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Supreme Court Strikes FMLA Regulation Requiring Additional Leave For An Employer's Failure To Send Individualized FMLA Designation Notice To Absent Employees

In *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155 (2002), the United States Supreme Court issued its first opinion interpreting the Family and Medical Leave Act of 1993 ("FMLA" or the "Act"). In a closely divided 5-4 decision, the Court struck down a U.S. Department of Labor ("DOL") regulation providing "[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." 29 C.F.R. § 825.700(a) (2001).

The question before the Court was whether an employee was entitled to another twelve weeks of specifically designated FMLA leave where the employer had already provided the employee with seven months of leave but had failed to notify the employee that her absence was being counted against her FMLA leave entitlement, a notice obligation imposed on employers in another DOL regulation (29 C.F.R. § 825.301(b), (c) (2001)). Specifically, the Court ruled that the "categorical penalty" imposed by DOL's regulation, 29 C.F.R. § 825.700(a), was "contrary to the Act's remedial design" because it created an "irrebuttable presumption" that the employee's rights to FMLA leave were restrained absent any showing that the employee suffered any prejudice by the employer's failure to notify her that the absence was FMLA leave. *Ragsdale*, 122 S. Ct. at 1161-62. The Court refused to address, however, whether DOL's individualized notice regulation was lawful.

Background

The FMLA provides employees with twelve weeks of unpaid leave in a one-year period following "a disabling health problem," a family member's serious illness, or the arrival of a new son or daughter. *Ragsdale*, 122 S. Ct. at 1160. If the employee is eligible, leave must be granted, even on an intermittent or part-time basis and, upon the employee's timely return, the employer must reinstate the employee to his or her former position or an equivalent one. The FMLA also grants the Secretary of Labor authority to prescribe necsary regulations to enforce the Act, two of which were at issue in the case before the Supreme Court.

Tracy Ragsdale ("Ragsdale") began her employment with Wolverine World Wide, Inc. ("Wolverine" or the "Company") in 1995. One year later, she was diagnosed with Hodgkin's disease and was unable to work. Under Wolverine's leave plan, she was entitled to seven months of unpaid sick leave, which she was provided. However, Wolverine never notified Ragsdale that it was designating twelve weeks of her absence as FMLA leave. After her seventh month on leave, Ragsdale requested additional leave, which Wolverine denied, notifying her that she had exhausted her leave entitlement. When Ragsdale did not return to work, Wolverine terminated her employment.

The FMLA Notice Designation Dilemma

Thereafter, Ragsdale filed suit arguing that the DOL regulation, 29 C.F.R. § 825.700(a), provided her with another twelve weeks of designated FMLA leave because Wolverine had failed to notify her that her absence would be designated FMLA leave pursuant to 29 C.F.R. §§ 825.208(a), 825.301(c). Wolverine conceded its notice failure but argued, instead, that it had complied with the rationale underlying the FMLA by granting her thirty weeks of leave, more than twice the statutory requirement. Hence, the Company argued it should not be penalized for its failure to communicate the FMLA designation to the employee who was afforded a leave benefit far in excess of the twelve week statutory requirement.

Under the Act, an employer is required to post a notice in the workplace informing employees about their FMLA rights. Although the Act itself is silent, the DOL prescribed another notice in a regulation requiring that employers provide employees with individualized written notice designating an absence as FMLA leave. According to the regulations, notice of the designation must contain detailed information concerning the employee's rights and responsibilities under the Act, and must be given "within a reasonable time after notice of the need for leave is given by the employee — within one or two business days if feasible." 29 C.F.R. § 825.301(c).

The statutory penalty for noncompliance with the FMLA's notice posting provision is "a civil monetary penalty not to exceed $100 for each separate offense." 29 U.S.C. § 2619 (b) (2002). In contrast, the DOL regulation at issue in *Ragsdale* denied the employer FMLA credit if it failed to provide the employee with the indi-

vidualized notice, the effect of which was to grant eligible employees up to another twelve weeks of FMLA designated leave. Whether the penalty set forth in DOL's regulation was "contrary to the statute" or otherwise "arbitrary" was the ultimate legal question confronting the Court. *Ragsdale*, 122 S. Ct. at 1160.

The U.S. District Court of Arkansas granted summary judgment for Wolverine, finding the regulation invalid because it compelled employers to grant employees with up to another twelve weeks of FMLA leave when the Act only required twelve weeks of leave. The U.S. Court of Appeals for the Eighth Circuit affirmed.

The Supreme Court's Decision

A closely divided Supreme Court invalidated the penalty provision contained in DOL's regulations, reasoning, it was "contrary" to the FMLA and "beyond the Secretary of Labor's authority." *Ragsdale*, 122 S. Ct. at 1159. Thus, the Court explained, the penalty provision provided an "irrebuttable presumption" that the employee's exercise of FMLA rights was impaired. Yet, as illustrated by Ragsdale's circumstances, there was no "empirical or logical basis for this presumption" because Ragsdale had suffered no harm due to the employer's lack of notice as she was not able to establish that she would have taken less leave or intermittent leave even if she had received the required notice. *Id.* at 1162. In so ruling, however, the Court found it unnecessary to determine whether the individualized notice regulation was "[in accord] with the text and structure of the FMLA," because "the categorical penalty the Secretary impose[d] for its breach [was] contrary to the Act's remedial design," even assuming the designation requirement was valid. *Id.* at 1161.

Underlying the majority's decision was its view that the penalty provision fundamentally altered FMLA's design by relieving employees of their burden to establish that the employer restrained or otherwise violated their statutory rights causing them consequential harm and damages. In particular, Justice Kennedy noted, writing for the majority, that "§ 2617 [29 U.S.C. § 2617] provides no relief unless the employee has been prejudiced by the violation." *Id.* Next, the Court found fault with the regulation because it "amends the FMLA's most fundamental substantive guarantee" subverting carefully drawn Congressional compromises "for it gives certain employees a right to more than 12 weeks of FMLA-compliant leave in a given 1-year period." *Id.* at 1163-64. Finally, the Court agreed, the regulation's penalty for the employer's lack of individualized notice was inconsistent with Congressional intent evident in the statute because it exacted a far heavier sanction than the $100 fine set forth in the Act for an employer's failure to post the statutorily mandated FMLA notice.

Implications For Employers

The implications of the Court's ruling are significant for employers. *First*, notwithstanding the Court's decision invalidating DOL's penalty provision, employers should still develop and implement policies in compliance with DOL's notice and designation regulations because the Supreme Court declared in *Ragsdale* that cases involving alleged FMLA violations will be subject to an individualized assessment to determine whether the employer's failure to designate prejudiced the employee. *Second*, the *Ragsdale* decision was narrowly tailored to its facts and, indeed, the Court specifically deferred to another day its consideration of DOL's notice regulations that impose a multitude of obligations on employers. Thus, employers are well advised to act in accordance with those regulations as the Court might uphold them in another case. *Third*, the Court suggested that an employer might be denied credit for undesignated leave afforded to an absent employee if the aggrieved employee can demonstrate that, as a result of the employer's lack of notice, s/he suffered some resulting prejudice or harm. Indeed, that was the message communicated to the DOL if it wants to reissue a penalty provision to replace the one invalidated. In light of the above, employers should assess their compliance with FMLA obligations in weighing disciplinary penalties for extended employee absences and, particularly, when termination is considered where the employee's absence extends beyond the employer's leave policy or the statutorily guaranteed twelve weeks.

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Client Alert

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