Supreme Court Rejects Penalty in the First Case Reviewed Under the Federal FMLA

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On Tuesday, March 19, 2002, a sharply divided United States Supreme Court issued a favorable decision for employers in the first case the Court has reviewed under the federal Family and Medical Leave Act. *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U. S. ____ (2002).

The 5-4 decision invalidates a Department of Labor regulation that penalized employers by requiring them to provide an additional 12 weeks of leave to employees who had not received the required employer notice that the leave would be counted as part of the annual FMLA allotment. As was the case here, many employers provide more generous benefits to employees than required by the FMLA but have failed to comply with the technical notice provisions of the Act. These employers now have reason to believe their good faith efforts to comply with the law will be upheld.

The FMLA decision is the latest in a string of victories for employers in cases involving laws protecting injured or ill workers. In this decision, the Supreme Court brings into alignment the FMLA piece of the interplay among the disability management laws that require employers to assess employee requests for leave and other accommodations for covered illnesses, injuries, and “disabilities” on an individualized case-by-case basis.

“With this decision, the FMLA may become even more challenging to administer on a day-to-day basis,” said Frank Alvarez, Jackson Lewis partner and coordinator of the firm’s Disability Management Practice Group. “The FMLA is now more akin to the Americans with Disabilities Act, which sets out general principles that employers are left to apply to individual cases. While that might be better than an ‘all or nothing rule’ that always worked against employers who fail to give the proper notice, it creates a need for more analysis and more case by case assessment.”

Seven-Month Leave Not Enough
The plaintiff, Tracy Ragsdale, began working for Wolverine Worldwide, Inc. as a shoe factory worker in 1995. A year later, she was diagnosed with Hodgkin’s disease and underwent surgery and months of radiation therapy. Wolverine’s leave policy, which was more generous than the FMLA, allowed exempt employees with at least six months of service to take leave for up to seven months. Ragsdale began leave in February 1996 and remained on unpaid leave for seven months. While Wolverine held her position open throughout the leave, maintained her health benefits and paid her health insurance premiums for six months, it did not notify her that 12 weeks of the absence would count as FMLA leave.

In September 1996, at the end of seven months, Ragsdale still was not able to return to work full time. She requested additional leave or to return to work on a part-time basis, but Wolverine refused her request and terminated her employment.

Claims of FMLA, ADA, and State Law Violations
In late 1997, Ragsdale filed her initial lawsuit against Wolverine alleging claims under the FMLA, the Americans with Disabilities Act, and Arkansas state law. She alleged that because Wolverine never formally designated any of the seven months of her leave as FMLA covered, she was entitled to an additional 12 weeks of leave. Nearly a year later, the district court ruled that the DOL’s regulations — that unless the employer prospectively designates leave as FMLA leave, the 12-week FMLA leave entitlement does not begin to run — are based on an erroneous interpretation of the law and cannot be enforced.
The district court also dismissed the ADA and state claims, saying that Ragsdale was not qualified to perform the essential functions of her job at the time Wolverine terminated her employment. She appealed the rulings to the Eighth Circuit Court of Appeals in St. Louis.

Agreeing with the lower court, the appeals court affirmed the dismissal of Ms. Ragsdale’s claims. In invalidating the regulations, the court held the DOL had created rights not clearly provided by the FMLA. The court found the regulations penalize unwary employers by requiring them to give more leave to an employee than the FMLA requires.

Supreme Court: No Entitlement to 12 More Weeks
In rejecting the FMLA claim, the five justice majority of the Court reasoned that, in this case, the regulation requiring the company to provide Ragsdale with 12 more weeks of leave is contrary to the Act and beyond the Secretary of Labor’s authority. Ragsdale was entitled to no more leave.

The Court’s reasoning focused on the “regulatory scheme” of the FMLA, concluding that “the categorical penalty is incompatible with the FMLA’s comprehensive remedial mechanism.” Specifically, the DOL regulation punishes an employer’s failure to provide timely notice of FMLA designation by denying the employer any credit for leave granted before the notice. The regulation would administer this punishment whether or not the employee would have acted differently if given the required notice, the Court notes: “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 leave entitlement.” According to the Court, this is inconsistent with the FMLA’s statutory requirement that an employee prove: 1) the employer interfered with, restrained or denied FMLA rights; and 2) the employee was prejudiced by the employer’s action.

The Court acknowledged there are situations where failure to provide notice might interfere with FMLA rights. For example, an employee who undergoes cancer treatments every other week over the course of 12 weeks may have worked during the off weeks if the employee was aware of the availability of intermittent leave under the FMLA. However, instead of tailoring the remedy to the actual harm suffered by an employee, the regulations impose an “irrebuttable presumption” that an employee’s right is restrained when the employer fails to provide timely notice of FMLA designation. The Court found “there is no empirical or logical basis for this presumption” in many cases, including this one.

