Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321 (5th Cir. 2003) (concluding that "[a] plain reading of the regulation is that it prohibits prospective waiver of rights, not the post-dispute settlement of claims").

106. 467 U.S. 837, 842–43 (1984).

107. *Id.* at n.9. This Comment will not try to ascertain a specific congressional intent from Congress's silence, because "'inferences from congressional silence,' in the context of administrative law, are often 'treacherous.'" EEOC v. Seafarers Int'l Union, 394 F.3d 197, 202 (4th Cir. 2005) (quoting Castro v. Chicago Hous. Auth., 360 F.3d 721, 729 (7th Cir. 2004); Alto Dairy v. Veneman, 336 F.3d 560, 566 (7th Cir. 2003)).

108. *See supra* text at note 10; *Chevron*, 467 U.S. at 842–43.

that what lies below the title is necessarily limited by it.[109] But the court failed to mention that a provision under this title, preceding the anti-waiver provision, actually speaks to what the court deemed to be nonsubstantive rights: namely that employers may not discriminate or retaliate in employment actions such as hiring, firing, promoting, or disciplining employees who take leave.[110] Thus, pursuing a claim for discrimination or retaliation is appropriately interpreted as covered by this title and is "otherwise assert[ing] FMLA rights."[111] It is then possible to view the regulation as limiting both substantive rights and proscriptive rights,[112] with the anti-waiver provision applying to both. Such an interpretation belies the *Faris* court conclusion that the regulation does not pertain to or regulate waivers of proscriptive claims.[113]

Even if courts conclude that the DOL regulation does not prohibit prospective waivers of FMLA claims, it does not follow that courts must endorse the construction. According to the Supreme Court, the DOL construction cannot be maintained if it is "arbitrary, capricious, or manifestly contrary to the statute."[114] At least one court has found that a DOL construction of the regulation that forbids waivers, or follows the anti-waiver approach, withstands the capriciousness test.[115] The administrative history of the statute also sheds light on whether either construction is permissible.

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109. *Faris*, 332 F.3d at 321 (noting that the title is: "How are employees protected who request leave or otherwise assert FMLA *rights*?" (emphasis added)); 29 C.F.R. § 825.220 (2007).

110. 29 C.F.R. § 825.220(c).

111. *Id.*

112. Taylor v. Progress Energy, Inc., 415 F.3d 364, 370 (4th Cir. 2005), *aff'd on reh'g*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539). For example, the waiver ban would be viewed as extending to substantive rights to leave and reinstatement and proscriptive rights to not incur FMLA-related discrimination or retaliation.

113. District courts have also addressed the claim versus right distinction with mixed results regarding whether contract provisions restricting the statute of limitations to bring FMLA claims are enforceable. While some courts held the provisions unenforceable on the ground that section 825.220 bars interfering with employee "rights" under the FMLA, *see, e.g.*, Henegar v. Daimler-Chrysler Corp., 280 F. Supp. 2d 680, 682 n.1 (E.D. Mich. 2003); Lewis v. Harper Hosp., 241 F. Supp. 2d 769, 772–73 (E.D. Mich. 2002), other courts hold the opposite. *See*, *e.g.*, Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 625 (M.D.N.C. 2005) (finding that statutes of limitations exist to protect defendants and are not claimant "rights").

114. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

115. *See, e.g.*, *Taylor*, 415 F.3d at 375.

B. Administrative History of Section 825.220(d) and Department of Labor Comments

The preamble to the implementing FMLA regulations specifically addressed whether the Act envisioned valid severance agreement waivers of FMLA claims. Prior to the implementation of the FMLA, the DOL invited public comments while it formulated rules for the legislation.[116] Several large businesses and the U.S. Chamber of Commerce took exception to the "no waiver" provision, and recommended that the DOL adopt an explicit allowance of employee waivers in settlement or severance agreements.[117] The DOL considered the proposal and proceeded to flatly reject it:

> The Department has given careful consideration to the comments received on this section and has concluded that prohibitions against employees waiving their rights and employers inducing employees to waive their rights constitute sound public policy under the FMLA, as is also the case under other labor standards statutes such as the [Fair Labor Standards Act].[118]

116. The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180 (Jan. 6, 1995) (preamble to the FMLA implementing regulations).

117. *Id.* at 2218. Nationsbank Corporation, Southern Electric International, Inc., and the U.S. Chamber of Commerce recommended "explicit allowance of waivers and releases in connection with settlement of FMLA claims as part of a severance package." *Id.*

118. *Id.* In 2006, the DOL filed an amicus brief with the Fourth Circuit arguing for rehearing of the *Taylor* decision, which found FMLA waivers unenforceable. *See* Brief for the Secretary of Labor as Amicus Curiae in Support of Defendant-Appellee's Petition for Rehearing En Banc, Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007) (No. 04-1525), *available at* http://www.dol.gov/sol/media/briefs/ taylor-08-16-2005.pdf [hereinafter DOL Brief]. The Secretary of Labor contended that despite the clarity of the implementing regulation statements, section 825.220 does not bar "retrospective settlement of FMLA claims." *Id.* at 4. The Secretary urged the court to adopt the "rights" and "claims" distinction used by the Fifth Circuit. *Id.* The court later ordered the Secretary to submit a supplemental brief addressing whether this new interpretation was inconsistent with the initial DOL interpretation of the section. *See* Supplemental Brief on Panel Rehearing for the Secretary of Labor as Amicus Curiae at 1–2, Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007) (No. 04-1525) [hereinafter DOL Supplemental Brief]. In its supplemental brief, the Secretary admitted that the preamble accompanying the final FMLA regulations was the only public explanation the DOL had issued on the FMLA waiver rule. *Id.* at 2. However, the Secretary claimed that its new interpretation was "consistent" with the past one, and was entitled to controlling deference despite the fact that it was first enunciated in a legal brief. *Id.* at 5. Even if the interpretations are consistent, the discussion in *supra* note 114 and accompanying text highlights that an agency's interpretation need not be used if it is "arbitrary, capricious, or manifestly contrary to the statute." In a July 2007 ruling, the Fourth Circuit affirmed and reinstated its prior opinion, *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir.

Such a straightforward rejection of any type of severance agreement waiver led a district court in *Dougherty v. Teva Pharmaceuticals USA, Inc.* to refuse to enforce a secretary's severance agreement waiver, given that "[a]ll parties appeared to acknowledge" that the regulation would bar "soon-to-be-former employees" from waiving rights to recover for FMLA violations that occurred during their employment.[119] The explicitness of the DOL comments also led the district court to criticize the Fifth Circuit for what it described as a "tortuously limited definition" of the regulation in *Faris*.[120]

In its comments in 1995, the DOL often compared the FMLA to the Fair Labor Standards Act (FLSA), including an illustration of why it concluded employees could not waive their FMLA rights.[121] The FLSA, for its part, regulates the payment of overtime wages and requires employers to pay statutory minimum wages to employees engaged in commerce or the production of goods for commerce.[122] FLSA claims for unpaid minimum wage or unpaid overtime can be settled or released only by the DOL or with court approval.[123] As such, the Supreme Court consistently holds that FLSA rights cannot be "bargained away" or abrogated by contract as this would "nullify the purpose" of the statute.[124] Given the DOL's explicit intent for the FMLA to mirror the FLSA as to the validity of releases of damages or claims, a strong

2005), once again holding that in the absence of DOL or court approval, section 825.220 bars prospective and retrospective waivers of FMLA rights. Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007). As this Comment was going to print, a petition for certiorari to the Supreme Court was filed and awaits decision. Progress Energy, Inc. v. Taylor, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539). Additionally, in February 2008, the DOL proposed to "clarify" the language in section 82.220(d), "in light of the Fourth Circuit's decision in *Taylor*," to provide that "employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the [DOL] or a court," denying that this would be a change in the law. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7897 (Feb. 11, 2008). Public comments to the proposed rule are due April 11, 2008. *Id.* at 7876.

119. No. 05-2336, 2006 WL 2529632, at *7 (E.D. Pa. Aug. 30, 2006).

120. *Id.*

121. The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2185–86, 2218 (Jan. 6, 1995) (preamble to the FMLA implementing regulations).

122. 29 U.S.C. § 206(a) (2000). The FLSA reflected a congressional purpose to protect "certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945) (citing H.R. REP. NO. 2738, at 1, 13, 21, 28 (1938)).

