

Employment Law

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The Supreme Court Strikes Down a Family Medical Leave Act Regulation that Penalizes Employers

INTRODUCTION

Under the Family Medical Leave Act of 1993 (FMLA), covered employers (generally, those with 50 or more employees) must provide qualified employees (generally, those with a minimum of one year of service that includes 1,250 hours of work in the past 12 months) with 12 weeks of unpaid leave annually due, among other things, to the need for treatment and recovery from the employee's serious health condition. During this time, the employer must maintain the employee's group health coverage (subject to the employee continuing his or her pre-leave premium contribution) and, upon the employee's timely return, must provide reinstatement to the employee's former position or an equivalent position.

The United States Department of Labor (DOL) has issued regulations stating that a covered employer must designate in advance whether a requested leave qualifies under the FMLA. If the employer determines that the reason for the leave does qualify as FMLA leave, the employer must "promptly" notify the employee of that decision. DOL regulation 29 C.F.R. §825.700(a) provides that "[i]f an employee takes paid or unpaid leave and the employer

does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." Since, under this regulation, only leave actually designated by the employer as FMLA leave counts towards the 12 weeks provided under the Act, employees are awarded more than the 12 weeks provided under the Act where the employer fails to make a designation.

Since the passage of the FMLA in 1993, prudent employers have instituted procedures to promptly designate requested leave as FMLA-qualifying leave out of concern that an employee might be able to take more than 12 weeks of FMLA entitlement if the employer did not act promptly. While employers should still adhere to the designation and notification regulations, and should do so in a timely fashion, the United States Supreme Court recently invalidated that portion of the regulation that automatically penalizes late notification by the employer by providing additional FMLA leave to the employee. *Ragsdale v. Wolverine World Wide, Inc.*, – S.Ct. – , 2002 WL 416011 (2002).

FACTUAL BACKGROUND

Tracy Ragsdale, an employee of Wolverine World Wide, Inc., was diagnosed with

Hodgkin's disease in 1996. Under Wolverine's leave policy, which provided more favorable leave than that required under the FMLA, Ragsdale applied for and was granted seven months of unpaid sick leave. Although Ragsdale's requested leave qualified under the FMLA, Wolverine failed to designate her leave as such. Nevertheless, Wolverine otherwise complied with the law by holding Ragsdale's position open and by continuing to maintain her group health insurance coverage. At the end of Ragsdale's seven month leave, she requested a 30-day extension. Wolverine denied the request and terminated her employment when Ragsdale failed to return to work.

Ragsdale sued Wolverine claiming that she was entitled to the 30-day extension as part of her 12 weeks of leave under the FMLA because Wolverine never designated the first seven months of leave as FMLA-qualifying. Ragsdale's position was squarely supported by the DOL regulation. According to Ragsdale, since Wolverine failed to designate her initial leave as FMLA leave, the first seven months of leave did not count against her 12-week entitlement, and Wolverine's denial of her subsequent request for a 30-day extension constituted a denial of her rights under the FMLA.

THE SUPREME COURT'S DECISION

By a 5-4 vote on March 19, 2002, the United States Supreme Court held that the DOL regulation was invalid to the extent that it automatically imposed a penalty upon employers who fail to timely designate leave as FMLA-qualifying. According to the Court, Congress created remedies under the FMLA that provide relief only on an individualized basis where the employee can show that he or she was harmed "by reason of a violation," or where he or she

can show entitlement to "appropriate" equitable relief. By contrast, the DOL regulation "punishes an employer's failure to provide timely notice of FMLA designation by denying it any credit for leave granted before the notice" and is, therefore, "unconnected to any prejudice the employee might have suffered from the employer's lapse." Focusing on the automatic operation of the penalty, the Court made the following observation:

If the employee takes an undesignated absence of 12 weeks or more, the regulation always gives him or her the right to 12 more weeks of leave that year. The fact that the employee would have acted in the same manner if notice had been given is, in the [DOL's] view, irrelevant. Indeed, ... the employer would be required to grant the added 12 weeks even if the employee had full knowledge of the FMLA and expected the absence to count against the 12-week entitlement.

