

**QUESTIONS AND ANSWERS CONCERNING
THE FIRST FMLA SUPREME COURT DECISION:
RAGSDALE v. WOLVERINE WORLDWIDE, INC.**

(3-19-02)

By:

Sue K. Willman, JD, SPHR
Spencer Fane Britt & Browne LLP
Amicus Counsel for SHRM

1. What are the legally significant facts of the case?

Wolverine Worldwide had a leave of absence policy, under which an employee was entitled to 7 months (or approximately 30 weeks) of leave for the employee's own serious health condition. This policy was far more generous than the 12 weeks of leave mandated by the FMLA.

Tracy Ragsdale requested and was granted a total of 30 continuous weeks of unpaid leave. While on leave, Wolverine continued her health benefits and held her job open for her.

Wolverine did not designate any of the 30 weeks as "FMLA leave" and did not notify Ragsdale that her time off would count against her 12 weeks of FMLA entitlement.

At the end of her 30 weeks of leave, Ragsdale requested 12 weeks of FMLA leave, as she was not able to return to work at the end of the 30 weeks. She argued that she was entitled to another 12 weeks of leave, since Wolverine had never designated any of her 30 weeks of leave as counting towards her FMLA entitlement.

Wolverine refused her request for 12 more weeks of leave and terminated her employment.

Ragsdale then filed suit, arguing that Wolverine's actions violated the FMLA. Specifically, she argued that the employer's failure to give her the designation notice required by the FMLA regulations prohibited the employer from counting any of her 30 weeks of time off against her 12 weeks of FMLA entitlement.

At the District Court level, the Court found the DOL regulation in question to be invalid.

Ragsdale then appealed to the 8th Circuit Court of Appeals. The Court of Appeals affirmed and also found the DOL regulation to be invalid.

Ragsdale then appealed to the U.S. Supreme Court, which also affirmed and found the DOL regulation to be invalid.

2. **What did the Court decide?**

The Court reviewed one particular regulation (one sentence) promulgated by the DOL, which states as follows:

“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.” 29 CFR § 825.700(a).

The Court decided that this regulation is invalid because it contradicts the remedy provisions provided by Congress in the FMLA Act itself. In essence, the Court said that the DOL regulation contains a remedy that contradicts the remedies passed by Congress.

In order for an employee to successfully sue an employer under the FMLA, Congress provided in the Act itself that the employee must show the following: (a) the employer violated the FMLA; (b) the employee suffered harm; and (c) the harm suffered by the employee was caused by the employer’s violation of the Act. If all of the following are proven, then the Act allows the courts to fashion an appropriate remedy for the employee (that is, the courts would decide the relief on a case-by-case basis and would customize the relief to fit the harm suffered).

Although the Act’s remedy provisions are very clear and allow flexibility for the courts to impose customized relief if an employee is harmed by an employer’s violation of the FMLA, the DOL took it upon itself to adopt additional remedies that are inconsistent with the Act’s own remedy provisions. In reviewing the above cited DOL regulation, the Supreme Court stated that the regulation failed to take into account: (a) whether the employee even suffered any harm; (b) whether the harm suffered was the result of the employer’s violation of the FMLA; and (c) whether the penalty would be an appropriate one under the facts and circumstances (whether the “punishment fits the crime” instead of being a “one size fits all” penalty).

3. **What arguments did the Court use to support its decision?**

- a. The regulation in question was manifestly contrary to the remedial provisions of the Act.

Key quotes from the Court on this issue:

- (1) “The categorical penalty is incompatible with the FMLA’s comprehensive remedial mechanism.”
- (2) “The challenged regulation is invalid because it alters the FMLA’s cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice.”
- (3) “By mandating these results absent a showing of consequential harm, the regulation worked an end run around important limitations of the statute’s remedial scheme.”
- (4) This regulation “punishes an employer’s failure to provide timely notice of the FMLA designation by denying it any credit for leave granted before the notice.”
- (5) “The penalty is unconnected to any prejudice the employee might have suffered from the employer’s lapse.”

(6) “The penalty provision does not say that in certain situations an employer’s failure to make the designation will violate [the Act] and entitle the employee to additional leave. Rather, the regulation establishes an irrebuttable presumption that the employee’s exercise of FMLA rights was impaired-and that the employee deserves 12 more weeks. There is no empirical or logical basis for this presumption, as the facts of this case well demonstrate.”

(7) “By its nature, the remedy created by Congress requires the retrospective, case-by-case examination the Secretary now seeks to eliminate.” While the Act says “that employees must prove impairment of their statutory rights and resulting harm, the Secretary’s regulation instructs the courts to ignore this command.”