123. 29 U.S.C. § 216(b) (2000); Taylor v. Progress Energy, Inc., 415 F.3d 364, 371 (4th Cir. 2005), *aff'd on reh'g*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539).

124. Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114 (1946); *see also Brooklyn Sav. Bank*, 324 U.S. at 706–07.

argument exists that it is appropriate for courts to strike down any prospective waiver of FMLA claims as invalid and illegal.

C. The Public Interest is Harmed by the Enforcement of FMLA Waivers

The notion of allowing individual employees to waive their FMLA rights for private economic gains is disconcerting, given that the broad public interest is clearly at the forefront of the Act, and "we all bear the cost" when employees are not granted leave.[125] Individuals themselves were not the intended beneficiaries of the FMLA.[126] The purpose of the FMLA was expressly to promote national interests in preserving family integrity and promoting the needs and stability of families.[127] In addition, businesses that do not grant workers leave for family needs "fail to establish a working environment that can promote heightened productivity, lessened job turnover, and reduced absenteeism."[128] It is unlikely, then, that the Act is intended to endorse the monetary gain one former employee receives from a waiver where it fosters continued FMLA violations in that workplace. It is equally unlikely that the government's decreased ability to monitor the effectiveness of the Act, due to the bypassing of litigation through waivers, serves the public interest and the Act's purposes.

There is serious concern that allowing FMLA waivers would hurt the public interest by giving employers a "free pass," or a slightly-more-than-free pass, to discriminate. An example of where the public interest has been undermined involves the Older Workers Benefit Protection Act

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125. Clinton Signing Statement, *supra* note 24, at 51. President Clinton noted that the cost falls upon everyone when employees are forced to choose between their jobs and personal and family obligations.

> When they must sacrifice their jobs, we all have to pay more for the essential but costly safety net. When they ignore their own health needs or their family obligations in order to keep their jobs, we all have to pay more for social services and medical care as neglected problems worsen.

Id. An FMLA severance agreement waiver does not dispel these problems. For instance, an employee whose medical problems worsened after her leave request was denied may resort to public assistance to pay her medical bills. Had the employee taken leave, the condition may have been easily treatable and less expensive.

126. 29 U.S.C. § 2601(b) (2000) (noting that the purpose of the FMLA is to balance the needs of families, promote national interests, and to promote the goal of equal employment for women and men).

127. *Id.*

128. Clinton Signing Statement, *supra* note 24, at 51.

(OWBPA), a 1990 amendment to ADEA, under which employers who meet statutory requirements are permitted to secure releases from employees upon severance.[129] The systematic problem is that the waiver will bar employees from bringing a suit which ripens when they later learn they were replaced by younger workers, leading one commentator to liken the waivers to a "license to discriminate."[130] While FMLA claims ripen during employment and so will not raise the same loophole concerns as OWBPA, a form of a license to discriminate is still available for purchase if waivers are enforced. For example, consider the situation of an eligible employee who requests leave to care for an extremely ill parent. If the employer knows that a waiver of FMLA rights will be enforced, the employer might refuse to honor the employee's leave rights and instead plan to include a waiver of the violation in that employee's future severance agreement. In other words, the employer's incentive is to deny FMLA rights to the extent it can afford to compensate the employee, and to the extent it believes the employee will agree to the waiver. The employee stands a lesser chance that her FMLA rights will be recognized where the employer thinks its interests are better served through a waiver. Over time, the distressed employee's various absences from work for doctor and hospital visits may lead to her firing. Regardless of whether or not she signs a waiver, her federal rights were violated and perceptions of FMLA rights in the workplace were lowered.[131] Other employees' knowledge of the denial of leave time will likely dissuade them from trying to assert their FMLA rights.

The result of an enforceable waiver is that employers have less incentive to rein in their discriminatory practices as long as they commit acts valued at or below the cost they are willing to pay in a severance agreement.[132] In this way, any unscrupulous employer can violate the FMLA to maintain or enhance its bottom line. Employees working at large corporations which have funds available to purchase a waiver may

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129. 29 U.S.C. § 626(f) (2000).

130. Richard J. Lussier, *Title II of the Older Workers Benefit Protection Act: A License for Age Discrimination? The Problem Identified and Proposed Solutions*, 35 HARV. J. ON LEGIS. 189, 194 (1998).

131. Even if a waiver is signed and the employee is compensated, other employees are unlikely to learn of this because the employee will no longer be working at the business or office. It would be reasonable for remaining employees to believe that the violations went unremedied.

132. See Judith A. McMorrow, *Retirement Incentives in the Twenty First Century: The Move Toward Employer Control of the ADEA*, 31 U. RICH. L. REV. 795 (1997), for a discussion of the waiver problem in an ADEA context: "Employers could put together incentives that otherwise would violate the ADEA, but offer attractive payments or buyouts under the shadow of layoffs. Risk-adverse employees are likely to take the offer. The employer's underlying [unlawful] conduct is shielded from public review." *Id.* at 807.

be particularly at risk of FMLA maltreatment. In effect, the very fact that an employer is covered by the FMLA, meaning the business has fifty or more employees, may suggest that the employer is large enough to have sufficient funds to buy off an employee's claims.[133] Such disregard for FMLA protections, if sanctioned by enforceable waivers, would not serve the goals of deterrence for which employment statutes with antidiscriminatory provisions were passed.[134]

There is also much to be said for the publicity and exposure entailed in litigation that private waivers preclude. Compliance with the FMLA may be eroded by a lack of litigation because employers are shielded from "reputational effects" of their actions through private waivers.[135] Employers can "avoid[] potentially unfavorable publicity, thereby limiting consumers', and others', ability to know whether they are patronizing a lawbreaker."[136] Disclosures in litigation of employer discriminatory practices or workplace incidents are also themselves important, as they may reveal "patterns of noncompliance resulting from a misappreciation of the Act's operation or entrenched resistance to its commands."[137]

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133. 29 U.S.C. § 2612(a)(1) (2000).

134. McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358 (1995) (stating that Title VII, FLSA, ADEA, and the Equal Pay Act were enacted to eliminate the "vestiges of discrimination" in employment practices, with objectives of deterrence and compensation for injuries).

135. Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 704 (2004) (examining the negative consequences of including mandatory arbitration clauses in individual employment contracts).

136. *Id.* The recent class action suit against Wal-Mart Stores, Inc. is an example of the negative publicity that can accompany allegations of discrimination in the employment context. The plaintiffs, initially thought to include more than 1.6 million current and former female employees, allege that Wal-Mart frequently paid its female workers less than their male counterparts, and often bypassed women for promotions. Wal-Mart shares dropped ninety-seven cents, or 1.8%, in morning trading after the class action approval was announced in 2004. *Judge Certifies Wal-Mart Class Action Lawsuit*, MSNBC, June 22, 2004, http://www.msnbc.msn.com/id/5269131/. Shares were little changed when the Ninth Circuit affirmed the lower court's class certification in February of 2007. Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007), *withdrawn*, 509 F.3d 1168 (9th Cir. 2007) (superseding withdrawn February 2007 opinion and again affirming lower court's class certification). The class could now include as many as 1.5 million women who have worked for Wal-Mart since 1998. *Dukes*, 509 F.3d at 1174. A likely effect of exposure and publicity of litigation was Wal-Mart's hiring of a "chief diversity officer" and establishment of an advisory panel to develop "equal employment opportunity." Abigail Goldman, *Wal-Mart Loses Job-Bias Appeal*, L.A. TIMES, Feb. 7, 2007, at C3.

137. *McKennon*, 513 U.S. at 358–59.

This awareness of industry-wide misconceptions about FMLA policies or widespread refusal to follow its requirements may spur remedial government action, alert employees to their FMLA rights with which they are unfamiliar, and dissuade prospective employees from accepting employment at an egregious FMLA violator. Bypassing litigation through the enforcement of private waivers, however, harms the government's ability to measure the success of the FMLA as revealed in litigation disclosures of noncompliance.[138] Finally, lack of litigation of FMLA claims may harm enforcement of the Act by inhibiting the development of precedent.[139] This is detrimental because employment law precedent helps guide parties, illustrates how statutes are being interpreted, and builds a body of law that systematically elaborates the statute.[140]

D. Market-Based Approaches to the Law Are Ill-Equipped to Further the Purposes of the FMLA

Enforcing contracts on grounds of market efficiency and freedom of contract principles creates tension with outlying social relationships and can lead to institutions suffering as a result of individual maximizing behavior.[141] This occurs because contract enforcement based on autonomy, voluntariness, and consent does not consider the needs of each person of a group and lacks sensitivity to surrounding individuals and communities.[142] Reliance upon market-based approaches, which courts such as the one in *Faris* presumably used in support of enforcing the waiver in that case, can actually leave employment institutions and employees worse off and is contrary to why the FMLA was created.

