

Employer Notice Requirements Under the Family and Medical Leave Act

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I. INTRODUCTION

The demise of the traditional *Leave It To Beaver* family is in full swing. No longer is it the norm for mom to stay at home with the kids while dad works to pay the bills. Today, in over 60% of American families, both spouses work outside of the home.¹ By 2005, over 66% of American workers will be female.² Over 65% of mothers and 96% of fathers are members of the paid labor force.³ Moreover, as a result of the recent advances in medicine and health care and the aging of the baby boomer population, the elderly are the fastest growing segment of the American population.⁴ With Americans living longer, many children are expected to care for their aging parents.⁵

In 1993, Congress and President Clinton responded to these changing demographics by passing the Family and Medical Leave Act ("FMLA").⁶ The FMLA acknowledges that situations may arise when employees must put their family needs before their job responsibilities, and the Act responds by providing these employees with job security and health insurance during such situations.⁷

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1. See Sabra Craig, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 52 (1995).

2. See Robert J. Aalberts & Lorne H. Seidman, *Employee Notice Requirements Under the Family Medical Leave Act: Are They Manageable?*, 24 PEPP. L. REV. 1209, 1210 (1997); S. REP. No. 103-3, at 5 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 8 (discussing the demographic changes which warranted the passage of the FMLA).

3. Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 48 (1994).

4. *Id.* at 48 n.64.

5. *Id.* at 48 n.65.

6. 29 U.S.C. §§ 2601-2654 (2000).

7. Lenhoff & Withers, *supra* note 3, at 49; see also 29 U.S.C. § 2601(b)(2) (2000) (stating that the purpose of the FMLA is "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition").

Unfortunately, however, the Act was drafted imperfectly,⁸ and courts now are stepping in to resolve its ambiguities.⁹ One such ambiguity concerns employer notice requirements.

The FMLA explicitly requires employees to notify employers when employees intend to take FMLA leave. While the statute requires employers to post a sign informing employees in a general way about the FMLA, however, it does not explicitly require employers to individually notify leave-taking employees of how the FMLA works, or even to how much leave the employee is entitled. Because the FMLA gives employers the option of designating whether FMLA leave runs concurrently with, or consecutively to, the employer's leave policy, problems may arise when the employer's leave policy is more generous than the FMLA. Often, however, the employer makes no prospective designation. The employee taking leave might assume that she is entitled to *both* FMLA leave *and* leave under the employer's policy, only to find out too late that the employer is treating the leave policies as running concurrently.

The Department of Labor ("DOL") attempted to solve this problem by issuing regulations that require employers to designate up front whether or not their leave policies run concurrently with FMLA leave, and to notify employees of this designation. An employer that failed to comply with this prior notice requirement would forfeit the opportunity to designate the two leave periods as running concurrently. The effect would be that a non-notified employee would be entitled to *both* the employer-provided leave and to an additional twelve weeks of FMLA leave. Employers could easily avoid this situation, however, merely by providing employees with pre-leave notice that FMLA leave would run concurrently with employer-provided leave.

Prior to March 2002, federal circuit courts were divided over the question of whether the DOL's penalty provision was consistent with the statutory

8. See Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1443 (noting that "the FMLA leaves much to be desired"); Shay Ellen Zeemer, Note, *FMLA Notice Requirements and the Chevron Test: Maintaining a Hard-Fought Balance*, 55 VAND. L. REV. 261, 262 (2002) ("[T]he FMLA finds employees and employers alike disillusioned, uncertain about rights and obligations, and still fighting to balance work and family needs by being forced to follow the FMLA's complex procedures."); see also Nevada Dep't of Human Res. v. Hibbs, 273 F.3d 844 (9th Cir. 2001), cert. granted, 122 S.Ct. 2618 (2002) (granting certiorari on a case presenting the issue of whether Congress exceeded its power under Section 5 of the Fourteenth Amendment when it gave state employees the right to sue their employers for violations of the FMLA).

9. See Peter D. Lejeune, *Employment Law*, Manuel v. Westlake Polymers Corp.: *Must an Employee Specifically Mention the Family Medical Leave Act When the Need for Protected Leave Is Unforeseeable?*, 19 AM. J. TRIAL ADVOC. 685 (1996).

language of the FMLA. The Fourth¹⁰ and Sixth¹¹ Circuits accepted the DOL's regulations and enforced the DOL's twelve-week penalty for noncompliance. The Eighth¹² and Eleventh¹³ Circuits, however, rejected these regulations, holding that they were beyond Congress' intended scope of the legislation.¹⁴

In March 2002, the United States Supreme Court, in a 5-4 decision in *Ragsdale v. Wolverine World Wide, Inc.*,¹⁵ agreed with the Eighth and Eleventh Circuits and held that the DOL's penalty for violation of its notice rule was inconsistent with the statutory language of the FMLA.¹⁶ The Court expressly left open the issue, however, of whether the DOL was within its statutory authority when it imposed an employer notice requirement.¹⁷ Moreover, the Court's opinion was ambiguous as to whether the DOL is prohibited from imposing *any* penalty for noncompliance with notice requirements that would extend an employee's leave beyond the twelve weeks provided in the statute, or whether, alternatively, the DOL has the statutory authority to require individualized notice so long as the remedy for noncompliance includes a showing of individualized harm.¹⁸

This Article argues that DOL regulations should continue to require employers to make a pre-leave designation of whether FMLA leave will run concurrently with, or consecutive to, the employer's leave and give notice to their employees, but that the penalty for an employer's noncompliance should be modified to comply with the Supreme Court's *Ragsdale* decision. Part II of this Article provides a brief background of the substantive provisions of the FMLA, notes the lack of an explicit individualized notice requirement imposed on employers in the text of the Act, and examines the DOL regulations that attempt to impose and enforce such a notice requirement. Part III describes the pre-*Ragsdale* cases that approved the DOL's notice and penalty regulations. Part IV describes *Ragsdale*.

Part V evaluates these conflicting positions by analyzing the rationales behind the decisions to impose or not to impose employer notice requirements. It argues that courts should require employers to notify employees whether employer-provided leave runs concurrently with or consecutively to FMLA leave, but that the penalty provision in the regulation should be modified to

10. *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 300-01 (4th Cir. 1998).

11. *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 934-36 (6th Cir. 2000).

12. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000), *aff'd*, 122 S. Ct. 1155 (2002).

13. *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1307-08 (11th Cir. 1999).