(8) “Even assuming the additional notice requirement is valid, the categorical penalty the Secretary imposes for its breach is contrary to the Act’s remedial design.”

b. The regulation is inconsistent with the Act and Congress’ intent because it can result in an employee receiving *more* than the maximum of 12 weeks of FMLA leave guaranteed by the Act.

Key quotes on this issue:

(1) “The Secretary’s chosen penalty subverts the careful balance, for it gives certain employees a right to more than 12 weeks of FMLA-compliant leave in a given 1-year period.”

(2) “[The penalty] also amends the FMLA’s most fundamental substantive guarantee-the employee’s entitlement to a ‘total of 12 workweeks of leave during any 12-month period’.”

(3) “Like any key term in an important piece of legislation, the 12-week figure was the result of compromise between groups with marked but divergent interests in the contested provision. Employers wanted fewer weeks; employees wanted more. Congress resolved the conflict by choosing a middle ground, a period considered long enough to serve the ‘needs of families’ but not so long that it would upset ‘the legitimate interests of employers’.”

(4) “Courts and agencies must respect and give effect to these sorts of compromises. It has the effect of making the employer comply with FMLA both before the designation and after the designation, even though ‘employee will often enjoy every right guaranteed by the FMLA during part or all of an undesignated absence’.”

c. The regulation is inconsistent with Congress’ intent because its penalty is inconsistent with the Act’s sole notice provision (a posting requirement).

Key quotes:

(1) “That the Secretary’s penalty is disproportionate and inconsistent with Congress’ intent is evident as well from the sole notice provision in the Act itself.” The Act “sets out its own penalty for noncompliance...[for] any employer that willfully violates” the posting requirement.” The employer may be assessed “a civil monetary penalty not to exceed \$100 for each separate offense.”

(2) “The regulation, in contrast, establishes a much heavier sanction, enforced not by the Secretary but by employees, for both willful and inadvertent violations of a supplemental notice requirement.”

d. The regulation is inconsistent with Congress' intent that employers should be discouraged from adopting or retaining leave policies that are more generous than the Act's requirements.

Key quotes:

(1) "Technical rules and burdensome administrative requirements, Congress knew, might impose unforeseen liabilities and discourage employers from adopting policies that varied much from the basic federal requirements."

(2) "[The regulation's] severe and across-the-board penalty could cause employers to discontinue these voluntary programs."

(3) "The regulation imposes a high price for a good-faith but erroneous characterization of an absence as non-FMLA leave, and employers [like Wolverine] might well conclude that the simpler, less generous route is the preferable one."

4. **What did the Court not decide? What issues are still undecided?**

a. The Court did not decide whether or not an employer must designate leave as "FMLA leave." In fact, for the purpose of reaching its decision, the Court assumed that the designation notice was a valid regulatory requirement. And the Court specifically said that it was not deciding, and did not need to decide, whether an employer must give the designation notice.

b. The Court did not decide whether or not an employee might be harmed by the employer's failure to post the required FMLA poster. The Court did note that the Act itself requires a posting, but also said that the Act gives only the DOL (and no one else) the power to enforce this regulation by imposing a monetary penalty. Although this posting requirement is also contained in the regulations, and although the regulations suggest that an employee might be able to sue for the employer's failure to post the poster, the Court did not decide whether an employee could in fact file suit over a posting violation.

c. The Court did not decide whether or not an employer must give any of the notices required by the regulations (other than the posting notice which is required in the Act itself). The Court specifically stated that it was not deciding whether any of the notices were required (other than the posting). The Court, however, also noted that there could be circumstances where some type of notice might be required or appropriate, although the Court did not elaborate on what these circumstances might be. Interestingly, the Court seemed to suggest that such circumstances would probably be infrequent.

I agree that a failure to give notice is unlikely to result in harm to an employee, except in relatively few cases. As a practical matter, a well-written FMLA policy will go a long way in eliminating any potential "lack of notice" issues. In fact, I believe more cases of prejudice to an employee are likely to result from "miscommunications" or "faulty notice" than from "lack of notice." Furthermore, notice issues can arise in any number of situations where no notice is even currently required by the FMLA regulations. (For example, an employer has no obligation to tell an employee how much FMLA time he/she has used or has left, but if the employer erroneously calculates the amount of FMLA time used or left, and then voluntarily communicates this erroneous information to the employee, and if the employee relies on it to his/her detriment, can the employer be liable? Probably yes.) The bottom line is still the same – if the employee suffers no prejudice from the faulty notice or lack of notice, the notice issue becomes irrelevant ("no harm, no foul" concept).

d. The Court did not decide whether any other penalty provisions contained in the DOL regulations are invalid. However, in light of the rationale used by the Court in reaching its decision, it is likely that other penalty provisions in the DOL regulations will be invalidated using the same rationale.