1. Lack of Employee Bargaining Power

The primary method for asserting employee needs in the United States has traditionally been through market-based approaches and freedom of contract.[143] Although market-based approaches rely on the efficacy of individual bargaining, employees have notoriously small bargaining

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138. *See id.* at 359 (noting that the efficacy of an Act's enforcement mechanisms, as revealed in litigation disclosures of noncompliance, is important in measuring the success of the Act); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) ("[T]he private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.").

139. *See* Summers, *supra* note 135.

140. *Id.*

141. Zalesne, *supra* note 56, at 595–96.

142. TREBILCOCK, *supra* note 56, at 18.

143. Kenneth G. Dau-Schmidt & Carmen Brun, *Protecting Families in a Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 165, 188–89 (2006).

power, leading them to acquire only "uneven benefits" and an "impoverished solution" which may fail to meet their basic needs.[144] For example, prior to the FMLA, a father-employee who missed work to care for a gravely sick daughter could be fired by his employer and left unemployed with no recourse or remedy under federal law. Private negotiations and contract, which produced such unpalatable results for employees, have been eroded by government involvement through legislation such as the FMLA.[145] Given that a lack of bargaining power makes it nearly impossible for employees themselves to secure allowances for family and medical leave from employers, Congress intervened through legislation to protect a majority of the U.S. workforce.[146] Allowing employees to bargain with employers over terms of a severance agreement waiver would present the same concerns of unequal employee bargaining power that led to the enacting of the FMLA.

2. Market Failure and Imperfect Information

Even if viewed from an economic perspective, embracing the anti-waiver approach may not violate market principles that value freedom of contract. A market-based approach suggests that market forces will ensure that contracts, including FMLA waivers, are socially efficient and beneficial.[147] This is premised on the idea that a perfect market itself corrects any "market failure," or anything that prevents it from operating perfectly.[148] For this reason, the freedom of contract should not be restricted.[149] However, market failures do occur and lead institutions to

144. *Id.* at 188; *see also* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981) (noting that national labor and employment policies are "[p]redicated on the assumption that individual workers have little, if any bargaining power").

145. Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 686–87 (1993).

146. *Id.* at 687. A similar lack of bargaining power and need for at least minimal employee protection also led Congress to enact workers compensation, unemployment, and wage and hour legislation. *See* Marc D. Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L.Q. 65, 73–74 (1985).

147. Korobkin, *supra* note 66, at 1203.

148. Richard Craswell, *Freedom of Contract*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 81, 84 (Eric A. Posner ed., 2000).

149. *Id.*; *see also* Korobkin, *supra* note 66, at 1207 (noting that, in reference to buyers and sellers, "[w]ithout market failure, there is no valid consequentialist argument for non-enforcement of any contract terms").

intervene.[150] In the FMLA context, a market failure plausibly occurred by way of the lack of employee bargaining power with employers which prevented employees from obtaining protection for their basic needs through contract.[151] Congress's intervention in 1993 through the FMLA could be viewed as the corresponding institutional involvement. From this perspective, a pre-FMLA market failure arguably occurred and corrective legislative measures were justifiably taken. Therefore, courts restricting the freedom of contract by holding waivers illegal are acting in accordance with market principles because they are upholding the corrective measure that remedied the market failure.

Imperfect information can also cause market failure.[152] This imperfection can take the form of a person misperceiving changes in the risks in a contract.[153] In the situation of an employee presented with a severance package and waiver, the employee is particularly likely to misperceive the allocation of risk as to FMLA claims. Data from the DOL raise concerns about the extent of employees' knowledge of their rights under the Act, and subsequently knowledge of claims they may be waiving.[154] The DOL survey in 2000 showed "a majority of employees in both covered and noncovered establishments have heard of [the] FMLA, but about half do not know whether the law applies to them."[155] The fact that such large numbers of employees are unsure if they are even covered by the FMLA, let alone do not know the specifics of the legislation, would seem to constitute imperfect information for purposes of a market failure that necessitates government intervention. Employees who are unfamiliar with the substance of the FMLA and its possible application to them cannot know that they are signing away rights to pursue FMLA claims they do not know exist. That discrimination against working mothers in the workplace is often subtle and difficult to detect may also lead women employees to not recognize a claim they

150. Craswell, *supra* note 148. "Market failure" is anything that prevents the market from operating perfectly. *Id.* at 84.

151. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 213–14 (2005) (discussing that a market failure may occur when parties with disparate status-based characteristics, such as poverty or wealth, or lack of education or business sophistication, attempt to transact).

152. Craswell, *supra* note 148, at 84.

153. *Id.* at 89.

154. *See* Waldfogel, *supra* note 4, at 20.

155. *Id.*; *see, e.g.*, Knussman v. Maryland, 272 F.3d 625, 628 (2001) (stating that employee testified he was unfamiliar with the FMLA because employer Maryland State Police Department provided no notice to employees of FMLA provisions, and employer told him there was "no way" he could take more than two weeks of leave to care for newborn and his wife).

may have.[156] In all, employees are likely to erroneously evaluate the risks in the severance package, leading them to believe they are walking away with a much more favorable bargain than actually exists. While a court that enforces FMLA waivers would presumably require that they are "knowing and voluntary,"[157] a presumption that they are binding would lead to many signed and privately executed agreements that never received a court's scrutiny, resulting in the employees' ignorance of their rights going undetected.[158]

Finally, if the market is functioning imperfectly and necessitates government involvement, the market is improved only if a court or legislature can "ban the inefficient terms without also banning the efficient ones."[159] In the FMLA context, the analysis might more appropriately

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156. The subtle nature that employment discrimination against women may take is due in part to mutually reinforcing stereotypes against women in the workplace. Chief Justice Rehnquist noted in *Nevada Department of Human Resources v. Hibbs* that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men." 538 U.S. 721, 736 (2003). Presuming a lack of domesticity in men led employers, prior to the FMLA, to deny men leave accommodations because the family was regarded as the "woman's domain." These stereotypes led women to continue to assume the role of primary caregivers, and "fostered employers' stereotypical views about women's commitment to work and their value as employees." *Id.* Such engrained perceptions of gender roles in the workplace create an environment where subtle discrimination may be difficult to detect. *Id.* See *infra* notes 209, 210, and accompanying text for more of the Supreme Court's discussion of gender discrimination in *Hibbs*.

157. Federal employment statutes in which waivers are enforceable generally require that they be "knowing and voluntary." *See* Senn, *supra* note 68, at 309 (recognizing that nine of the United States Circuit Courts of Appeals use a totality of the circumstances test to assess knowledge and voluntariness, while the Fourth and Eighth Circuits continue to use a contract-based approach); *see also* 29 U.S.C. § 626(f)(1) (2000) (requiring knowing and voluntary waivers for ADEA).

158. Despite the troubling statistics showing a fairly uninformed workforce, the 2000 data also show an increased use of leave for reasons other than one's own health. Waiver proponents could argue that this increase reflects a growing awareness of the types of leave afforded under the FMLA, and subsequently greater knowledge of the Act's protections. *See* Waldfogel, *supra* note 4, at 20.

159. Craswell, *supra* note 148, at 89. The question is unsettled as to what notice of FMLA provisions an employer must provide. The statute provides that an employer must post a notice "in conspicuous places" setting forth employees' FMLA rights. 29 U.S.C. § 2619(a) (2000). However, the DOL expanded upon this requirement and issued regulations requiring "more comprehensive and individualized notice" for those employees who request leave. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 87–88 (2002) ("According to the Secretary . . . the regulations [are] necessary to ensure that employees are aware of their rights when they take leave."). The Supreme Court passed on the question of whether the regulations accord with the statute and are valid. *Id.* at 88. The DOL noted the *Ragsdale v. Wolverine World Wide, Inc*. decision

look to ensuring that Congress's introduction of efficient terms is not counteracted. In other words, if misinformation or lack of bargaining power creates a form of market failure justifying some degree of institutional aid in specifying employment terms, this intervention is counteracted by employee waivers of those terms. While Congress may have introduced large-scale family and leave protections, including terms of leave,[160] reinstatement,[161] and anti-retaliatory provisions,[162] so long as courts are free to enforce waivers of claims to these rights, the inefficiency sought to be expunged returns. Allowing waivers would not forestall the market from operating with misperceptions, misinformation, and unequal bargaining power; thus the waivers would constitute inefficient terms that should be banned. If the term is not barred, then employees are left with the same unprotected status that they had prior to the FMLA protections.

