

## ARTICLES

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#### **IF IT AIN'T BROKE . . . CHANGES TO FMLA REGULATIONS ARE NOT NEEDED; EMPLOYEE COMPLIANCE AND EMPLOYER ENFORCEMENT OF CURRENT REGULATIONS ARE**

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The Family and Medical Leave Act of 1993 (“FMLA” or “the Act”) was enacted to provide protections to employees who require leaves of absence from their employment for an employee’s own medical condition and other identified family circumstances.<sup>1</sup> In adopting the FMLA, Congress found, *inter alia*, that “there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods.”<sup>2</sup>

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1. This article addresses only provisions of the federal FMLA. Readers are reminded that the vast majority of states have adopted legislation relative to FMLA-like leave and/or leave related only to pregnancy, childbirth, and adoption. Additionally, readers are reminded that employers must consider the myriad of other leave laws potentially available to employees and their possible interplay with the FMLA (e.g., the Americans with Disabilities Act; state workers’ compensation laws; the Pregnancy Discrimination Act and related state laws).

2. *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253, 1260 (N.D. Cal.

A recent survey reports that the direct cost impact to employers of FMLA leave in 2004 was \$21 billion.<sup>3</sup> Sometimes, in gentler terms, it has been suggested that some aspects of the FMLA (*e.g.*, family leave) have presented “relatively few problems” to employers, while other aspects (*e.g.*, medical leave) have presented “numerous challenges.”<sup>4</sup> Yet, on other occasions, such as in connection with other laws dealing with employee leaves of absence like the Americans with Disabilities Act (“ADA”), more vociferous criticism as to the flawed nature of the FMLA from the employer’s perspective has described absence management as being “virtually unworkable for employers.”<sup>5</sup>

Promulgated by the U. S. Department of Labor (“DOL”) in 1995, the FMLA regulations expand upon the statute and provide instructive guidance to both employers and their employees in the management and taking of such leaves of absence. Because Congress authorized the DOL to promulgate regulations implementing the FMLA, the DOL’s reasonable interpretations of the Act are therefore entitled to deference by the courts.<sup>6</sup> In contemplation of new FMLA regulations, some critics suggest that labor groups are accusing employers of trying to limit workers’ ability to take time off while employers deny such accusations, responding that they simply wish to reduce excessive absences and address employee FMLA leave abuses.<sup>7</sup>

In large part, the impetus for changes to FMLA regulations appears to be generated by a 2002 U.S. Supreme Court decision that invalidated a notice provision of a FMLA regulation.<sup>8</sup> While the authors do not begin to suggest that it is an easy task for employers to effectively administer and manage FMLA leaves of absence, they do contend that the vast majority of current FMLA administrative

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1998) (citing 29 U.S.C. § 2601(a)(4)).

3. See Employment Policy Foundation (“EPF”), *Analysis of EPF FMLA Survey*, April 19, 2005 (stating that three factors were considered in its analysis: lost productivity (\$4.8 billion); continuation of benefits (\$5.9 billion); and net labor replacement cost (\$10.3 billion)).

4. Margaret Clark, *Sides Gear for Battle over Expected FMLA Regulations*, HR NEWS (April 18, 2005) available at <http://www.shrm.org>.

5. Francis P. Alvarez, *‘Peripheral Vision’ Needed to Navigate Requirements on Employee Leaves*, N.Y. LAW JOURNAL, February 23, 2004, at 9.

6. *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1123 (9th Cir. 2001).

7. Tammy Joyner, *Debate over Family Leave: Feds Weigh Changes Sought by Employers*, ATLANTA JOURNAL AND CONSTITUTION, April 21, 2005, at E1.