5. **What arguments made by the DOL and Ragsdale did the Court reject or set aside?**

a. The DOL argued that more comprehensive and individualized notice required by the regulations is necessary to ensure that employees are aware of their rights when they take leave. The Court said that “we need not decide today whether this conclusion accords with the text and structure of the FMLA, or whether Congress has instead ‘spoken to the precise question’ of notice...and so foreclosed the notice regulations.”

b. The DOL argued that, under certain circumstances, the employer’s failure to give the notice required by the regulation could be said to ‘deny,’ ‘restrain,’ or ‘interfere with’ the employee’s exercise of an employee’s right to take leave. The Court acknowledged that “this position may be reasonable” in certain situations, “but the more extreme” position of the categorical penalty is not.

c. The DOL argued that a categorical penalty requiring the employer to grant more leave is easier to administer than one involving a fact-specific inquiry into what steps the employee would have taken had the employer given the required notice. The Court said “regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law’.” “The purpose of [the Act’s] cause of action is to permit a court to inquire into matters such as whether the employee would have exercised his or her FMLA rights in the absence of the employer’s actions. 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. Though the Secretary could not enact rules purporting to make these kinds of determinations for the courts, [the penalty provision in the regulation] has this precise effect.”

d. The DOL argued that other case law authorizes the DOL to adopt a categorical rule (such as its notice penalty). The Court stated that “even if the Secretary were authorized to reconfigure the FMLA’s cause of action for her administrative convenience, this particular rule would be an unreasonable choice.” The Court also said that “categorical rules...reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would needless and wasteful.” It further said:

“When the generalizations fail to hold in the run of cases...the justification for the categorical rule disappears. That said, the generalization made by the Secretary’s categorical penalty-that the proper redress for an employer’s violation of the notice regulations is a full 12 more weeks of leave-holds true in but few cases. The employee who would have taken the absence anyway, of course, would need no more leave; but the regulation provides 12 additional weeks. Even the employee who would have chosen to work on an intermittent basis-say, every other week...could claim an entitlement not to 12 weeks of leave but instead to the 6 weeks he or she would not have taken. To be sure, 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. It is not a ‘fair assumption,’ ...however, that this fact pattern will occur in any but the most exceptional of cases.”

6. What are the broad implications of the Court's decision?

a. Basically, the Court said that if an employer violates the FMLA, then an employee is only entitled to relief if the employee suffered harm resulting from the violation (called "consequential harm" by the Court). In such a case, the employee's relief must be customized to fit the harm. The Court's ruling has broader applicability than its application to the one regulation that was before the Court.

Although the Court only focused on one particular DOL regulation, there are a number of other DOL regulations that impose "across the board" penalties that will not meet the Court's standard. Consequently, other DOL regulations that include penalty provisions are now in question, will probably not withstand judicial scrutiny, and will probably be held invalid by various courts unless DOL amends the regulations to be consistent with the Supreme Court's decision.

b. The fact that an employer has successfully challenged a DOL FMLA regulation may very well emboldened other employers to challenge various DOL regulations. I expect we will see an increasing number of lawsuits challenging FMLA regulations, partially because the Ragsdale decision has confirmed that the DOL regulations are fair game now and partially because employers are extremely frustrated in trying to comply with the DOL's very complex regulations.

c. The Court's decision imposes a fairer balance between employee rights and employer obligations. It means that all relevant factors will be taken into account if an employer violates the FMLA. Although employers should be pleased with the Court's decision, as it imposes a fairer balance between employee rights and employer obligations, employers still need to make good faith efforts to comply with the FMLA and to minimize potential harm to employees. The bottom line is that an employer can still be held accountable, in an appropriate way, for its violations of the FMLA (and the FMLA regulations) if an employee suffers harm.

d. Employees and advocates of employee rights should not view the Court's decision as a loss or a defeat. Employees have really lost nothing as a result of the Court's decision. They are still entitled to relief, customized to fit the circumstances, if they suffer harm as a result of an employer's violation of the FMLA. All the Court did was to confirm that the Act contains flexibility for the courts to fashion remedies appropriate to the harm suffered. This is the same approach that courts and juries take in awarding damages and relief in lawsuits. It is not a new or earth-shattering concept. In fact, the flexibility ensures fairer results to all parties.