E. Concerns of Employer Coercion: Economic Duress and Undue Influence

The frequent financial vulnerability and worries of FMLA leave-takers raise concerns that coercive economic undertones may be present when employees waive their rights. The most frequent concern of FMLA leave-takers in the 2000 DOL survey was financial.[163] More than fifty-three percent of them "worried about not having enough money to pay the bills" and some cut their leave short due to money issues.[164] Of those who did not take leave, seventy-seven percent said it was because they could not afford it.[165] Additionally, more than two-thirds of leave-takers aged eighteen to twenty-four who had household incomes below $20,000 did not receive pay during their leave, and less than one-fourth of older leave takers, aged fifty to sixty-four, with household incomes of $50,000 or more received no pay.[166] In all, over fifty-eight percent of

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and solicited public comment on the notice issue in its recent request for public comment regarding FMLA effectiveness. Request for Information on the Family and Medical Leave Act of 1993, 71 Fed. Reg, 69,504, 69,508 (Dec. 1, 2006). See *supra* note 17 for further discussion of the DOL request. For more on FMLA notice requirements, see Debra L. Greenberger, Note, *Toward Increased Notice of FMLA and ADA Protections*, 80 N.Y.U. L. REV. 1797 (2005) (arguing that the FMLA notice regime needs to be "re-conceptualiz[ed]" to focus on reaching target populations, and to compensate for employees' hesitancy to assert their statutory rights).

160. 29 U.S.C. § 2612(a)(1) (2000).
161. *Id.* § 2614(a)(1).
162. *Id.* §§ 2614(a)(2), 2615(a).
163. Waldfogel, *supra* note 4, at 21.
164. *Id.*
165. *Id.*
166. *Id.*

leave-takers not receiving pay characterized it as "somewhat or very difficult to make ends meet."[167] In light of the financial hardship facing many covered employees, it would be unsurprising if employers recognized the vulnerability of the workers and used it to their advantage to persuade employees to sign severance package waivers of rights to pursue damages for FMLA violations.[168]

Courts will police severance agreements and contracts for hints of undue influence or economic duress as a "'last resort' to correct exploitation of business exigencies."[169] Economic duress renders a contract voidable, while undue influence will render it invalid and unenforceable.[170] Whether the pressures on an employee to sign a

167. *Id.*

168. The employer may also be able to take advantage of related employee concerns. As Eileen Silverstein discusses, even if an employee with a possible employment discrimination claim is "quite angry and 'knows in her bones' that her employer acted illegally . . . she recognizes the need to secure another job and the unattractiveness of an applicant who is suing a former employer." *See* Silverstein, *supra* note 61, at 492. The illegalization of FMLA waivers in the anti-waiver approach would not dispel this employee's concerns as to the effect of pending litigation against her former employer. However, the anti-waiver approach would help preclude the discrimination from occurring in the first place. If the employer knows it cannot buy a release, the employer then has incentives to comply with the FMLA and avoid the expense, publicity, and uncertainty of litigation. *See* text at notes 132 through 136 for discussion of deterrence and publicity. The anti-waiver approach precludes the employer from capitalizing on employee fears of having to obtain new employment by ensuring court or DOL action to hold the employer accountable for its noncompliance with the FMLA.

169. Johnson v. IBM Corp., 891 F. Supp. 522, 529 (N.D. Cal. 1995) (quoting Rich & Whillock, Inc. v. Ashton Dev., Inc., 204 Cal. Rptr. 86, 90 (Ct. App. 1994)) (upholding release of claims as it was not obtained through economic duress or undue influence); *see also* Aubert v. Entergy Corp., 762 So.2d 288, 291–92 (La. Ct. App. 2000) (reviewing and upholding OWBPA releases against economic duress challenge where employees discovered possible age-motivation in their low performance rankings which led them to agree to the releases). In *Faris*, for example, the employee alleged duress, stating that she was pressured into signing the agreement because she was confronted by her supervisor and told, "This is your last opportunity to sign the release if you expect to get compensation for it." Faris v. Williams WPC-I, Inc., 332 F.3d 316, 318 (5th Cir. 2003). The court found that she did not tender back the consideration to ratify the release. *Id.* at 322–23.

170. For undue influence to void an agreement, courts must generally find that persuasion is exercised on a party who is under the domination of the person executing it, and that person is justified in assuming the other will not act in a manner inconsistent with their welfare. RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981). A release may be rendered voidable due to economic duress where a party is subjected to a wrongful act such as an improper threat, and must succumb to the party or face "financial ruin." Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001). The wrongful act must be sufficiently coercive to cause a reasonable person faced with no reasonable alternative to

presumably enforceable waiver rise to a level to make the waiver voidable is not examined unless the employee later decides to challenge the agreement in court. Thus, employers may take advantage of employees' unequal bargaining power and financial instability to induce the employees to waive FMLA rights on the hope that the employee will not undertake to challenge the agreement.[171] Making FMLA waivers illegal removes this incentive of the employer to exploit employees.

F. Courts Should Not Treat the FMLA Analogously to ADEA and Title VII

1. The FMLA Distinguished

Courts that have held waivers enforceable have often done so on grounds that the FMLA is similar to ADEA and Title VII in that all three are employment antidiscrimination statutes with similar protections, and waivers are enforceable under ADEA and Title VII.[172] However, this argument overlooks an overriding distinction that separates the FMLA from the other statutes: the FMLA is directed toward protecting families, not merely individuals as employees.[173]

Unlike ADEA and Title VII which were enacted to protect individual employees from discrimination,[174] the FMLA addresses itself to the larger sphere of the family.[175] For their part, Title VII protects "individuals" from employment practices that discriminate on the basis of race, color, religion, sex, or national origin,[176] and ADEA protects an

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succumb to the pressure. *Id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 176 (1981) (defining economic duress as an improper threat made, which includes a threat where resulting agreement is on unfair terms and either what is threatened is otherwise a use of power for illegitimate ends, or the threat's effectiveness in inducing assent is significantly increased by prior unfair dealing by the party making the threat). Economic duress will not be found simply because an employee entered into an agreement with which they were not fully satisfied. Bhushan v. Loma Alta Towers Owner's Ass'n., 148 Fed. App'x 882, 886 (11th Cir. 2005).

171. *See supra* note 144 and accompanying text.

172. See, for example, discussion of Title VII and ADEA and the reasoning of the Fifth Circuit in *Faris*, *supra* note 80 and accompanying text.

173. *See* 29 U.S.C. § 2601(b) (2000) (stating purposes of FMLA include "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity").

174. The purposes of ADEA include to "promote employment for older persons based on their ability rather than age" and to prohibit arbitrary age discrimination and help employment. 29 U.S.C. § 621(b) (2000). The purpose of Title VII is to make unlawful employment discrimination against an individual on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (2000).

175. *See supra* notes 4, 126, and accompanying text.

176. 42 U.S.C. § 2000e-2(a).

"individual" from discrimination in employment on the basis of age.[177] To be sure, *these* two Acts are strikingly similar. The Supreme Court has noted that prohibitions in ADEA were derived verbatim from Title VII.[178] On the other hand, Congress explicitly stated that the purpose of the FMLA was to strike a balance between the demands of the workplace and the needs of families, to promote the stability and economic security of families, and to preserve family integrity.[179] Analyzing these three statutes as if they are one and the same ignores the fact that Congress intended the FMLA to protect the interests of more than just the employee who is given an option by her employer to release statutory violations; the Act envisions broader protections.[180] The broader protection is evidenced in that even "stray but hostile remarks" are actionable under the FMLA because they may inhibit employees from taking leave or "utiliz[ing] other family-friendly benefits."[181] Title VII, on the other hand, focuses on "overt subjective intent" and more than offhand remarks are required to constitute discrimination.[182]

It is true that in some situations families would benefit from a family member receiving money in lieu of the right to pursue FMLA claims, such as when the family is facing pressing economic difficulties. But this does not support waivers generally. For one, the economic pressure the family member-employee feels increases the likelihood that the employee can be taken advantage of by the employer who offers undercompensation for the waiver. Families will be harmed if the family member accepts a small payout where a much larger award was

177. 29 U.S.C. § 623(a) (2000).