Even if Wolverine had complied with the notice requirements, the Court noted the record showed that Ragsdale still would have taken the entire 30-week absence. Accordingly, the DOL regulation fundamentally alters the intent of Congress in enacting the FMLA by giving Ragsdale a basis to bring an action against her employer even though she was unable to show any prejudice or restraint of her FMLA rights. “This regulatory sleight of hand” would mean that Ragsdale and others could recover back pay without suffering any loss of compensation by reason of the Company's failure to designate her absence as FMLA.

The DOL regulation as written disregards the FMLA’s fundamental guarantee of up to 12 weeks of leave by providing for additional leave beyond what may have been given without the FMLA notice. It also ignores the intent of Congress that courts examine allegations of FMLA violations on a case by case basis, said the Court. “To determine whether damages and equitable relief are appropriate under the FMLA, the judge or jury must ask what steps the employee would have taken had circumstances been different - considering for example, when the employee would have returned to work after taking leave.” The DOL may not disregard that intent for the administrative convenience of enforcing a “categorical rule.”

The penalty imposed by the regulation is “disproportionate and inconsistent” with the statute’s notice requirement, the Court continued. While the FMLA requires an employer post a general notice informing employees of their FMLA rights, with civil penalties of up to $100 for each violation, the sanction imposed by the regulation for failing to provide the individualized notice, even in the absence of harm to the employee, is inappropriate.

The Court also noted the regulation is inconsistent with the FMLA’s admonition that nothing in the Act should discourage employers from adopting more generous leave policies, as for example, leave for non-FMLA reasons or to employees not yet eligible for FMLA. It remains to be seen whether this reasoning will provide a safe harbor for employers who provide more generous leave policies than the FMLA requires.

Dissenting Justices Say Individual Notice Justified
Four of the nine Supreme Court Justices dissented from the majority on a number of points, saying the DOL was justified in requiring individualized notice to an employee before an employer may count the leave against the employee’s 12-week FMLA entitlement. The individualized notice may be the first opportunity an employee learns that the leave is protected by FMLA, says the dissent, and without the regulation, employers would have no incentive to provide such a notice. Additionally, requiring an
employee to prove that failure to receive the notice caused harm is not practical because it is difficult to assess, after the fact, what different options the employee may have had or taken if notice had been received. Expressing concern about the implications of the majority’s opinion, the dissent said courts might construe the FMLA “as removing from the [DOL] Secretary the power to craft any regulation that might have even a small discouraging effect, no matter how otherwise important.” Taken together, the arguments of the dissenting justices further underscore the significance of this opinion—that agency regulations are not sacred and are subject to challenge on numerous grounds.

Lingering Questions About the Obligation to Provide Notice That Leave Counts Toward FMLA Entitlement

Is individualized notice required under the Act?

The Court left open for another day whether requiring individualized notice exceeds the DOL’s regulatory authority. It is also unclear how the Court may address the individualized notice requirement in other circumstances. In this case, the penalty for a lack of individualized notice - 12 additional weeks of leave beyond the 30 weeks given under the employer’s generous leave policy - was disproportionate to the violation. Employers should still provide the form of notice required by the Act stating the requested leave is being counted as FMLA leave and describing whether it runs concurrently with any other leave entitlement.

What remedies may the Department of Labor impose when an employer fails to give notice that a leave will be counted toward the employee’s FMLA entitlement?

Striking down the DOL’s current remedial provisions, the ruling suggests that the remedy must be determined on a case by case basis and the employee must be able to show some harm resulting from the employer’s failure. However, the case by case determination of remedy may also be problematic since it leaves employers unaware of what, if any, penalties the courts, including the Supreme Court, would approve in future cases.

What evidence may tend to prove or disprove an impairment of an employee’s FMLA rights as a result of the failure to give notice?

The Court did not provide examples of how the lack of notice might adversely affect an employee or impair his or her FMLA rights. However, we suspect the following considerations may be relevant in determining whether an employee would have acted differently if specifically advised of FMLA rights:

- was the employee totally disabled during the leave period?
- was the medical condition of such a nature that it would have permitted work on an intermittent basis?
- did the employee ever raise the possibility of taking leave on an intermittent basis (either before taking the leave or after being advised of their rights under the Act at the time of the leave)?
- did the employee receive notice of his/her right to take intermittent leave through company postings or handbook policies?
- was there any other course of treatment or option available that would have permitted the employee either to return to work sooner or delay the leave until some future date?
- does the employer provide more generous leave than the FMLA?