14. *See Ragsdale*, 218 F.3d at 939.

15. 122 S. Ct. 1155 (2002).

16. *Id.* at 1165.

17. *Id.* at 1160-61.

18. *See id.* at 1167-68 (O'Connor, J., dissenting).

require a factual showing of harm by aggrieved employees and to impose a penalty equivalent to the harm suffered. This approach is consistent with the majority opinion in *Ragsdale*. It also is consistent with the purpose of the statute, which is to protect the job security of employees taking leave. The approach imposes a minimal burden on employers: because employers retain the right to designate employer leave as running concurrently with FMLA leave, the only burden on employers is to notify employees of this designation at the beginning of employees' leave. This approach confers a significant benefit on employees because it enables them to effectively plan their leave and to keep their jobs.

II. BACKGROUND

A. Family and Medical Leave Act

Congress enacted the Family and Medical Leave Act for several purposes. Primarily, Congress passed the FMLA in an effort to balance job responsibilities with the needs of families.¹⁹ This balance includes promoting the stability and economic security of families, along with the national interest in preserving family integrity.²⁰ To accomplish this, the FMLA grants employees leave for qualifying medical and family reasons.²¹ The FMLA strives to achieve these goals in a way that respects the legitimate interests of employers.²²

To qualify for leave under the FMLA, an employee must meet several requirements. First, the FMLA applies only to employers who engage in interstate commerce and who employ fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year.²³ Second, an employee is eligible to take FMLA leave if the employee has been employed: (1) for at least twelve months (the months need not be consecutive);²⁴ (2) for at least 1250 hours during the previous twelve-month period;²⁵ and (3) at a work site where fifty or more employees are employed by the same employer within seventy-five miles of the work site.²⁶ Third, an eligible employee may take leave under the FMLA if the leave: (1)

19. See 29 U.S.C. § 2601(b)(1) (2000).

20. *Id.*

21. *Id.* § 2601(b)(2).

22. *Id.* § 2601(b)(3).

23. *Id.* § 2611(4)(A)(i).

24. *Id.* § 2611(2)(A)(i).

25. *Id.* § 2611(2)(A)(ii).

26. *Id.* § 2611(2)(B)(ii).

relates to the birth or care of the employee's newborn child;²⁷ (2) is the result of the placement of a child with the employee for adoption or foster care;²⁸ (3) concerns the care of an employee's child, spouse, or parent having a serious health condition;²⁹ or (4) is the result of the employee's serious health condition when the employee is unable to perform the requirements of his or her job.³⁰

The FMLA guarantees eligible employees twelve weeks of leave in a one-year period.³¹ During these twelve weeks, the employer must maintain the employee's group health coverage³² and must grant leave to the employee, when "medically necessary," on an intermittent or part-time basis.³³ Some employers have adopted family leave policies with terms more generous than the statute requires, such as policies that permit more than twelve weeks of leave per year.³⁴ As long as these policies meet the statute's threshold requirements, leave taken under them may be counted toward the twelve weeks of leave required by the FMLA.³⁵ The statute explicitly states that it provides a floor—not a ceiling—to family leave policies.³⁶

Following an employee's return from FMLA leave, the employee is entitled to reinstatement to his or her former position or an equivalent position with the same benefits and terms of employment.³⁷ The Act makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of" these rights.³⁸ An employer who violates the FMLA is liable for compensation and benefits lost "by reason of the violation,"³⁹ for other monetary losses incurred "as a direct result

27. *Id.* § 2612(a)(1)(A).

28. *Id.* § 2612(a)(1)(B).

29. *Id.* § 2612(a)(1)(C).

30. *Id.* § 2612(a)(1)(D).

31. *Id.* § 2612(a)(1).

32. *Id.* § 2614(c)(1).

33. *Id.* § 2612(b)(1).

34. *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1160 (2002) (citing *D. CANTOR ET AL.*, U.S. DEPT. OF LABOR, *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE 5-10, 5-12*, available at <http://www.dol.gov/asp/fmla/main2000.htm>).

35. The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2,180, 2,230 (Jan. 6, 1995) (to be codified at 29 C.F.R. pt. 825) ("[E]mployers may designate paid leave as FMLA leave and offset the maximum entitlements under the employer's more generous policies.").

36. 29 U.S.C. § 2653 (2000) ("Nothing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act.").

37. *Id.* § 2614(a)(1).

38. *Id.* § 2615(a)(1).

39. *Id.* § 2617(a)(1)(A)(i)(I) (discussing how "wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation" can

of the violation,"⁴⁰ and for "appropriate" equitable relief, including employment, reinstatement, and promotion.⁴¹ Job security is, thus, the essence of the FMLA.⁴²

The FMLA explicitly requires employees to provide employers notice of their intention to take leave for a qualifying FMLA reason.⁴³ The statute also contains a notice requirement for employers: employers must display a poster containing certain excerpts from the FMLA to inform employees of their FMLA rights.⁴⁴ This is the only *statutory* notice requirement imposed on employers; as will be discussed below, DOL regulations additionally require that employers notify their employees that the employees' leave is covered under the FMLA.⁴⁵

Although the Act imposes minimal notification requirements on employers, the FMLA directs the Secretary of Labor to "prescribe such regulations as are necessary to carry out [the substantive provisions of] subchapter I."⁴⁶ Seizing on this authority and the lack of employer notice provisions in the text of the FMLA, the DOL has issued several regulations which require that an employer provide an employee with notice that employer provided leave is FMLA leave both in situations where the employee is taking paid leave and where the employee is

be granted).

40. *Id.* § 2617(a)(1)(A)(i)(II) (granting "any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to twelve weeks of wages or salary for the employee"). These damages can be doubled if the employer did not act in good faith. In such cases, the statute provides for "an additional amount as liquidated damages equal to the sum of the amount described in clause (i) (i.e., wages, benefits, etc.)[, and the interest" on those amounts also can be awarded. *See id.* § 2617 (a)(1)(A)(iii).

41. *Id.* § 2617(a)(1)(B) (providing for equitable relief).

42. Aalberts & Seidman, *supra* note 2, at 1215.

43. 29 U.S.C. § 2612(e)(1) (2000). The precise components of such notice, however, are unclear. *See* Timothy Stewart Bland, *The Required Content of Employees' Notice to Employers of the Need for Leave Under the FMLA*, 12 LAB. LAW. 235 (1996).