178. Lorillard, Inc. v. Pons, 434 U.S. 575, 584 & n.12 (1978) (comparing 42 U.S.C. § 2000e-2(a)(1) and 29 U.S.C. § 623(a)(1) and noting that Title VII and ADEA provisions each make it unlawful for an employer "to fail or refuse to hire or to discharge an individual," or to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment").

179. 29 U.S.C. § 2601(b) (2000).

180. Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 365–69 (2003) (discussing in what ways the FMLA provides broader protection than Title VII and "its progeny"). Not only does it envision broader protections, but Chief Justice Rehnquist noted in *Nevada Department of Human Resources v. Hibbs* that the FMLA was enacted after Title VII and the Pregnancy Discrimination Act both failed to rectify the gender discrimination problem in parental leave. 538 U.S. 721, 737 (2003). It is therefore unlikely that Congress intended FMLA provisions to mirror Title VII, as Title VII itself was an unsuccessful legislative attempt to eradicate the discrimination.

181. Malin, *supra* note 180, at 367.

182. *Id.*

available if the claim was recognized or pursued. In other words, a waiver for a small amount of cash may eliminate a claim worth many times more money, to the family's detriment. Given the problems of unequal bargaining power and coercion of employees, protecting the interests of families supports forbidding family members from waiving their rights, especially when they are most vulnerable.[183]

Because ADEA and Title VII were enacted with more of a focus on the individual than was the FMLA, it is reasonable that the individual is permitted to waive claims and rights under those two acts. The statutes contemplate protecting society through protection of the individual, not protecting society family by family.[184] Conversely, the FMLA seeks to secure and protect the needs of children, spouses, and parents in the family unit.[185] Because Congress sought to protect multiple persons' interests in one context, it is doubtful it intended for an individual to singlehandedly waive violations that affected the interests of multiple family members. For example, the 2000 DOL survey showed that a large majority of leave-takers said that taking leave had a positive impact on their ability to care for family members (78.7%), their own family's emotional well-being (70.1%), and their own family member's physical health (63.0%).[186] Enforcing a waiver of claims which may have arisen after detrimentally impacting an entire family unit is at odds with the FMLA, an Act through which Congress intended to protect more than just the employee.[187]

Other distinctions between employment discrimination statutes counsel against analyzing the statutes as one and the same. For one, Title VII and the ADA pertain to individuals in their capacity as employees.[188] The FMLA, as previously noted, extends beyond the workplace and is intended to preserve the family and work-life balance.[189] Title VII also applies to employers with fifteen or more employees, while the FMLA

183. The Fourth Circuit in *Taylor* noted the vulnerability of FMLA employees in stating that the FMLA leave standard is necessary so that the "'minority of employers who act irresponsibly [unscrupulous employers]'" cannot "more easily exploit employees at the times when they are most vulnerable." Taylor v. Progress Energy, Inc., 415 F.3d 364, 374 (4th Cir. 2005) (quoting S. REP. NO. 103-3, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7), *aff'd on reh'g*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539).

184. Nowhere in ADEA or Title VII do the statutes include provisions regarding family or family members. *See* 42 U.S.C. § 2000e (2000); 29 U.S.C. § 621 (2000).

185. 29 U.S.C. § 2612(a)(1) (2000).

186. Waldfogel, *supra* note 4, at 20.

187. Unlawfully denying a leave request likely harms the person for whom the employee sought to care. For example, a severely ill parent loses the companionship, comfort, and physical care that an adult child can render by way of taking leave.

188. *See* 42 U.S.C. § 2000e; 29 U.S.C. § 623 (2000).

189. *See* 29 U.S.C. § 2601(b) (2000).

minimum is fifty employees.[190] Because smaller employers tend to be on fairly even bargaining terms with employees,[191] it is more reasonable that Title VII allows for waivers. The fact that FMLA-covered employers may be larger alludes to their ability to entertain litigation in the court system, whereas the burden of the expense of litigation on a Title VII or ADA employer weighs in favor of allowing waivers.[192] The FMLA also applies to all state and local government employers regardless of the employer's size.[193] The size of the government employer may not matter as much as that of a private employer because in all government-employer disputes the cost of defending from liability lies with the government. Finally, waivers are enforceable under Title VII because Congress's preferred method—or method that is "at least as viable as any other"—to vindicate those rights is through "voluntary conciliation and compliance."[194]

2. The FMLA May Be Better Characterized as a Labor, Rather than an Antidiscrimination, Statute, Which Weighs Against the Enforceability of Waivers

Despite some judicial analysis of the FMLA as comparable to the ADA, Title VII, or ADEA,[195] the statute may best be described as one regulating labor practices like the FLSA, rather than discriminatory

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190. 42 U.S.C. § 2000e(b); 29 C.F.R. § 825.104 (2007).

191. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 465–66 (2000) (discussing also that smaller start-up businesses not covered by the FMLA are often more vulnerable to employment discrimination lawsuits because they do not have the "proper mechanisms to ensure that hiring and firing isn't discriminatory" (quoting Tatiana Boncompagni, *High-Tech: Full Employment Act—Labor Practices Boom with Economy*, LEGAL TIMES, Nov. 8, 1999, at 1)).

192. *See*, *e.g.*, Melissa S. Wandersee, *The Far-Reaching Effects of Reproduction as a "Major Life Activity" Under the ADA: What Will This Expansion Mean to Employers and Their Insured?*, 3 J. SMALL & EMERGING BUS. L. 429, 433 (1999) (noting that for ADA, small business owners will likely agree to "the most extreme requests for accommodation [so to comply with the "reasonable accommodations" requirement of the statute] because they cannot afford to risk litigation"). It is likely that smaller employers such as these are more able to afford to buy a release of liability from an employee rather than endure costly litigation expenses.

193. 29 C.F.R. §§ 825.104(a), 825.108.

194. United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 862 (5th Cir. 1975).

195. *See, e.g.*, Faris v. Williams WPC-I, Inc., 332 F.3d 316, 321–22 (5th Cir. 2003) (comparing the FMLA to ADEA and Title VII).

ones.[196] While waivers are generally enforceable under the antidiscrimination statutes,[197] they are not enforceable under labor statutes such as the FLSA.[198]

It bears repeating that the Department of Labor explicitly analogized the FMLA to the FLSA when issuing the regulations that would govern the FMLA.[199] In considering the FMLA, the House of Representatives also analogized it to minimum standards of child labor laws, the minimum wage, and health and safety standards,[200] while the Senate said the "minimum labor standard" was necessary for healthy competition.[201] Congressional debate also reveals that the Act was envisioned to be a labor-oriented statute rather than one aimed as much at combating discrimination, as were Title VII and ADEA.[202] Furthermore, the

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196. *See* Michael L. Ripple, Comment, *Supervisors Beware: The Family and Medical Leave Act May be Hazardous to Your Health*, 16 J. CONTEMP. HEALTH. L. & POL'Y 273, 276 (1999).

197. 29 U.S.C. § 626(f) (2000) (allowing knowing and voluntary waivers under ADEA); Rogers v. Gen. Elec. Co., 781 F.2d 452, 456 (5th Cir. 1986) (enforcing Title VII waiver); *see* 42 U.S.C. § 2000e-2(a) (2000) (including no prohibition on waivers in Title VII text).

198. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–08 (1945). The Court noted that the FLSA was enacted to

> protect certain groups of the population from sub-standard wages and excessive work hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency . . . . No one can doubt but that to allow waiver of statutory wages [or employee's right to liquidated damages] by agreement would nullify the purposes of the Act.

Id. at 706–07; *see also* Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (noting that the Supreme Court's decisions interpreting the FLSA frequently emphasize the nonwaivable nature of employee's right to minimum wage and overtime pay under the FLSA, and stating that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate" (quoting Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945))); D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114–16 (1946) (stating that "the remedy of liquidated damages cannot be bargained away by bona fide settlements of disputes of coverage" because allowing waivers of liquidated damages would thwart public policy of promptly paid, mandatory minimum wages that Congress adopted in the FLSA).

