

LEGAL ALERT

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UNITED STATES SUPREME COURT STRIKES DOWN FMLA REGULATION

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Most employers with 50 or more employees know the Family Medical Leave Act (FMLA) requires they grant employees up to 12 weeks of leave per year for certain events, including the employee's serious health condition, a family member's serious health condition or the arrival of a new son or daughter. Many employers do not know, however, that Department of Labor regulations state that if the employer fails to designate the employee's leave as FMLA leave, then the leave does not count against an employee's FMLA entitlement, conceivably allowing the employee to take an additional 12 weeks leave within the 12 month period. 29 CFR §825.700(a). The Sixth Circuit Court of Appeals (which has jurisdiction over Michigan) upheld this regulation as recently as May of 2000, reasoning that the regulation was not inconsistent with legislative intent merely by creating the possibility that employees could end up receiving more than 12 weeks of leave in one 12 month period. However, on March 19, 2002, in a decision which is sure to cause a collective sigh of relief from employers across the country, the United States Supreme Court ruled that, as drafted, this FMLA regulation is contrary to the language of the statute and beyond the Secretary of Labor's authority.

In Ragsdale v Wolverine World Wide, Inc., plaintiff Tracy Ragsdale was unable to work for several months while undergoing surgery and radiation therapy for cancer. During this time she took advantage of Wolverine's leave plan, which provided for seven months of unpaid sick leave. Wolverine held open Ms. Ragsdale's position and paid her health

benefit premiums while she was on leave. However, Wolverine did not notify Ms. Ragsdale that 12 weeks of the 7-month leave would count as her FMLA leave.

When Ms. Ragsdale exhausted her seven months of leave, she requested either more leave time or a part-time schedule because her doctor had not yet cleared her to return to work full-time. Wolverine refused this request and terminated Ms. Ragsdale when she did not return to work.

Ms. Ragsdale filed suit claiming the company violated the Family Medical Leave Act, even though the company had granted her more than 12 weeks of leave in a 12 month period. Her claim relied on Regulation 825.700(a), which provides in part: "If 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."

The employer argued that this regulation should be struck down because it is contrary to the statute. The U.S. Supreme Court agreed. It reasoned that the "FMLA's central provision guarantees eligible employees 12 weeks of leave in a one-year period following certain events." With regard to employers like Wolverine that offer leave benefits more generous than the FMLA, the Court stated, "As long as these policies meet the Act's minimum requirements, leave taken [under more generous policies] may be counted toward the 12 weeks guaranteed by the FMLA," regardless of whether notice is given to the employee.

The Court declined to address the perhaps more fundamental question of whether the Department of Labor had the authority to issue regulations requiring employers to tell individual employees about their rights under the FMLA. Instead, the Court found that the penalty set forth in the Regulations for not telling the employees about their rights (essentially giving the employees an additional 12 weeks of leave in a 12 month period) clashed with the rights provided by the FMLA and exceeded the Department of Labor's authority. The Court also reasoned that this penalty was incompatible with the FMLA's remedial mechanism, which requires an employee to prove harm from the violation, and pointed out that Ms. Ragsdale admitted she would not have taken less leave or intermittent leave if she had received the required notice.

Unfortunately for employers, this reasoning opens a loophole. If the employee can show that the lack of notice caused harm, then that employee may still be entitled to relief. For example, an employee could claim that he or she would have taken leave on an intermittent basis to "stretch" FMLA leave had proper notice been given.

So what does this mean for employers? Unless the regulation in question is modified, employers should still inform employees about their rights under the FMLA and tell employees when their leave is being counted against their FMLA entitlement. However,

employers don't need to be as concerned about the harsh penalty for non-compliance with the notice requirements, because the Supreme Court ruled that under most circumstances, the penalty provided in the regulation is contrary to the statutory scheme.

Ragsdale also suggests that the Court may be receptive to challenges to other FMLA regulations that employers believe exceed rights Congress originally conferred upon employees. For instance, Regulation 825.110(d) waives FMLA eligibility requirements if an employer fails to inform employees regarding FMLA eligibility before the leave starts. This regulation has already been criticized by many lower courts, and if brought to the Supreme Court, could suffer the same fate as the regulation in *Ragsdale*. Even after *Ragsdale*, one thing remains certain: the FMLA continues to be a statute that can be difficult to understand and challenging to administer, even by the most well-informed employer.

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