The facts in the case decided by the Supreme Court deal with one continuous leave, however, the issue of prejudice or impairment of FMLA rights may arise in other, more complex situations, as the above factors suggest.

How long after the leave begins can the employer designate it as FMLA leave?

Although not specifically addressed, the decision seems to call into question the Department of Labor’s regulation that the employer must designate a leave as FMLA leave within two business days of becoming aware of the reason for the leave. The Court, however, offers no specific guidance on whether initial or re-designation of FMLA leave must occur during the leave, or if permissible, even after the leave period ends. Again, the answer to this question depends on whether the employee actually suffers prejudice as a result of the employer’s failure to designate the leave as FMLA leave.

Twelve Steps to Assist Employers in Compliance Efforts

The Ragsdale decision requires employers to assess how they will avoid being dragged into after-the-fact speculation about whether proper notice would have made a difference. “From a prevention perspective, the best thing employers can do is act as if Wolverine had lost this case and issue notices assuming they could be punished by the courts if they do not,” suggested Frank Alvarez. “If an employer must guess whether the notice would have changed an employee’s leave decisions, it is only increasing the legal risks of already precarious personnel decisions. Remember, the ADA or state law may require additional leave with a right to job restoration as a form of reasonable accommodation, so even if you get past the FMLA, you are not out of the woods.
More than ever before, employers need to take steps to communicate to managers and supervisors the details and processes for administering employee leaves, including the need to designate absences as FMLA leave, the need to notify Human Resources of leaves so proper notices can be issued to employees, and the need to evaluate at the end of leaves governed by FMLA or company policy, whether additional leave is required under the ADA or state law. "Training is key," says Michael J. Lotito, a partner at Jackson Lewis and member of the Firm’s Disability Management Practice Group. "This is the year of disability law for the United States Supreme Court. The Ragsdale decision is very important on its own, but it becomes even more significant when viewed in the larger context of worker’s compensation, ADA, insurance issues, and the other ADA decisions that will soon be handed down by the Court."

The following twelve steps will assist employers in the ongoing efforts to comply with the changing complexities of the various disability leave management laws and requirements:

1. Review existing FMLA practices to ensure compliance with basic FMLA requirements.

This ruling does not change the most basic requirements for FMLA administration. For example, it is still the employer’s obligation to designate leave as FMLA qualifying to start the 12-week clock ticking. Managers should be reminded that employees do not have to specifically mention the FMLA at the time they request leave. In some circumstances, when an employee requests leave, a manager still may need to make inquiries to determine whether the leave is FMLA qualifying, how much leave time is needed, and whether the leave may be needed on an intermittent or reduced schedule. Employers should be using the forms provided by the Department of Labor to obtain and document such information.

2. Makes sure employee handbooks contain FMLA policies; consider obtaining receipts confirming that employees have read and understand FMLA policies.

If a company has an employee handbook, the FMLA requires it contain a FMLA policy. If a company does not have an employee handbook, it must provide written guidance to employees concerning their rights and obligations under the FMLA. Whether a policy is in a handbook or distributed through some other means, this decision highlights the importance of having evidence that employees have received written notice of their rights and obligations under the FMLA. This could be particularly important in cases where the individualized notice requirement is not met. Employers should consider having employees sign receipts acknowledging that they have received, read, and understand the written policy on FMLA rights and are aware of the process to follow if they have questions about their rights in the future.

3. Develop additional procedures to facilitate better communication between supervisors and Human Resources regarding employee absences and leaves.

Many companies do not have formal procedures instructing managers and supervisors on the process to follow in administering employee leaves. Companies should consider putting in place written procedures for communicating with Human Resources about employee absences. This is more likely to ensure that the appropriate FMLA notices are issued in a timely manner.

4. Train supervisors in the triggering mechanisms for FMLA.

It is not always easy to identify what absences are covered by the FMLA. The definition of “serious health condition” can be confusing. For example, the flu usually would not be considered a "serious health condition," but some courts have found that the particular circumstances of a case justified the conclusion that it was. To make matters more difficult, a federal district court in New York recently ruled that an employer’s policy requiring a "brief" doctor’s note after each sick leave absence violated the ADA. Managers and supervisors need to understand what factors might cause an illness to be covered under the FMLA and ADA, what they may ask employees about their illness or injuries, and what they can do to get help making such determinations.