199. *See supra* text accompanying note 118.

200. H.R. REP. NO. 103-8(II), at 37 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 6–7.

201. S. REP. NO. 103-3, at 5, 18 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 7, 20 ("Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers. . . . Uniform standards like the FMLA help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness.").

202. Senator Dodd referred to the legislation as a "minimum labor standard, recognizing the demographic changes that have occurred in this country and the absolute necessity not to place working families in the position where they must choose between

penalties imposed by the FMLA also resemble labor statutes in that they are more expansive than traditional employment antidiscrimination statute penalties.[203] The FMLA allows for equitable and punitive relief against "any employer," which has been interpreted to apply to both employers and individuals themselves, such as supervisors.[204] Individual liability under antidiscrimination statutes, on the other hand, has been rejected by courts.[205] Finally, that Congress chose to protect smaller businesses from obligations to provide FMLA protections when it created a fifty-employee minimum shows that Congress was conscious of the economic consequences of the Act and not squarely focused on protection from discrimination as in other statutes.[206] Because the FLSA does not permit generic employee waivers, viewing the FMLA as a similar labor statute supports illegalizing employee severance agreement FMLA waivers, or at least supports requiring some fairness scrutiny of the agreement.[207] Even viewing the FMLA in part as a labor statute distinguishes it from the civil rights statutes which are focused primarily on eradicating discrimination.

G. Women in the Workplace

Forbidding FMLA waivers may also be important to achieve the FMLA objectives as related to women in the workplace. Congressional FMLA findings indicated that the nature of the roles of men and women in society often leads the primary responsibility of family caretaking to fall on women, thus affecting the lives of working women more than

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the family that they want to take care of during a time of crisis and the job they need." These comments on the Senate floor allude to the likelihood that the legislation was more a labor statute taking into account changes in U.S. society than a full-fledged antidiscrimination statute. 139 CONG. REC. S1254, S1257 (daily ed. Feb. 4, 1993) (statement of Sen. Dodd).

203. Ripple, *supra* note 196, at 299.

204. 29 U.S.C. § 2617(a)(2) (2000); Ripple, *supra* note 196, at 299.

205. Ripple, *supra* note 196, at 299; *see, e.g.*, EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d, 1276, 1279–81 (7th Cir. 1995) (deciding that ADA definition of *employer*, which mirrors the definition in Title VII and ADEA, does not extend to individual liability).

206. *See* Ripple, *supra* note 196, at 300–01. This Congressional intent to minimize the economic consequences of the FMLA has proven successful, as both the 1995 and 2000 DOL surveys revealed that about ninety percent of employers found no noticeable effect on their business as a result of complying with the FMLA. Waldfogel, *supra* note 4, at 19.

207. See *infra* note 225, discussing how FLSA waivers are enforceable only after judicial approval or the Secretary of Labor approves the agreement.

those of men.[208] In upholding the FMLA and its abrogation of state immunity in 2003, Chief Justice Rehnquist stated that the record of states' unconstitutional participation in and fostering of gender-based discrimination in administering leave benefits justified the prophylactic legislation.[209] He noted Congress's finding that "[h]istorically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second," which in turn has "justified discrimination against women when they are mothers or mothers-to-be."[210] The pervasive history of gender discrimination against mothers in the workplace raises concerns that women may be particularly susceptible to coercion in agreeing to sign FMLA waivers, or may be targeted by employers to sign such agreements. To allow waivers might insulate employers from liability for such discrimination and, contrary to the FMLA, actually promote it.[211]

V. INVALIDATING AND ILLEGALIZING FMLA WAIVERS

Although there are arguments for enforcing FMLA waivers, resting primarily on freedom of contract principles that purport to promote an efficient market,[212] stronger countervailing arguments require prohibiting them.[213] The FMLA was not enacted as a commercial endeavor to

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208. 29 U.S.C. § 2601(b) (2000).

209. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003).

210. *Id.* at 736 (quoting *The Parental and Medical Leave Act of 1986: J. Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 99th Cong. 100 (1986)). This gender discrimination against women in the workplace can coincide with gender discrimination against men taking leave. Martin H. Malin explored this workplace hostility toward men and found that "[m]en's accommodation requests are often met by, 'Your wife should handle it.'" Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1077 (1994). Fathers may also be met with taunts and comments from coworkers that a "'real man' does not take parental leave." Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER RACE & JUST. 411, 426 (2002). Malin argues that the FMLA provision forbidding employers from interfering with FMLA rights should be applied to combat this discrimination. *See* 29 U.S.C. § 2615(a) (2000) (noninterference provision); Malin, *supra*, at 1090–94. He suggests using the hostile work environment paradigm from Title VII sexual harassment cases to hold employers liable for workplace environments that discourage men's leave-taking. This "FMLA hostile work environment" liability would be broader than Title VII because the FMLA does not limit illegal discrimination to terms or conditions of employment as does Title VII. *See* 42 U.S.C. § 2000(e)-2(a)(1) (2000).

211. See also *supra* note 33 discussing the hole in FMLA coverage of independent contractors and how it disproportionately impacts women.

212. *See* Epstein, *supra* note 55, at 951.

213. Notably, when contract principles are used they are often adhered to even at the expense of the public interest. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 918–19 (1974) (describing the evolution

maximize the efficiency of markets, but rather to promote family well-being in a time of changing workforce.[214] Given that the Act was created with the nation's families at the forefront, it is unlikely that Congress intended to allow employees to privately relinquish their rights to pursue claims in exchange for money. Such a practice shields employers from the public exposure of litigation and amounts to buying a "license to discriminate," which effectively undermines the purposes of the FMLA.[215] In fact, the DOL referred to an FMLA prohibition on waivers as "sound public policy,"[216] the soundness of which is bolstered by the historically disparate bargaining power between employers and employees.[217] Furthermore, with employee coercion concerns,[218] the distinguishing features of the FMLA as related to other employment discrimination statutes,[219] and noted workplace discrimination against women,[220] it is difficult to accept that Congress intended for binding severance agreement waivers under the Act. Finally, interpreting section 825.220(d) to prohibit waivers of both current and prospective rights is entirely consistent with the plain meaning of the regulation.[221]

Rendering FMLA waivers illegal, however, is perhaps not the only acceptable solution. As some courts have analogized the FMLA to the FLSA,[222] an approach similar to FLSA enforcement of settlement agreements is an option. An employer who violates the FLSA is liable to its employees for unpaid minimum wages or overtime compensation, and for an equal amount in liquidated damages,[223] but employees may

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of eighteenth-century equitable contract principles into nineteenth-century contract at-will principles that seek to protect the market economy and commercial interests at the expense of the public interest).

214. 29 U.S.C. § 2601(b) (2000).

215. *See* Lussier, *supra* note 130 and accompanying text.

216. *See supra* note 118 and accompanying text. In its amicus brief successfully arguing for rehearing in *Taylor v. Progress Energy, Inc*., the Secretary took the position that section 825.220(d) does not bar the "retrospective settlement of FMLA claims." *See* DOL Supplemental Brief, *supra* note 118, at 4. In its amicus brief for the rehearing, the DOL also claimed that it has never established a system for reviewing "private settlement" of FMLA claims, although it admitted that it has "supervised" settlements investigated by the Wage and Hour Division. *See* DOL Brief, *supra* note 118.

217. *See supra* note 144 and accompanying text.

218. *See supra* note 169 and accompanying text.

219. *See supra* note 173 and accompanying text.

220. *See supra* notes 156, 209, and accompanying text.

221. *See supra* note 102 and accompanying text.

222. *See supra* note 119 and accompanying text, and text at note 118.