Significantly, however, the Court did not decide "whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the [FMLA]." Rather, the *Ragsdale* decision is limited to an invalidation of the categorical penalty contained in the DOL regulation that would otherwise automatically entitle a qualified employee to more than 12 weeks of FMLA leave whenever an employer failed to timely designate leave as FMLA-qualifying.

PRACTICAL IMPLICATIONS OF RAGSDALE

Employers should still abide by the designation and notice regulations.

While there is no doubt that *Ragsdale* benefits employers, it is important to keep the scope of

the decision in perspective. The Court did not invalidate the regulatory duty to designate leave as FMLA-qualifying and to notify employees of the designation. In fact, the Court seemed to agree with the DOL that, under certain circumstances, an employer's failure to communicate its designation decision to the employee might constitute interference with the exercise of FMLA rights and could, therefore, be a violation of the FMLA. This is most likely to occur where the employer's failure to designate and notify frustrates the employee's ability to plan and coordinate available leave.

Instead, the decision merely strikes down as unreasonable the regulatory presumption that every violation of an employer's duty to designate and promptly notify will entitle qualified employees to more than the 12 weeks of leave provided by the FMLA. However, the Court did not hold that an expansion of the 12 weeks of FMLA leave could never be an appropriate remedy. For example, an employee whose serious health condition requires him or her to "undergo cancer treatments every other week over the course of 12 weeks might want to work during the off weeks, earning a paycheck and saving six weeks for later." Where the employer fails to make appropriate notification to the employee - including the availability of intermittent leave - and the employee, therefore, exhausts his or her entire 12 weeks of leave, an appropriate remedy might very well be to require the employer to provide the employee with an additional six weeks of FMLA leave. Indeed, the Court even suggested that, in rare circumstances, "12 more weeks might be an appropriate make-whole remedy for an employee who would not have taken any leave at all if the notice had been given." Consequently, employers should continue the practice of promptly determining

whether requested leave qualifies as FMLA leave and communicating that decision to their employees.

For larger employers, timely designating and notifying an employee whether requested leave is FMLA-qualifying is administratively difficult in that it is often days before the employee's request and resultant leave is communicated to the person responsible for complying with the FMLA. Before *Ragsdale*, this delay always resulted in an automatic extension of leave under the FMLA, in that exhaustion of this leave would not begin until the employer learned of the request and made a designation or a preliminary designation. Unfortunately, however, *Ragsdale* provides little guidance for this scenario because the Court did not specifically address whether an employer may retroactively designate leave as FMLA-qualifying.

What if the employee's request is insufficient to make an initial designation?

Perhaps the most difficult aspect of complying with the designation and notification regulations is making the initial determination of whether the requested leave is FMLA-qualifying. If an employee's request for leave does not provide sufficient information to allow the employer to make a good faith and informed determination, or if requested medical certification is inadequate or has yet to be received, DOL regulations allow the employer to make a preliminary designation that the leave qualifies as FMLA leave and so notify the employee. If the leave turns out to be FMLA-qualifying, the preliminary designation becomes final. If, on the other hand, it is later determined that the leave is not FMLA-qualifying, the employer should notify the employee that the preliminary designation is withdrawn.

CONCLUSION

Despite a modicum of fanfare, the Supreme Court's decision in *Ragsdale* is of limited value to employers. While it does invalidate the automatic penalty for failing to timely comply with the regulatory obligation to designate and notify an employee whether requested leave is or is not FMLA-qualifying, the decision does not absolve employers from making good faith efforts to comply with the obligation in the first instance. And, while the decision makes it

fairly clear that in only the rarest of circumstances will an employee be truly injured by reason of an employer's failure to designate and notify, the Court left ample room for argument that, in some situations, an extension of the 12 weeks of FMLA leave provided by the FMLA may be an appropriate remedy.

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