44. 29 U.S.C. § 2619(a) (2000); *see also* 29 C.F.R. § 825.300(a) (2001) ("Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any 'eligible' employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. The poster and the text must be large enough to be easily read and contain fully legible text."); 29 C.F.R. § 825 app. C (2001) (sample posting notice).

45. *See infra* Part II(B).

46. 29 U.S.C. § 2654 (2000).

taking unpaid leave.⁴⁷ These regulations also provide for significant consequences if employers fail to provide such notice.⁴⁸

B. Department of Labor Regulations

The DOL has mandated that “[i]n all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section.”⁴⁹ In two separate regulations, the DOL provides that failure to notify an employee that leave taken pursuant to the employer’s leave policy is also designated as FMLA leave will result in the employee retaining her entitlement to twelve weeks of leave under the FMLA.⁵⁰

The first regulation is 29 C.F.R. § 825.208(c). In this provision, the DOL applies the principle to paid leave under an employer-provided leave policy, stating:

If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employer either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation.⁵¹

In such circumstances, the employee is subject to the full protections of the Act, but none of the employee’s time off preceding the notice to the employee of the designation may be counted against the twelve week FMLA leave entitlement. The DOL stated that this provision forbidding retroactive designation of leave as being covered under the FMLA was meant “to eliminate protracted ‘after the fact’ disputes.”⁵²

The second regulation requiring employers to give notice to their employees is 29 C.F.R. § 825.700(a). In this provision, the DOL applies the principle to unpaid employer-provided leave policies, stating that “[i]f an employee takes

47. *See Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 936-37 (8th Cir. 2000), *aff’d*, 122 S. Ct. 1155 (2002).

48. *Id.* at 937.

49. 29 C.F.R. § 825.208(a) (2001).

50. *See id.* §§ 825.208(c), 825.700(a).

51. *See id.* § 825.208(c).

52. The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2,180, 2,207 (Jan. 6, 1995) (to be codified at 29 C.F.R. pt. 825).

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."⁵³ The DOL also stated, however, that, as long as the employer designated the leave as FMLA leave, the time off could run concurrently with the employer-provided leave policy.⁵⁴ Both Sections 825.208(c) and 825.700(a) clearly require employers to designate leave as being covered under the FMLA. Absent such notice, the employee remains entitled to the entire twelve weeks of leave.

III. IMPOSING A NOTICE REQUIREMENT ON EMPLOYERS

Prior to the Supreme Court's 2002 decision in *Ragsdale v. Wolverine World Wide, Inc.*,⁵⁵ the federal circuits were split on the issue of whether the DOL penalty provisions for violation of its employer-notice requirement were consistent with the statutory language of the FMLA. Two circuits—the Fourth⁵⁶ and the Sixth⁵⁷—enforced the DOL regulations and required employers to notify employees that their leave was covered under the FMLA.

*Plant v. Morton International, Inc.*⁵⁸ was a 2000 Sixth Circuit decision. Philip Plant was injured in a work-related motor vehicle accident in February 1995.⁵⁹ Plant took a paid leave of absence from work until September 1995.⁶⁰ On April 26, 1996, Plant took another paid leave from work when he aggravated his back and leg injuries while at work.⁶¹ Approximately six weeks into Plant's second leave of absence, Morton fired Plant, citing poor performance.⁶²

Plant sued under the FMLA,⁶³ the Americans with Disabilities Act,⁶⁴ and state wrongful discharge laws.⁶⁵ The district court granted summary judgment to Morton on all counts, and Plant appealed to the Sixth Circuit.⁶⁶

53. 29 C.F.R. § 825.700(a) (2001).

54. See The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2,180, 2,230 (Jan. 6, 1995) (to be codified at 29 C.F.R. pt. 825).

55. 122 S. Ct. 1155 (2002).

56. See *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 300-01 (4th Cir. 1998).

57. See *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 934-36 (6th Cir. 2000).

58. *Id.*

59. *Id.* at 932.

60. *Id.*

61. *Id.*

62. *Id.*

63. 29 U.S.C. §§ 2601-2654 (2000).

64. 42 U.S.C. §§ 12101-12213 (2000).

65. OHIO REV. CODE ANN. § 4112.02 (Anderson 2001).

66. *Plant*, 212 F.3d at 933.

On appeal to the Sixth Circuit Court of Appeals, Plant argued that his 1996 injury qualified as a “serious health condition,” entitling him to twelve weeks of FMLA leave.⁶⁷ He argued that Morton had violated the FMLA by only providing six weeks of leave.⁶⁸ Plant admitted that he would not have been able to return to work within the twelve weeks provided by the FMLA, but alleged that he should be able to “stack” the twelve weeks of FMLA leave on top of the six weeks of disability leave that Morton had provided, for a total of eighteen weeks.⁶⁹ In any event, he argued that his FMLA leave should not have started to run until Morton notified him that it was designating his leave as FMLA leave, which Morton never did.⁷⁰

The Sixth Circuit began by acknowledging that “[t]he FMLA makes it clear that employer-provided leave, whether paid or unpaid, may be counted toward the twelve-week minimum required by statute.”⁷¹ The court then pointed out, however, that the DOL had elaborated on this issue in its regulations.⁷² Citing 29 C.F.R. § 825.208, the Sixth Circuit stated that the DOL regulations provide that “[i]n all circumstances, it is the employer’s responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee,”⁷³ and that if the employer failed to give such notice within two days of learning of the employee’s qualifying reason for leave,⁷⁴ the employer may not designate it as FMLA leave.⁷⁵

The Sixth Circuit explicitly upheld the DOL regulations.⁷⁶ The court found that Section “825.208(c) evinces a reasonable understanding of the FMLA, reflecting Congress’s concern with providing ample notice to employees of their rights under the statute.”⁷⁷ Furthermore, the court noted that Section 825.208(c) was not inconsistent with legislative intent simply because it created the possibility that employees might receive more than twelve weeks of leave in one twelve-month period.⁷⁸ This ruling was based on the fact that the FMLA standards were intended to be *minimum* labor standards.⁷⁹ The court concluded that the DOL “regulations are valid and forbid employers from retroactively

67. *Id.* at 934.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* (citing 29 U.S.C. § 2612(c)-(d) (2000)).

72. *Id.* at 934-35.

73. *Id.* at 935 (quoting 29 C.F.R. § 825.208(a) (2001)).

74. *Id.*

75. *Id.*

76. *Id.* at 936.