8. See *e.g.*, Caitlyn M. Campbell, *Overstepping One’s Bounds: The Department of Labor and the Family and Medical Leave Act*, 84 B.U. L. REV. 1077 (2004).

regulations provide acceptable protections for both employers and employees, and that problems associated with the management and taking of FMLA leaves lie not with the DOL regulations, but relate rather to employee abuses and employers' corresponding ignorance of and/or unwillingness to apply the regulations, consistent with their own internal policies and procedures. Just as employee handbooks cannot foretell every issue that an employer will face in connection with its employees and then outline the corresponding methods by which each issue should be managed, it is unrealistic to expect that FMLA administrative regulations are the absolute panacea to the difficulties presented with management of employee leaves of absence. Therefore, the authors maintain that the answer is not to adopt new regulations, but rather is for employers to proactively manage all leaves of absence, including those covered by the FMLA, and to aggressively address employee abuses by mandating understanding and compliance of the Act by their managers, supervisors, human resources professionals, and all other employees, including those who apply for and take FMLA leaves.

#### INTRODUCTION

As noted, proposed changes to the FMLA regulations appear to be spurred, at least in part, by *Ragsdale v. Wolverine Worldwide, Inc.*,<sup>9</sup> the 2002 decision of the U. S. Supreme Court that invalidated the administrative regulation<sup>10</sup> requiring employer notice to an employee requesting FMLA leave.<sup>11</sup> As recently as 2003, the validity of eleven FMLA regulations had been challenged in 64 cases, partially as a result of *Ragsdale*.<sup>12</sup>

In *Ragsdale*, Tracy Ragsdale's employer granted her 30 weeks of

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9. *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002).

10. 29 C.F.R. § 825.208(c) (2005) states:

If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee . . . ), the employer may not designate leave as FMLA leave retroactively. . . . In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

11. See e.g., Margaret M. Clark, *Labor Department Still Promising New FMLA Regulations*, HR NEWS (May 17, 2005), available at <http://www.shrm.org>.

12. *More Changes Coming? Possible Updates to FMLA Regulations*, NEW HAMPSHIRE EMPLOYMENT LAW LETTER (September 2003).

unpaid sick leave when cancer kept her from work, even though the FMLA only guaranteed her twelve weeks of unpaid leave annually.<sup>13</sup> After the employer terminated her when she failed to return to work due to the persistence of her cancer, Ms. Ragsdale argued that none of her leave ever counted against her FMLA entitlement since her employer never notified her that such leave would count against her FMLA leave (*i.e.*, she was entitled to an additional twelve weeks of FMLA leave).<sup>14</sup> The Court held that Ms. Ragsdale was not entitled to additional FMLA leave because the notice requirement “effected an impermissible alteration of the statutory framework and (was not) within the Secretary of Labor’s power to issue regulations ‘necessary to carry out’ the (FMLA).”<sup>15</sup> The Court expressly noted that it was not deciding whether the notice and designation requirements themselves were valid, rather simply that the bounds of the Secretary’s discretion were exceeded.<sup>16</sup>

#### OVERVIEW OF THE FMLA

The FMLA allows eligible employees of a covered employer to take job-protected, unpaid leave (or to substitute available and appropriate paid leave if the employee has earned or accrued it)<sup>17</sup> for up to a total of twelve workweeks in any twelve month period due to:

- the birth of a child and to care for the newborn child;
- the placement of a child with the employee for adoption or foster care;
- the need for the employee to care for an immediate family member (*i.e.*, child, spouse, or parent) with a serious health condition; or
- the employee’s own serious health condition makes the employee unable to perform the functions of his or her job.<sup>18</sup>

FMLA leave may be taken on a continuous basis or an intermittent basis (*i.e.*, FMLA leave may be taken in separate blocks

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13. *Ragsdale*, 535 U.S. at 85.

14. *Id.*

15. *Ragsdale*, 535 U.S. at 96.

16. *Id.*

17. An employer may require that employees exhaust available paid leave concurrent with FMLA leave with any balance of FMLA leave taken on an unpaid basis. 29 C.F.R. § 825.208 (2005).

18. 29 U.S.C. § 2612(a)(1) (2005); 29 C.F.R. § 825.100 (2005).