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Employment Law

When Is an Employer's Failure To Provide Notice Of FMLA Rights or Designate FMLA Leave Actionable?

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The Family Medical Leave Act of 1993, 29 U.S. C. §§2601, et seq., protects the rights of many employees to take up to 12 weeks of family and medical leave per year without the fear of losing their jobs.

Specifically, most employees who have worked for a company with at least 50 employees for at least one year and who worked at least 1,250 hours during the previous year are entitled to take up to 12 weeks of leave for the serious health condition of one's self, parent, child or spouse; child birth; adoption; and/or to care for a newborn or newly adopted child, per every 12-month period.

Employees taking an FMLA leave are generally entitled to be reinstated to their job or an equivalent one upon the expiration of the leave. In addition, the FMLA prohibits employers from "interfering with, restraining, or denying" an employee's exercise of FMLA rights. See 29 U.S.C. 2615.

The FMLA does not specifically require employers to designate FMLA leaves, and only requires employers to post a summary of pertinent provisions of the FMLA. However, the secretary of labor, who has the power to implement regulations necessary to carry out the FMLA, has issued regulations that require employers to notify employees when time off qualifies as an FMLA leave (the "designation regulation") and to provide employees with written notice of their rights and responsibilities under the FMLA (the "notice regulations"). See 29 C.F.R. 825.208(a); 29 C.F.R. 825.300 (requiring employers to post pertinent FMLA information in the workplace); and 29 C.F.R. 825.301 (requiring employers either to provide pertinent FMLA information in the employee handbook or policy or to provide employees with written FMLA guidelines).

Another regulation imposed a penalty where an employer fails to designate an FMLA leave (the "penalty regulation"). Under the penalty regulation, a leave does not count toward the employee's 12-week FMLA entitlement until the employer formally designates it as an FMLA leave, thus entitling the employee to 12 weeks of leave from the date of the designation regardless of when the leave actually began. 29 C.F.R. 700(a).

Two years ago, in *Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81 (2002), the U.S. Supreme Court struck down the penalty regulation, finding it incompatible with the FMLA to the extent it was "unconnected to any prejudice the employee might have suffered" as a result of the employer's failure to properly designate the FMLA leave.

Under the FMLA, an employee is only entitled to recover damages for wages, salary or benefits lost "by reason of" a violation of the FMLA or, where there was no such loss, for any other monetary losses sustained "as a direct result" of a violation of the Act. See 29 U.S.C. 2617(a)(1)(A)(i).

In other words, according to the *Ragsdale* Court, an employee cannot prevail under the FMLA without showing some sort of prejudice. The Supreme Court found that the penalty regulation is invalid and struck it down because it created an irrebuttable presumption that the employer's failure to designate an FMLA leave interfered with the employee's rights, regardless of whether the employee can show prejudice.

While *Ragsdale* makes it clear that prejudice is required to prove a violation of the FMLA, the Supreme Court did not address the notice or designation regulations one way or the other, and provided no real guidance as to what constitutes "prejudice." Since *Ragsdale*, most courts addressing the issue have upheld the designation regulation.

The District of Arizona, District of Kansas, Northern District of Illinois and Western District of Kentucky have upheld the designation regulation since

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Ragsdale. See *Farina v. Compuware Corp*., 256 F. Supp. 2d 1033 (D. Az. 2003); *Hill v. Steven Motors, Inc*., 228 F. Supp. 2d 1247 (D. Kan. 2002); *Sims v. Schultz*, 2004 WL 305693, *6 (N.D. Ill. 2004); and *Summers v. Middleton & Reutlinger, P.S.C*., 214 F. Supp. 2d 751 (W.D. Ky. 2002).

In addition, in *Roberson v. Cendant Travel Servs., Inc*., 252 F. Supp. 2d 573, 577 (M.D. Tenn. 2002), the Middle District of Tennessee held the regulation invalid.

Although no state or federal case in New Jersey has directly addressed this issue since *Ragsdale* was decided, *Nusbaum v. CB Richard Ellis, Inc*., 171 F. Supp. 2d 377 (D.N.J. 2001) — which was decided before *Ragsdale* — does.

Nusbaum recognizes that the purpose of the designation and notice regulations is to ensure that employees are allowed to make informed decisions about FMLA leaves. The District Court therefore denied the employer's motion to dismiss, finding the plaintiff would have a cause of action if her employer's failure to give her proper information about her rights and responsibilities under the FMLA interfered with her ability to structure her leave to qualify for protection under the act.

Beyond the circumstances suggested by *Nusbaum*, there are other situations in which an individual could show that his employer's failure to inform him of his rights under the FMLA caused him prejudice.

For example, since a parent can take a maternity or paternity leave at any time within 12 months after a birth or adoption, an employee would be prejudiced if he or she would have timed the leave so it was part of a different FMLA year from a previous FMLA year. See 29 U.S.C. 2612(a)(2).

A fully informed employee might be able to begin his FMLA leave at the end of one year and continue it as a new FMLA leave in the next year.

Similarly, under the right circumstances, an employee who has already used some or all of his FMLA leave one year might be able to delay an FMLA leave so it would begin during the next FMLA year. However, to do so, the employee would need to know the method his employer uses to determine the 12-month period in which the 12-week leave entitlement occurs — a calendar year, a fiscal year, the anniversary date of the employee's first FMLA leave, or measure backward from the date any FMLA leave begins — and the extent to which the employer counted his past time off toward his 12-week entitlement.

Likewise, a fully informed employee might be able to time the start of his FMLA leave so he can begin his leave at the end of one year and continue it as a new FMLA leave at the beginning of the next year.

In sum, *Ragsdale* suggests there is a cause of action for an employee who has been prejudiced by his employer's failure to designate his FMLA leave or by his employer's failure to provide him with notice of his FMLA rights.

If an employee is prejudiced in this way, he is entitled to recover the wages, salary and benefits he lost as a result. On the other hand, if there is no prejudice, such as when the employee could not have returned within the 12-week time period regardless of the employer's actions, there is no violation of the FMLA.

The secretary of labor is currently preparing revised regulations in response to *Ragsdale* and anticipates the proposed regulation will be ready for public review this June. See Department of Labor 2003 Regulation Plan, www.dol.gov/asp/regs/unifiedagenda/plan03.htm.

In the meantime, attorneys representing employees with potential claims must do their best to determine whether an employee has been prejudiced by an employer's failure to designate an FMLA leave or by an employee's failure to inform an employee of his FMLA rights.

At the same time, employers would be best served by making sure they properly inform their employee of their rights and responsibilities under the FMLA, and designate FMLA leaves in a timely manner, to minimize potential FMLA claims by employees. ■