77. *Id.* at 935 (citing 29 U.S.C. § 2619(a) (2000)).

78. *Id.*

79. *Id.*

designating FMLA leave if they have not given proper notice to their employees that their statutory entitlement period has begun to run.”⁸⁰ Based on this conclusion, the court held that Plant was not precluded from asserting an FMLA claim, since his employer, Morton, did not notify him that his leave was covered under the FMLA.⁸¹ In essence, Plant was still entitled to his twelve weeks of FMLA leave.

The Fourth Circuit Court of Appeals reached a similar decision in *Cline v. Wal-Mart Stores, Inc.*⁸² Keith Cline was diagnosed with a brain tumor.⁸³ Prior to taking medical leave for surgery from his employer, Wal-Mart, he submitted forms to Wal-Mart requesting accrued vacation leave and medical leave.⁸⁴ The medical leave form provided that leave for “medical” reasons was designated as FMLA leave.⁸⁵ Approximately twelve weeks after Cline began his leave, he returned to work, but was promptly demoted, then fired.⁸⁶ He sued under the FMLA and ADA, and obtained a judgment for nearly \$700,000.⁸⁷

Wal-Mart appealed to the Fourth Circuit, arguing that the medical leave form that Cline had signed put him on notice that his vacation days were to be designated as part of his twelve weeks of FMLA leave.⁸⁸ The court, however, disagreed, finding that “[a]lthough the form explained that leave for ‘medical’ reasons was designated as FMLA leave, it said nothing about vacation leave, and a reasonable employee reviewing the form would have no idea that vacation leave was designated.”⁸⁹ The court, therefore, held that the DOL regulations discussed above required that Cline’s vacation and FMLA leave would run consecutively rather than concurrently, and that Wal-Mart violated the FMLA by demoting him prior to the expiration of his total leave time.⁹⁰

In addition to the Fourth and Sixth Circuits, two federal district courts also upheld the DOL regulations prohibiting employers from retroactively designating leave as FMLA-qualifying leave.⁹¹ As discussed in Part IV, however, all of these

80. *Id.* at 936.

81. *See id.*

82. 144 F.3d 294 (4th Cir. 1998).

83. *Id.* at 298.

84. *Id.*

85. *Id.* at 301.

86. *Id.* at 299.

87. *Id.* at 300.

88. *Id.*

89. *Id.* at 301.

90. *Id.*

91. *Ritchie v. Grand Casinos of Miss.*, 49 F. Supp. 2d 878, 880-81 (S.D. Miss. 1999); *Chan v. Loyola Univ. Med. Ctr.*, No. 97 C 3170, 1999 WL 1080372, at *10 (N.D. Ill. Nov. 23, 1999).

decisions have effectively been overruled by the Supreme Court's 2002 decision in *Ragsdale v. Wolverine World Wide, Inc.*,⁹² discussed *infra*.

IV. REFUSING TO IMPOSE A NOTICE REQUIREMENT ON EMPLOYERS

Prior to the Supreme Court's *Ragsdale* decision, two federal circuits (the Eighth⁹³ and the Eleventh⁹⁴) and three federal district courts⁹⁵ had held that the DOL regulations enforcing pre-leave designation by the employer were inconsistent with the statutory language of the FMLA. Because the circuit and Supreme Court decisions in *Ragsdale* collectively address all the issues discussed in the other cases, this Part will focus exclusively on the *Ragsdale* decisions.

The plaintiff, Tracy Ragsdale, requested medical leave from the defendant, Wolverine, after she was diagnosed with Hodgkin's disease.⁹⁶ Wolverine's generous leave policy permitted Ragsdale to take seven months of unpaid sick leave.⁹⁷ An employee who wanted this leave would be granted an initial leave of up to thirty days; she then would have to submit monthly requests for thirty-day extensions of her leave.⁹⁸ Ragsdale submitted six additional requests and exhausted her seven months of leave.⁹⁹ Wolverine never notified Ragsdale that she was eligible for FMLA leave, however, or that her FMLA leave would run concurrently with her sick leave.¹⁰⁰

After Ragsdale had taken the seven months of sick leave that Wolverine's plan entitled her to, she requested an additional thirty-day extension.¹⁰¹ Wolverine told Ragsdale that she had exhausted all of her available leave and was not entitled to any more time off.¹⁰² Ragsdale then requested that she be

92. 122 S. Ct. 1155 (2002).

93. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000), *aff'd*, 122 S. Ct. 1155 (2002).

94. *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1307-08 (11th Cir. 1999).

95. *Schloer v. Lucent Tech., Inc.*, No. CIV 99-3392, 2000 WL 128698, at *1 (D. Md. Jan. 21, 2000); *Covey v. Methodist Hosp. of Dyersburg, Inc.*, 56 F. Supp. 2d 965, 970 (W.D. Tenn. 1999); *Neal v. Children's Habilitation Ctr.*, No. 97 C 7717, 1999 WL 706117, at *2 (N.D. Ill. Sept. 10, 1999); *see also* *Donnellan v. New York City Transit Auth.*, No. 98 Civ. 1096 (BSJ), 1999 WL 527901, at **4-5 (S.D.N.Y. July 22, 1999) (criticizing the regulations but finding for the employer on narrower ground).

96. *Ragsdale*, 122 S. Ct. at 1159.

97. *Id.*

98. *Id.*; *see also* *Ragsdale*, 218 F.3d at 935.

99. *Ragsdale*, 122 S. Ct. at 1159.

100. *Id.*

101. *Id.*

102. *Id.*

allowed to work fewer hours, but Wolverine denied her request.¹⁰³ Ragsdale did not return to work, and Wolverine fired her.¹⁰⁴

Ragsdale sued, arguing that Wolverine's failure to designate her sick leave as FMLA leave entitled her to an additional twelve weeks of FMLA leave after her seven months of sick leave had expired.¹⁰⁵ Wolverine conceded that it had not designated Ragsdale's sick leave as FMLA leave, but argued that it had complied with the FMLA by giving Ragsdale thirty weeks of leave—more than twice what the FMLA required.¹⁰⁶ The parties filed cross motions for summary judgment.¹⁰⁷ The district court granted Wolverine's motion, reasoning that the regulation requiring leave to run consecutively, absent an employer designation that the leave would run concurrently, would require Wolverine to offer Ragsdale more than twelve weeks of FMLA leave, and, therefore, was inconsistent with the statute.¹⁰⁸