5. Review documentation for all employees currently on medical leaves.

Employers should take a close look at open FMLA files to determine whether the appropriate notices have been issued. In most cases, if the notices have not been issued, little is lost by issuing the notice. At worst, it starts the FMLA clock ticking as of that date and reduces the chances that an employee or court might find that none of the leave granted counts for FMLA purposes. In some situations where an employee remains on leave for an additional 12 weeks after the late notice is issued, it will eliminate the potential for a dispute entirely. In cases where the notice is not given at all, or an employee is terminated less than 12 weeks after receiving the notice, employers should gather the documentation and evidence that the employee’s receipt of timely notice would not have changed the employee’s leave decisions.

6. Integrate workers’ compensation programs with FMLA.
Often, companies delegate the management of workers' compensation leaves to safety, risk management or other disciplines that are not traditionally responsible for FMLA administration. This raises the risk that FMLA notices will be overlooked and makes employers more vulnerable to FMLA violations. Coordinating these programs with Human Resources is a cornerstone of an effective disability management program.

7. Integrate workers' compensation programs with ADA and FMLA.

Reasonable accommodation under the ADA might avoid the need for additional leave entirely or mandate that additional leave be provided with a right to job restoration. Light duty, for example, is commonly used in workers' compensation loss control programs but, depending on how it is structured, may or may not be required as an ADA reasonable accommodation. Under the Department of Labor Regulations, however, an employee on FMLA leave may refuse light duty even if it is within the employee's medical restrictions. Without integrating workers' compensation programs with ADA and FMLA, employers are walking through an employment mine field.

8. Establish disability management committees to manage employee leaves.

We have known for years that the ADA requires "individualized assessment." Now we know the same holds true for the FMLA and that all FMLA leaves are not equal. Two employees with the same condition might make different decisions on how to use their 12-week FMLA leave allotment. There is no substitute for rolling up one's sleeves and developing a specific strategy to manage each leave. To do so, employers normally need input from a variety of sources including front line supervisors, human resources, safety, medical personnel, insurance representatives, and legal counsel. By forming a committee that meets periodically to review the status of leaves, employers put themselves in the position to return employees to work more quickly, limit the duration of leaves, and reduce their exposure to employment related litigation. While the effort and cost of creating a committee might be significant, returning workers to work more quickly can drastically reduce workers' compensation costs and avoid prolonged staff disruptions. If the employer avoids even one lawsuit under the ADA or FMLA, the expense of such a program will be a worthwhile investment.

9. Review state laws to determine if they provide greater employee protections than the federal laws.

The Supreme Court has narrowed the scope of the ADA’s definition of "disability" and the FMLA’s penalty provision. As the Court narrows federal law, however, states are expanding the scope and reach of laws protecting injured and ill workers. More and more states, California, New York and New Jersey to name a few, are defining "disability" more broadly than the ADA, and many states have their own Family and Medical Leave Acts. The gaps in protection provided under federal law may soon be filled by their state counterparts, ironically creating a patchwork of laws which Congress hoped to eliminate by enacting federal legislation. Savvy plaintiff employment lawyers are likely to look to state laws and courts as the new battle ground for protecting workers, and employers need to be vigilant in their efforts to review policies and procedures to ensure compliance with state law obligations.

10. Train managers to recognize situations when the FMLA, ADA, and workers’ compensation intersect.

Managers must develop peripheral vision, the ability to see different laws in everyday personnel situations. There are few shortcuts for developing this skill. We recommend a comprehensive training program designed to educate managers on the requirements of these law and their application to common situations arising in the workplace.

11. Review benefit plans to ensure definitions of "disability" are consistent.

Many employees who do not return to work after extended medical leaves apply for and receive long term disability benefits. The duration of benefits under such programs might differ depending on whether the condition is a mental or physical disability. A federal district court in Washington, D.C. recently held that "bi-polar disorder" constituted a "physical" disability under the company’s long term disability plan. While the drafters of the plan likely did not intend such a result, the decision highlights the need to review benefit plans to ensure that the definition of disability is consistent with the coverage levels intended.

12. When defending FMLA cases, consider challenging the Department of Labor regulations.

Employers litigating FMLA claims should not necessarily accept the DOL’s regulations as “law,” particularly in cases where the employer’s policy is arguably more generous than the FMLA. One such challenge currently brewing in the federal courts involves cases where employers initially designate leave as being covered by the FMLA but later learn that designation was a mistake. The DOL
regulations say an employer must provide FMLA leave in such circumstances. Whether deference will be given to the regulations in this and other cases remains to be seen.

Stay Tuned For More Disability Management Decisions From the Supreme Court
With two decisions in ADA and FMLA cases already decided this term, the Supreme now moves on to two additional important ADA cases. In U.S. Airways v. Barnett, Docket No. 00-1250 (argued December 4, 2001), the Supreme Court will soon decide its first ADA case involving the meaning and scope of "reasonable acco
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