223. 29 U.S.C. § 216(b) (2000).

not waive FLSA rights in a private employee-employer agreement.[224] Employees may settle or compromise their rights in only two ways: they can accept the Secretary of Labor's supervision of payments of unpaid wages owed to them, whereby the employees waive their right to pursue claims; or employees may bring suit directly against their employer and a district court can enter a stipulated judgment after analyzing a proposed settlement.[225] Allowing the court to scrutinize the agreement increases the likelihood that it "reflect[s] a [more] reasonable compromise of disputed issues than a mere waiver of statutory rights brought by an employer's overreaching."[226] If the agreement is reasonable, district courts may approve it in order to promote the policy of encouraging settlement in litigation.[227]

Utilizing the FLSA scheme for DOL and judicial supervision of FMLA employer-employee agreements is likely feasible. The FMLA directs the Secretary to attempt to resolve complaints of FMLA violations "in the same manner" that the Secretary attempts to resolve FLSA settlements.[228] The Department, therefore, has the same authority to supervise binding settlements and waivers under the FMLA that it has

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224. Taylor v. Progress Energy, Inc., 415 F.3d 364, 371, 374 (4th Cir. 2005), *aff'd on reh'g*, 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07-539); *see also supra* note 123 and accompanying text.

225. 29 U.S.C. § 216(c) (including procedure for Secretary to supervise payments); Lynn's Food Stores, Inc. v. United States, 679 F.2d 1350, 1352–53 (11th Cir. 1982) (noting that if an employee does not involve the Secretary of Labor, then the "only other route" to compromise FLSA claims is through stipulated judgment in a suit against an employer under 29 U.S.C. § 216(b), in which the court analyzes the proposed agreement for fairness). Employees may not settle for an amount less than what they are owed under the statute. A settlement may also only be binding where there is a bona fide dispute over the amount owed or liquidated damages. *See, e.g.*, Guess v. Montague, 140 F.2d 500, 504–06 (4th Cir. 1943) (stating that an agreement for less than the minimum wage is nonbinding because it contravenes express provisions of the statute, but "there is nothing in the statute or in public policy which forbids settlement of the claim for liquidated damages at any figure that the parties may agree on").

226. *Lynn's Food Stores*, 679 F.2d at 1354. Another benefit of a settlement in this context, as opposed to a general FMLA waiver, is that the employer may agree as part of the negotiated settlement to take "ameliorative steps" related to the underlying FMLA complaint that will benefit the remaining workforce. *See* Silverstein, *supra* note 61, at 486–87 (discussing advantages of negotiated settlements taking place after a complaint or administrative charge is filed, as opposed to mere waivers of statutory violations before any legal action is instituted).

227. *Lynn's Food Stores*, 679 F.2d at 1354 (refusing to approve agreement where employees did not consult lawyers, some could not speak English, employer insinuated employees were entitled to no back-pay, and employer noted that past employees returned settlement payments from DOL actions because they felt they had already been paid what they were due).

228. 29 U.S.C. § 2617(b) (2000) ("The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 2615 of this title in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 206 and 207 [FLSA provisions] of this title.").

under the FLSA,[229] and has exercised these supervisory powers to settle FMLA claims.[230]

The added responsibilities on the Department of an explicit requirement to supervise FMLA claims are also probably manageable, and only a slight burden if any at all. First, DOL enforcement data show that employers are at *far* more risk of violating the FLSA than the FMLA.[231] Second, a majority of employers are complying with the FMLA, which lowers their risk of liability and the likelihood that they will insert FMLA waiver clauses into severance agreements which might require DOL approval.[232] Severance agreements with FMLA provisions would presumably only be necessary from the employer's perspective in rare situations where significant liability existed.[233] Finally, no empirical evidence has been presented by organizations opposing such an idea to show that FLSA-like supervisory requirements would overwhelm DOL resources.[234] In fact, it can take relatively minimal effort to meet DOL supervisory requirements; one court found the requisite supervision where the DOL investigated a claim, concluded FMLA back wages were owed, forwarded release forms to the employer signed by the employee, and

229. *See, e.g.*, Mion v. Aftermarket Tool & Equip. Group, 990 F. Supp. 535, 540 (W.D. Mich. 1997) (recognizing that, in accordance with § 2617(b), the Secretary has the same authority to supervise binding FLSA settlements as it does for FMLA settlements).

230. *See, e.g.*, *id.* (holding that the DOL supervised a settlement of employee's $310.18 FMLA back wage claims, within meaning of FLSA, where DOL provided employer with release form, employer forwarded the form to employee along with the check, and employee cashed the check and was aware of attached forms).

231. In 2003, there were 32,591 concluded FLSA back wages cases. In the same year, there were only 3565 total FMLA complaints for back wages. U.S. Department of Labor, 2003 Statistics Fact Sheet, Wage and Hour Fiscal Year 2003 Enforcement Continues Record Climb, *available at* http://www.dol.gov/esa/whd/statistics/200318.htm.

232. Supplemental Reply Brief of Appellant at 6, Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007) (No. 04-1525). In other words, it is not in employers' interests to pay departing employees for FMLA waivers when the risk of liability for FMLA violations is low.

233. *Id.* at 7.

234. *See* Supplemental Reply Brief on Panel Rehearing of Amici Curiae the Equal Employment Advisory Council et al. at 8–9, Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007) (No. 04-1525) [hereinafter EEAC Reply Brief] (suggesting that a DOL approval requirement is unfeasible because DOL has no established system for supervising private FMLA settlements); *cf.* Supplemental Brief of Amici Curiae the National Employment Lawyers Association (NELA) and the North Carolina Academy of Trial Lawyers (NCATL) at 7, Taylor v. Progress Energy, Inc., 493 F.3d 454 (4th Cir. 2007) (No. 04-1525) (responding that if there was any empirical evidence of such consequences of FLSA-like enforcement, organizations would have presented them).

several other communications between the DOL and employer took place.[235]

Despite the practicality of such a scheme, several organizations claim that an FMLA supervision requirement would undermine the preclusive effect of general releases, thus lowering the amount employers are willing to pay employees for releases[236] and decreasing the offering of severance agreements.[237] This argument rests on the fact that "the principal value of a general release is that it eliminates any possibility of post-termination litigation" and "facilitat[es] a full and peaceful closure of the employment relationship."[238] But a release of all but FMLA claims has value to an employer as it precludes the possibility of other litigation, and has overarching value to the public by way of holding employers accountable for FMLA noncompliance. The fact that the amount paid for the release, not including FMLA claims, is lower than that of an all-encompassing release also does not necessarily harm employees; employees are worse off if they sign a release for claims that would yield a larger payment if pursued. Furthermore, the approval requirement does not prevent employers from drafting a separate FMLA agreement for approval that accompanies the general release of all other claims. Finally, facilitating a "full and peaceful" end to the employment relationship should not come at the expense of a fair resolution of FMLA violations, as adjudged by DOL or court supervision. In all, the possible negative consequences of implementing a DOL or court supervision requirement are likely overcome by the public policies in favor of the approach. Protecting vulnerable employees from overreaching employers, protecting the interests of families in times of need, and strengthening the deterrent effect of the FMLA almost certainly compensate for any imperfections in the process.

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235. *Mion*, 990 F. Supp. at 540 (noting that the "other communications" included a letter, fax, phone call, and one other communication); *see also* Cuevas v. Monroe St. City Club, 752 F. Supp. 1405, 1416 (N.D. Ill. 1990) (holding under FLSA that there was adequate supervision where DOL met with employer, received employer correspondence, and DOL supplied release forms); Torreblanca v. Naas Foods, Inc., No. F 78-163, 1980 WL 2100, at *2–3 (N.D. Ind. 1980) (holding there was adequate supervision under FLSA where employer treasurer and Secretary of Labor compliance officer exchanged a visit, memorandum, phone call, and letter).

236. The lowered amount is a supposed result of possible FMLA liability still existing.

237. EEAC Reply Brief, *supra* note 234. The organizations also claim that the offering of severance agreements would surely decrease with such a rule because employers would fear the possibility of added expense of defending suits if they could not know that they would not be subjected to post-termination litigation. They also suggest that in mass layoffs, employees are likely to be worse off because they would not receive any financial relief.