The Eighth Circuit agreed and affirmed.¹⁰⁹ The court looked to other sections of the FMLA to demonstrate that Congress detailed specific notice requirements when it deemed such requirements necessary.¹¹⁰ For example, the court noted that the FMLA details the specific notice requirements that employees must abide by when they request leave.¹¹¹ Also, the employer is specifically required by statute to notify an employee if holding open that employee's position would be a "substantial and grievous economic injury to the operations of the employer," and the employer cannot restore the employee to her past position upon her return.¹¹² The Eighth Circuit concluded that since Congress obviously knew how to include a notice requirement, and did not do so here, it must have intended no notice requirement.¹¹³

The Eighth Circuit also examined the legislative history for insight as to whether employers must designate their employees' leave as falling under the provisions of the FMLA.¹¹⁴ The court found that "the FMLA was intended only to be a statute that provided a minimum labor standard; an assurance that

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000), *aff'd*, 122 S. Ct. 1155 (2002) ("The terms of the statute contemplate only that the employer will be required to provide a 'total' of twelve weeks of unpaid leave.").

110. *Id.*

111. *Id.*

112. *Id.* at 939 (citing 29 U.S.C. § 2614(b)(1)(A) (2000)).

113. *Id.*

114. *Id.*

employers would provide employees with twelve weeks of leave every year.”¹¹⁵ The court concluded that any other reading of the statute would be contrary to the compromise Congress reached when it passed the FMLA.¹¹⁶ The court cited a report from the House of Representatives which stated that:

[t]he amount of time available for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees’ perspective, a twelve week minimum represents a middle ground between the family needs of workers and an employer’s business needs.¹¹⁷

Thus, the court held that the DOL regulations could impermissibly force an employer to provide more leave than the twelve weeks required by statute.¹¹⁸

The Eighth Circuit also pointed out, however, that it was not completely striking down the DOL employer notice requirements.¹¹⁹ The court noted that in some cases such notice is necessary.¹²⁰ For example, the court stated that notice may be necessary where the sole reason the employee exceeded her FMLA leave was because the employer failed to notify her that she was using her FMLA leave, and if she would have known, she would have returned to work.¹²¹ Also, the court noted that notice may be required where the leave is anticipated, and lack of notice would interfere with the employee’s ability to plan and use future FMLA leave.¹²²

Ragsdale appealed to the Supreme Court. The Court, in a 5-4 decision authored by Justice Kennedy, affirmed,¹²³ holding that the DOL’s penalty for violation of its notice rule was inconsistent with the statutory language of the FMLA, that it exceeded the DOL’s authority under that statute,¹²⁴ and that it consequently was not entitled to deference.¹²⁵ First, the Court addressed, but did

115. *Id.*

116. *Id.*

117. *Id.* (citing H.R. REP. NO. 102-135(1), at 37 (1991)).

118. *See id.*

119. *Id.*

120. *Id.*

121. *Id.* at 939-40.

122. *Id.* at 940.

123. *Ragsdale v. Wolverine Worldwide, Inc.*, 122 S. Ct. 1155, 1158 (2002).

124. *Id.* at 1159.

125. *Id.* at 1160-61 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), and its progeny). For thorough discussions of *Chevron* deference, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*,

not resolve, the issue of whether the DOL has the statutory authority under the FMLA to issue regulations requiring employers to provide individual employees with notice of their rights under the statute, because the text of the statute only requires the collective notice provided by posting a sign.¹²⁶ Instead, the Court focused on the narrower issue concerning the penalty imposed by the DOL for noncompliance with its employer notice requirements.¹²⁷

The Court advanced five arguments in support of its holding that the DOL penalties were invalid. First, the Court stated that the penalty is incompatible with the comprehensive remedial provisions of the statute, which provide only equitable relief and remedies for *actual* damages in most cases.¹²⁸ The DOL regulations, however, created an "irrebuttable presumption" that an employee who had not received the requisite notice "deserves 12 more weeks" of leave.¹²⁹ The Court reasoned, however, that this is inconsistent with the statute because it "relieves employees of the burden of proving any real impairment of their rights and resulting prejudice."¹³⁰ In this case, for example, even if Wolverine had complied with the DOL's notice requirement, Ragsdale would not have been able to return to work until after her thirty weeks of employer-provided sick leave had run.¹³¹ Thus, according to the Court, she had suffered no injury which would entitle her to damages (or an extension of leave) under the statute, and the DOL's regulations giving her such damages and a leave extension were inconsistent with the statute.¹³²

Second, the Court rejected the DOL's argument 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."¹³³ Regulations adopted for "administrative convenience," stated the Court, must be consistent with the organic statute. In this case, the DOL's regulations were not.¹³⁴ Moreover, the matter to be presumed in a legal presumption¹³⁵ must be true in most cases, or the

27 PEPP. L. REV. 1, 26-28 (1999); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1256-60 (1997). See generally Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994).

126. *Ragsdale*, 122 S. Ct. at 1160-61.

127. *Id.* at 1161.

128. *Id.*

129. *Id.* at 1162.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 1162-63.

135. For an extensive discussion of presumptions and inferences, see Anna Laurie

reason for the presumption disappears.¹³⁶ The Court reasoned that no showing had been made here that most employees provided with notice would not have suffered injury.¹³⁷ To the contrary, the Court argued, the DOL's presumption likely would be true in only a small minority of cases.¹³⁸

The Court's third argument for invalidating the DOL's regulations was that it gave non-notified employees more than the twelve weeks of leave to which the statute entitled them.¹³⁹ The DOL regulations would have given Ragsdale forty-two weeks of leave: the thirty weeks of sick leave provided by her employer, *plus* the twelve weeks of FMLA leave which the DOL regulations would require to run consecutively as a penalty for the employer's noncompliance with the notice regulation.¹⁴⁰ Moreover, the Court dismissed the argument that employers must provide more than twelve weeks of leave only when they fail to comply with the notice requirement, because, according to the Court, that rationale could be used to justify a penalty of twenty-four or thirty-six or forty-eight weeks.¹⁴¹ Anything greater than the twelve weeks provided by the statute, reasoned the Court, would be inconsistent with the statute.¹⁴²

Fourth, the Court ruled that the DOL penalty was disproportionate and inconsistent with the penalty imposed by the statute for an employer's noncompliance with the statute's posting requirement.¹⁴³ That provision provides for a penalty of a \$100 fine.¹⁴⁴ The additional twelve weeks of punitive leave imposed by the DOL's regulations, however, created a "much heavier" sanction than the sanction imposed by statute and, therefore, was inconsistent with the statute.¹⁴⁵

Bryant & Richard A. Bales, *Using the Same Actor "Inference" in Employment Discrimination Cases*, 1999 UTAH L. REV. 255, 281-83 (1999).