7. How will the Court's decision affect employer's handling of FMLA issues? What is the practical application of the Court's decision?

a. Employers should still make good faith efforts to comply with the FMLA regulations. However, an employer's focus in this area should be more on ensuring reasonable and accurate communications and preventing and minimizing harm to an employee than worrying about technical compliance with the regulations. If an employee is not harmed, then a technical violation of the Act will not matter. In all situations, the employer should do whatever would be fair and reasonable to minimize or prevent harm to an employee.

b. Employers should still make a good faith effort to designate leave as "FMLA leave." After all, the Ragsdale case would never have been litigated if the employer had given the notice in the first place. So why take an unnecessary risk until we all have a better idea of where the courts and the DOL will go with the various notice and other burdensome regulations. Employers should try to follow the regulations as closely as possible, but at a minimum should give all notices as soon as reasonably possible, even if it's outside the time periods required by the regulations. If the designation is made within a reasonable period of time under the circumstances, then the employer is probably safe in counting the leave retroactively, even if the regulations technically prohibit retroactive designations.

c. It is probably extremely important that an employer have a well-drafted, comprehensive FMLA policy that puts an employee on notice of all pertinent FMLA issues. It is possible that the courts will ultimately decide that a sound FMLA policy precludes the need to give any other type of notice in most situations. A copy of the policy should be distributed to all employees. It would also be advisable to get a signed receipt from the employee. A well-drafted and distributed policy should go a long way in proving that an employee had sufficient notice and has not been harmed, assuming that the employer complies with its own policy.

The policy should include all decisions made by the employer that are within the employer's discretion to make, such as:

- (1) designating which 12-month period will be used to calculate FMLA eligibility (12-month rolling backwards; 12-month rolling forward; calendar year; or fiscal year);
- (2) whether an employee must exhaust all of his/her paid time off while on FMLA leave (such as vacation, sick days, PTO, personal days, etc.);
- (3) whether intermittent or reduced schedule leave may be used for the care of a newborn or newly adopted child or foster child or to care for a parent;
- (4) whether an employee's voluntary election to accept light duty will adversely affect the employee's reinstatement rights to the job held prior to light duty;
- (5) whether the employee will be forbidden to work elsewhere while on leave;
- (6) whether FMLA leave will run concurrently with other types of leave (such as STD leave, worker's compensation leave, etc.);
- (7) whether a fitness for duty report will be required when the employee is released to return to work;
- (8) whether an employee must periodically report to the employer while on FMLA leave regarding the status of his/her situation and intent to return to work.

d. The employer should accurately document all communications it has with an employee regarding FMLA issues. If an employer inadvertently gives incorrect information to an employee, then the employer should immediately notify the employee (once the error is discovered) of the correct information. Prompt correction of employer mistakes will help prevent subsequent harm to the employee in many cases.

e. Before a final decision is made by an employer to deny FMLA leave, terminate an employee after he/she has exhausted FMLA leave, or impose any adverse action in connection with FMLA issues, the employer should implement some type of review process to determine if the situation has involved any fault (inadvertent or intentional) on the part of the employer (such as failure to communicate important information or miscommunication of important information). If so, such a process will give the employer an opportunity to correct the situation before the employee is actually harmed.

8. Who is the Real Winner in this Case?

The Court's decision is a victory for fairness. It strikes an appropriate balance between employer obligations and employee rights. All the Court did was confirm that a standard of fairness and reasonableness will be imposed on a case-by-case basis. The Court did not eliminate any obligations imposed on employers under the Act or the regulations. The Court did not eliminate the remedies available to an employee under the Act if an employer violates the FMLA. The Court merely said that if an employer violates the FMLA, and if an employee is harmed by that violation, then employee is entitled to relief that is customized to fit the harm. This is no different than what the Act already says.

As a practical matter, the Court's decision should not affect, in any material way, how employers deal with FMLA situations. It does, however, give reassurances to employers that technical violations of the FMLA's very burdensome and complex regulations will not necessarily impose liability on the employer *unless* the employee is actually harmed in some way. Even then, the relief the employee will receive will be tailored to fit the harm. It does not get any fairer than that.

Employers should now focus on making good faith efforts to comply with regulations *in a way that will prevent or minimize harm to employees*. The new inquiry on this issue is not whether the employer complied with or violated the Act or the regulations. The inquiry is now on whether the employee was harmed by non-compliance.