238. *Id.*

A third approach, perhaps a middle approach between making waivers illegal and implementing an FLSA-like scheme, is to require that FMLA waivers meet explicit requirements.[239] This could resemble the OWBPA requirements that Congress enacted to protect older workers from waiving their rights under ADEA.[240] Like the FLSA supervision framework, requiring a heightened standard for waivers would work to ensure the agreement is fundamentally fair to the employee, and would abate concerns of coercion and weak bargaining power accompanying general

239. An approach not endorsed by this Comment is mandatory arbitration of FMLA claims. Employment arbitration has drawbacks similar to those of FMLA waivers. As Richard A. Bales notes in his discussion of mandatory arbitration clauses pertaining to all employee disputes, arbitration notably fails to deter discrimination. First, arbitration reduces the cost of defending a suit, which makes employers less wary of violating the Act. Second, it leads to confidential outcomes which have a host of negative consequences related to compliance and deterrence of discrimination, as discussed *supra* at notes 135 through 140. Arbitration also undermines employees' right to a jury that they would otherwise have in a civil suit. Richard A. Bales, *Normative Consideration of Employment Arbitration at* Gilmer*'s* Quinceañera, 81 TUL. L. REV. 331, 359–66 (2006). The advantages of arbitration include speed, lower cost than litigation, and for those who cannot afford representation by an attorney, access to dispute resolution. *Id.* at 353–57. However, the DOL or court approval scheme, or explicit statutory requirements suggested by this Comment, also offer these advantages without the serious concerns associated with arbitration. For example, the DOL scheme may delay the enforcement of a waiver, but it allows the DOL to track compliance and is not costly (at least monetarily) to the employee.

240. 29 U.S.C. § 626(f) (2000). An individual may not waive an OWBPA right or claim unless: (1) the waiver is part of an agreement between the individual and the employer that is "written in a manner calculated to be understood by the individual, or by the average individual eligible to participate"; (2) the waiver specifically refers to rights or claims arising under ADEA; (3) the individual does not waive rights or claims that may arise after the date the waiver is executed; (4) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; (5) the individual is advised in writing to consult with an attorney prior to executing the agreement; (6) (a) the individual is given at least twenty-one days to consider the agreement, or (b) the individual is given at least forty-five days to consider it if the waiver is requested in connection with an exit incentive or other employment termination program offered to a group of employees; (7) the agreement is revocable for at least seven days following its execution, and is not effective or enforceable until the revocation period expires; (8) if the waiver is in connection with an exit incentive or other employment termination program offered to a group of employees, the employer informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to (a) any class or group of individuals covered by the program and any eligibility factors or time limits applicable to the program, and (b) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or unit who are not eligible or selected for the program.

FMLA waivers.[241] Requiring that the agreement specifically refer to FMLA rights would also minimize concerns that employees are waiving rights which they did not realize existed.[242] However, implementing requirements similar to those of OWBPA does not serve the public policy goals of increasing FMLA compliance and promoting the interests of families as much as a complete ban on waivers, or a DOL or court approval requirement.[243] The scheme allows for situations where employees never learn that a departing employee received compensation for FMLA violations. This limited knowledge may dissuade remaining employees from asserting their own rights to medical and family leave. Also, it is probably unlikely that most employees encouraged to seek legal advice before signing a waiver will do so, considering that employees who took leave likely face financial difficulties.[244]

It is important to note that making waivers illegal, FLSA-like supervision, or explicit waiver requirements do not preclude a settlement of claims after a complaint is filed or litigation is commenced. The differences between a waiver and these options are significant. When an employee signs a waiver abdicating the right to pursue any claims she may have against her employer, it is unlikely she has retained an attorney to advise her on the consequences or fairness of the agreement. On the other hand, in a litigation settlement context an employee will most likely be represented by an attorney who can guide the negotiations

241. Such requirements for FMLA waivers are similar to procedural requirements suggested for use in other types of agreements, as well. *See*, *e.g.*, Karen Servidea, Note, *Reviewing Premarital Agreements to Protect the State's Interest in Marriage*, 91 VA. L. REV. 535, 576 (2005). The author argues that concerns of bounded rationality in enforcement of postnuptial agreements could be lessened by procedural requirements of waiting periods, marital counseling, and independent legal advice. This would ensure that the parties rationally analyze the risks of the contract, while not unnecessarily infringing on the parties' freedom to contract.

242. *See supra* note 155 and accompanying text, discussing the DOL survey that showed a majority of employees have heard of the FMLA, but about half do not know whether the law applies to them.

243. It is interesting to note that Congress decided to apply the heightened waiver requirements only to older workers under ADEA, and not to female or minority workers protected under Title VII. Congress contended that older workers "may be manipulated or even coerced into signing away their ADEA protections," and in contexts of "voluntary" exit incentives they "have little or no reason to suspect that their employer is a potential adversary." H.R. REP. No. 101-664, at 24 (1990). However, the manipulation and coercion concerns are also present in the FMLA context, as is the presence of employees ignorant of their FMLA rights who do not realize that an employer is potentially liable to them. *See supra* note 155 and accompanying text, discussing the survey showing that half of employees do not know whether the FMLA applies to them. For more on the OWBPA requirements and the view that they are Congress's response to the shortcomings of the totality of the circumstances waiver test, see Senn, *supra* note 68.

244. *See supra* note 163 and accompanying text, discussing the financial hardship that often afflicts leave-takers.

and ensure that the decision is fully informed and in the best interest of the employee. Both the anti-waiver approach and supervision requirements ensure that an employer's greater bargaining power does not overwhelm the employee, and waiver requirements may lessen the effects of disparate bargaining power. Also, where a severance agreement waiver is likely signed on the employer's "turf," the employee agreeing to a settlement has the advantage of distance from her workplace, which may foster more rational and less emotional analysis. Finally, settlement agreements sometimes include provisions whereby the employer promises to takes steps to ameliorate the alleged violations of employee rights, which could enhance compliance with FMLA provisions.[245]

VI. CONCLUSION

A compelling need exists to uphold the integrity of the FMLA and protect the rights of employees when they are weakest and most vulnerable to employer overreaching, such as when facing trying family events stemming from medical crises. Uninformed or emotional employees are at risk of exploitation from the unscrupulous employers which are inevitable in the workplace. It is unlikely that a severance agreement waiving FMLA rights will constitute a fair bargain benefiting the nation's families where employees are likely tending to essential needs at home, are not fully aware of their FMLA rights, and have a noted lack of bargaining power. Even more importantly, individual private FMLA waivers diminish the rights that other employees perceive the Act to afford. The more that coworkers witness uncompensated or unsanctioned violations of FMLA rights, the more likely the employees are to yield rather than assert the rights to which they are entitled. Thus, waivers give obvious incentives for employers to violate the Act. Fostering employee acquiescence to these violations hardly encourages utilization of leave options so that employee-family members may participate in early childrearing or care for seriously ill family members. Endorsing waivers actually discourages use of leave options, which in

245. *See supra* note 226, discussing Silverstein, *supra* note 61, at 486. A severance agreement will contain no ameliorative provision as they are largely form contracts provided by the employer on a take-it-or-leave-it basis. *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563–64 (2005) (noting that rarely negotiated policies also include health insurance, life insurance, pension plans, noncompetition agreements, vacation pay, and mandatory arbitration).

turn hinders efforts to minimize the potential for employment discrimination[246] and simply does not promote the stability of families.[247]

The anti-waiver approach of illegalizing FMLA waivers advances many public policy aims and is an appropriate interpretation of section 825.220(d). A viable alternative, rather than the anti-waiver approach, is to require a court or the DOL to supervise a proposed severance agreement waiver for fairness. This scheme does not impossibly stretch any administrative framework; 29 U.S.C. § 2617(b) explicitly states that FMLA complaints of violations should be resolved "in the same manner" as FLSA complaints are resolved,[248] and the DOL has supervised waivers in the past.[249] The least that can be done to better protect employees and the effectiveness of the Act itself is to implement strict waiver requirements, perhaps similar to those in OWBPA, to safeguard employees' well-being.[250] Changing nothing and treating FMLA waivers as ordinary private contracts is not a well-reasoned path, as in the end waivers serve to reestablish the choice for employees between "the job they need and the family they love."[251]

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246. 29 U.S.C. § 2601(b) (2000) (including among FMLA purposes the goal to "to minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis . . . .").

247. The statute provides:

> Congress finds that . . . it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions . . . . It is the purpose of this Act to . . . balance the demands of the workplace with the needs of families, . . . to promote national interests in preserving family integrity . . . [and] to entitle employees to take reasonable leave . . . for the care of a child, spouse, or parent who has a serious health condition.

Id. § 2601(a)–(b).

248. *Id.* § 2617(b); *see supra* note 228 and accompanying text.

249. *See supra* note 216 and accompanying text.

250. *See supra* note 240 and accompanying text.

251. Clinton Signing Statement, *supra* note 25.