136. *Ragsdale*, 122 S. Ct. at 1163. One of the most common reasons courts create legal presumptions is probability: "[P]roof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it." MCCORMICK ON EVIDENCE § 343 (John William Strong ed., 4th ed. 1992); see also Bryant & Bales, *supra* note 135, at 282; Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 929-30 (1931).

137. *Ragsdale*, 122 S.Ct. at 1163.

138. *Id.*

139. *Id.* at 1163-64.

140. *Id.* at 1164.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (citing 29 U.S.C. § 2619 (b) (2000)).

145. *Id.*

Fifth, the Court cited the statute's proscription against "discourag[ing] employers from adopting or retaining leave policies more generous than" those required by the FMLA.¹⁴⁶ The Court reasoned that the severe and across-the-board penalty imposed by the DOL regulations might cause employers to discontinue their more-generous leave policies, and, therefore, is inconsistent with the statute.¹⁴⁷

Justice O'Connor, in a dissent joined by three other justices, advanced five counter-arguments. First, she argued that requiring employers to provide individualized notice to employees is necessary to implement the FMLA's provisions, because individualized notice ensures that employees are aware of their FMLA rights and facilitates employees in planning their leaves.¹⁴⁸ Moreover, "the Secretary's power to create such a [notice] requirement must also include a power to enforce it in some way."¹⁴⁹

Second, O'Connor argued that the statutory requirement that an employee show actual harm before receiving damages for an employer's failure to provide leave does not preclude the DOL from prescribing a different type of penalty for a different type of noncompliance.¹⁵⁰ To the contrary, the existence of other remedies within the FMLA statute—such as the \$100 fine for noncompliance with posting requirements—indicates that Congress did not intend for the "actual harm" standard to be exclusive.¹⁵¹

Third, O'Connor rejected the majority's argument that twelve "weeks of additional leave is too great a punishment because few employees will have actually suffered this much harm from the employer's failure to give individualized notice."¹⁵² The Court is bound, O'Connor reasoned, to defer to the DOL's judgment of the harms likely to result from an employer's failure to give notice, so long as that judgment is reasonable.¹⁵³ O'Connor concluded that the twelve weeks of additional leave was reasonable, and that it, therefore, should be enforced.¹⁵⁴

Fourth, O'Connor rejected the argument that the penalty was inconsistent with the statute because it would exceed the twelve weeks of statutorily-provided leave.¹⁵⁵ An employer may avoid this penalty, O'Connor noted, simply by

146. *Id.* (citing 29 U.S.C. § 2653 (2000)).

147. *Id.* at 1164-65.

148. *Id.* at 1165-67 (O'Connor, J., dissenting).

149. *Id.* at 1167 (O'Connor, J., dissenting).

150. *Id.* at 1168 (O'Connor, J., dissenting).

151. *Id.* (O'Connor, J., dissenting)

152. *Id.* at 1168-69 (O'Connor, J., dissenting).

153. *Id.* at 1169 (O'Connor, J., dissenting).

154. *Id.* (O'Connor, J., dissenting)

155. *Id.* (O'Connor, J., dissenting)

providing the requisite notice.¹⁵⁶ Moreover, the penalty would no more extend an employer's obligations under the statute than would a fine or any other sort of remedy.¹⁵⁷

Finally, O'Connor rejected the argument that the penalty would discourage employers from providing more leave than the FMLA requires.¹⁵⁸ This provision should not be interpreted, she argued, as prohibiting the DOL from implementing otherwise-valid regulations to secure enforcement of the statute.¹⁵⁹ Moreover, because an employer may avoid the penalty easily by simply providing notice, she concluded that it was unlikely that the penalty would deter many employers from providing more generous leave policies.¹⁶⁰

V. ANALYSIS

A. *The Supreme Court Opinion in Ragsdale*

The majority opinion in *Ragsdale* is hardly a model of clarity. Moreover, because it garnered only five votes, it is also potentially unstable. The opinion left two issues completely undecided.

The first open issue is whether the DOL has the statutory authority to issue regulations requiring employers to provide individualized notice to employees. The four dissenters unequivocally concluded that the DOL does. The five-justice majority expressly avoided the issue. Thus, if only one member of the majority decides in a future case that the DOL does have this statutory authority, that will be sufficient to carry the issue. Moreover, on this point the dissent has the stronger argument; it makes little sense to give the DOL the statutory authority to "prescribe such regulations as are necessary to carry out"¹⁶¹ the substantive provisions of the statute, and then to deprive the DOL of the authority to enforce such regulations.¹⁶²

The second open issue is whether the DOL is prohibited from imposing *any* penalty for noncompliance with notice requirements that would extend an employee's leave beyond the twelve weeks provided in the statute. Several of the majority's arguments seem to support this view.¹⁶³ The majority's third argument—that the regulatory penalty was an invalid extension of the statutorily

156. *Id.* (O'Connor, J., dissenting)

157. *Id.* (O'Connor, J., dissenting)

158. *Id.* (O'Connor, J., dissenting)

159. *Id.* (O'Connor, J., dissenting)

160. *Id.* (O'Connor, J., dissenting)

161. 29 U.S.C. § 2654 (2000).

162. *See Ragsdale*, 122 S. Ct. at 1167 (O'Connor, J., dissenting).

163. *Id.*

mandated twelve weeks of leave¹⁶⁴—would, on its face, prohibit any extension of leave beyond the twelve weeks provided in the statute. Similarly, the majority's fourth argument—that the regulatory penalty was disproportionate and inconsistent with the statute's \$100 penalty for an employer's noncompliance with posting requirements¹⁶⁵—would seem to prohibit any penalty that more than marginally exceeds \$100. Most leave extensions would easily cost the employer more than \$100, since the employer is obligated by statute to maintain the employee's health insurance.¹⁶⁶ Finally, the majority's fifth argument—that punitive regulations cannot discourage employers from adopting or retaining leave policies more generous than those required by the FMLA¹⁶⁷—would prohibit the imposition of *any* administrative penalty.

The majority's first two arguments, however, seem to reflect a more flexible, nuanced view.¹⁶⁸ The first argument—that the punitive regulations were invalid because they absolved employees of showing actual harm¹⁶⁹—and the second argument—that the categorical presumption adopted by the DOL was invalid because it would be true only in a small number of cases¹⁷⁰—indicate that the DOL has the statutory authority to require individualized notice, but that the remedy for failing to give such notice must include a showing of individualized harm.¹⁷¹ Consistent with this approach, the majority stated that the appropriate rule would “involve[] a fact-specific inquiry into what steps the employee would have taken had the employer given the required notice.”¹⁷² This was also the approach taken by the Eighth Circuit.¹⁷³

Under this approach, the DOL simply needs to re-draft its regulations to require, first, a factual showing of harm by aggrieved employees, and second, a penalty equivalent to the harm suffered. This would dull the teeth of the DOL regulations invalidated by the *Ragsdale* Court,¹⁷⁴ insofar as it would impose an

164. See *supra* notes 139-42 and accompanying text.

165. See *supra* notes 143-45 and accompanying text.

166. See 29 U.S.C. § 2614(c)(1) (2000).

167. See *supra* notes 146-47 and accompanying text.

168. See 122 S. Ct. at 1167-68 (O'Connor, J., dissenting).

169. See *supra* notes 128-32 and accompanying text.

170. See *supra* notes 133-38 and accompanying text.

171. See *Ragsdale*, 122 S. Ct. at 1167-68 (O'Connor, J., dissenting).

172. *Id.* at 1162.

173. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000), *aff'd*, 122 S. Ct. 1155 (2002) (permitting recovery when an “employer’s failure to give notice . . . interfere[s] with or [denies] an employee’s substantive FMLA rights”).

174. See Victoria Roberts, *FMLA: Enforcement of FMLA Notice Regulations Left Open after Ragsdale*, *Attorneys Agree*, 59 DAILY LAB. REP. C-1 (March 27, 2002) (noting that “attorneys agree that as a result of *Ragsdale*, the FMLA regulations on notice and designation requirements have lost their punch”); Katherine H. Parker & Kathryn V.

additional burden on aggrieved employees and would decrease the penalty levied on most noncompliant employers. It would, however, permit the DOL to maintain its requirement of individualized notice.

B. The Rationale for Requiring Notice

There are four reasons for requiring employers to give their employees notice that leave is covered under the FMLA. First, such notice is a necessary prerequisite to effectuation of the statute. Second, requiring notice is consistent with the broad purposes of the FMLA. Third, employers are in a better position than employees to know if an employee's leave is covered under the FMLA.

The first reason why employers should be required to give pre-leave notice is that such notice is a necessary prerequisite to enforcement. The FMLA contains a posting requirement,¹⁷⁵ but this posting is not comprehensive and employees cannot reasonably be expected to be thereby put on notice of the pages and pages of administrative regulations governing the statute. Individualized notice is necessary so that employees may plan their leave in a way that maximizes the possibility of a successful post-leave transition back into the workplace.

One example is an employee who qualifies for intermittent leave.¹⁷⁶ Katherine Parker and Kathryn Chandless explain:

If, for instance, an employee who must undergo medical treatments every other week over the course of 12 weeks is not informed that her intermittent absence qualifies as FMLA leave, she might take all of her 12 weeks consecutively and have no leave remaining for future emergency. The inadequate notice of FMLA rights here may have a causal connection to the inability of the employee to exercise her FMLA-guaranteed rights. Thus, because, arguably, the employer's failure to properly notify *did* interfere with the employee having all her choices before her, some imposition of penalties against the employer may be warranted, a position the [*Ragsdale*] [C]ourt noted "may be reasonable."¹⁷⁷

Chandless, *Employers Should Proceed with Caution Despite Invalidation of FMLA Notice Rule*, 70 U.S. LAW WEEK 2659, 2660 (Apr. 23, 2002) (noting that it likely will be the "rare" case in which an employee is awarded additional leave under the Supreme Court's interpretation of the statute).

175. See 29 U.S.C. § 2619(a) (2000).

176. The FMLA entitles a person to take intermittent leave when "medically necessary." *Id.* § 2612(b)(1) (2000).

177. Parker & Chandless, *supra* note 174, at 2660.

Thus, employees who qualify for intermittent leave illustrate the need for pre-leave employer notification.

Such notification is desirable in other cases as well.¹⁷⁸ For example, Wolverine's leave policy gave Tracy Ragsdale thirty weeks of sick leave.¹⁷⁹ Because Wolverine had not notified Ragsdale at the beginning of her leave that her FMLA leave would run concurrently with her sick leave, DOL regulations would have added to her thirty weeks of sick leave an additional twelve weeks of FMLA leave.¹⁸⁰ This would have sufficed to permit Ragsdale to return to work. The Supreme Court, of course, invalidated the regulations and "dis-entitled" Ragsdale to her right to return to work.¹⁸¹ Even under this interpretation, however, prior notice would have had a salutary effect for Ragsdale. Without such notice, employees have no way of knowing whether the employer intends for the FMLA leave to run concurrently with, or consecutively to, the employer's own leave policy. If Wolverine had told Ragsdale up front that her leave would run concurrently, she would have known at the *beginning* of her leave period that she was entitled only to thirty weeks of leave, and not to the forty-two weeks that she would have received had the leave run consecutively. Perhaps Ragsdale could have found a way to structure her leave in a way that only would require her to miss thirty weeks of work; if so, she could have retained her job.¹⁸² Even if not, the prior notice would have given her an opportunity to begin the process of looking for another job before her sick leave expired. But because Wolverine did not provide her with notice until *after* her sick leave had expired, she lost her job with no notice.

178. *See, e.g.*, *Schover v. SMC Pneumatics, Inc.*, No. IP99-1285-C-T/G, 2000 U.S. Dist. LEXIS 12478 (S.D. Ind. Aug. 21, 2000); *Mitchell v. Continental Plastic Containers, Inc.*, No. C-1-97-412, 1998 U.S. Dist. LEXIS 21465 (S.D. Ohio March 3, 1998).

179. *Ragsdale v. Wolverine World Wide, Inc.*, 122 S. Ct. 1155, 1159 (2002).

180. *Id.*

181. *Id.* at 1165.

182. Shay Zeemer offers several other variations on this theme, such as:

Where the employee claims that the sole reason she exceeded her FMLA leave was the employer's lack of notice, and with proper notice, the employee would and could have returned to work at the end of twelve weeks;

Where the employee anticipated taking leave, such as for elective surgery, and the employer's lack of notice caused the employee to take more than needed at the current time;

Where the employee anticipated taking leave and lack of notice deprived the employee of the opportunity to schedule the leave to coincide with work holidays; [and]

Where the employee needed leave to care for a family member, and with proper notice could have managed the leave differently by arranging for other caregivers.

Zeemer, *supra* note 8, at 307-08 (footnotes omitted).

The second reason why employers should be required to give pre-leave notice is that such notice is consistent with the broad purposes of the FMLA. The overriding purpose of the FMLA is job security.¹⁸³ Another important purpose is to help employees balance family and work responsibilities.¹⁸⁴ An employee cannot be secure that her position will be available when she returns to work, and cannot make informed decisions about balancing family and work responsibilities, if she is not properly informed of the amount of time that she is entitled to take off. Requiring employers to notify their employees is elementary to achieving the central purposes of the statute.

Third, employers are in a better position than employees to know if an employee's leave is covered under the FMLA. The FMLA makes it the employer's responsibility to figure out if the employee's reason for taking time off qualifies her for FMLA leave.¹⁸⁵ Furthermore, the FMLA only applies to employers who hire fifty or more employees.¹⁸⁶ Such employers are likely to have human resource departments devoted to keeping track of employee leave. Therefore, it should be routine for an employer to inquire as to the reason for the requested leave, and then determine if it will qualify the employee for FMLA leave. If it is a qualifying reason, the employer should promptly notify the employee that she is entitled to twelve weeks of leave under the FMLA.

Moreover, the burden on employers of designating leave up front as running either concurrently or consecutively is minimal. As *Ragsdale* itself illustrates, employers must make this determination eventually. In *Ragsdale*, the employer waited until after the employee had exhausted her employer-provided leave before informing her that she was not entitled to additional FMLA leave. It would have taken little effort on the employer's part to have provided this notice at the beginning, rather than the end, of the employer-provided leave. Indeed, one would expect that an employer progressive enough to have a generous leave policy would provide early notice as a matter of course, if for no other reason than a self-serving desire to retain its valued employees.

C. *The Rationale for Not Requiring Notice*

There are two reasons why notice requirements arguably should not be imposed. The first is that either the notice requirements themselves, or the penalties for noncompliance, might be inconsistent with the language of the FMLA. As discussed in Part V.A, *supra*, however, one reading of the majority opinion suggests that both the notice requirements and the penalties would be

183. 29 U.S.C. § 2601(b)(1) (2000); Aalberts & Seidman, *supra* note 2, at 1215.

184. 29 U.S.C. § 2601(b)(1) (2000).

185. *See id.* § 2612(e)(1).

186. *See id.* § 2611(4)(A)(1).

consistent with the statute so long as the applicable regulations require a factual showing of harm by aggrieved employees, and the regulations impose a penalty that does not exceed the harm suffered.

The second argument against imposing notice requirements is that notice requirements, coupled with harsh penalties for noncompliance, may discourage employers from providing leave policies that exceed the statutorily-required minimum.¹⁸⁷ Employers may be unwilling to adopt their own leave policies if they believe that they will be required to provide an additional twelve weeks of leave on top of their own policy. The DOL has made it clear, however, that FMLA leave can run concurrently with employer-provided leave policies. Employers are only required to inform the employee taking time off that her leave is covered under the FMLA. As discussed above, the burden of doing so is minimal, because the employer will have to make this determination at some point; under most circumstances it will be just as easy for the employer to provide pre-leave notice as it would be for the employer to provide post-leave notice. Therefore, the addition of this minimal requirement should not discourage employers from providing leave policies of their own that exceed the statutory requirements of the FMLA.

D. Proposal

The Authors believe that the DOL regulations should continue to require that, within two days of the commencement of an employee's FMLA leave, an employer that offers a more-generous leave policy must notify the employee whether the FMLA leave runs concurrently with, or consecutive to, the employer-provided leave. The penalty for an employer's noncompliance must be modified, however, to comply with the Supreme Court's *Ragsdale* decision. The Authors propose that the DOL modify 29 C.F.R. § 825.700(a) to require a factual showing of harm by aggrieved employees and to impose a penalty equivalent to the harm suffered. Thus, an aggrieved employee must allege (and ultimately prove) not only that the notice provided by the employer was insufficient but also that the employee's claimed damages could have been avoided if the employee had received notice. Moreover, if the employee were to prevail on her claim, the DOL would not be permitted to impose a penalty that exceeded the employee's actual damages.

Imposing such a notice requirement on employers places very little additional burden on employers above that which the FMLA already requires.

187. See Parker & Chandless, *supra* note 174, at 2660 (arguing that a ruling for the plaintiff in *Ragsdale* "would have provided a disincentive for employers to give more generous leave policies than required by law, a chilling effect in direct conflict with [] congressional intent").

Failing to impose a notice requirement on employers, however, would effectively require every individual employee, at the risk of forfeiting her job, to be familiar enough with the FMLA and its attendant regulations to recognize that FMLA leave may run concurrently with employer-provided leave, and to demand, prior to taking leave, that the employer specify whether the leave to be taken will qualify as FMLA leave. This is an unreasonable burden to put on employees who, by definition, already are facing a major family event of some type.

VI. CONCLUSION

The implementation of the Family and Medical Leave Act has not been perfect. Statutory ambiguity in the FMLA has raised many questions, including the questions at issue here: whether employers are obligated to provide notice to employees that their leave is covered under the FMLA, and, if so, how the DOL may enforce such a notice requirement. While the Department of Labor has attempted to resolve these issues by promulgating regulations that impose and enforce employer notification requirements, the Supreme Court has struck down the penalty provisions of these regulations as inconsistent with the statutory language and with Congress' intent in enacting the FMLA.

The Authors believe that employer notice requirements are consistent with the text and purpose of the FMLA, and that they are a necessary prerequisite to the statute's effective implementation and enforcement. The DOL can and should amend the provision struck by the Supreme Court. The amended provision should require a factual showing of harm by aggrieved employees and impose a penalty on noncompliant employers that is equivalent to the harm suffered by the employee. This would impose an extremely minimal burden on employers, would permit employees to effectively plan their leaves with minimal risk of jeopardizing their jobs, and would further the overall purpose of the FMLA, enabling employees to balance their work and family obligations.

