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# NOTICE, DESIGNATION AND SUBSTITUTION OF LEAVE REQUIREMENTS UNDER THE FAMILY AND MEDICAL LEAVE ACT<sup>1</sup>

## OVERVIEW OF THE LAW

The Family and Medical Leave Act of 1993 (FMLA) imposes notice obligations on both employers and employees. **Employees** must give their employer notice of their need for leave by providing an FMLA-qualifying reason for leave.<sup>2</sup> Employees are not, however, required to use the words “FMLA” when asking for leave.<sup>3</sup> Employees must also tell their employer if they wish to substitute paid leave for unpaid FMLA leave.<sup>4</sup> Finally, employees must provide their employer with two-days’ notice of their plans to return to work following leave.<sup>5</sup>

**Employers** initially must give employees notice of their FMLA rights.<sup>6</sup> Once an employee has requested leave, the employer then must (1) notify the employee if he/she is eligible for FMLA leave, (2) designate the employee’s leave as FMLA leave, if appropriate, and (3) tell the employee if paid leave must be substituted for unpaid FMLA leave.<sup>7</sup>

In 2002, in a 5-4 decision, the U.S. Supreme Court altered the legal landscape of FMLA notice. In *Ragsdale v. Wolverine World Wide*, 535 U.S. 81 (2002), the Supreme Court invalidated one remedial FMLA regulation related to notice, but expressly declined to rule on the validity of other notice and related remedy provisions.<sup>8</sup> Notably, the *Ragsdale* dissent did validate these related individualized notice provisions, finding the regulations a reasonable exercise of the Department of Labor’s (DOL) authority.<sup>9</sup>

## DISCUSSION

This memorandum discusses the statutory provisions, legislative history and regulations governing FMLA notice, as well as select case law. It includes a discussion of the impact of the U.S. Supreme Court’s ruling in *Ragsdale* on FMLA notice and remedy provisions.

### What did *Ragsdale* do?

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<sup>1</sup> Title II of the FMLA, governing most federal employees, is not discussed here, nor are any special provisions governing employees of local education agencies. For a discussion of notice requirements related to intermittent and reduced schedule leave, see Workplace Flexibility 2010, *Intermittent Leave and Reduced Schedule Leave Under the FMLA* (2004).

<sup>2</sup> 29 U.S.C. § 2612(e); 29 C.F.R. §§ 825.208, 825.302, 825.303.

<sup>3</sup> 29 C.F.R. §§ 825.208(a), 825.302(c), 825.303(b).

<sup>4</sup> 29 U.S.C. § 2612(d)(2).

<sup>5</sup> 29 C.F.R. § 825.309(c).

<sup>6</sup> 29 U.S.C. § 2619(a); 29 C.F.R. §§ 825.300, 825.301.

<sup>7</sup> 29 U.S.C. § 2612(d)(2); 29 C.F.R. §§ 825.110(d), 825.208(a)&(c).

<sup>8</sup> *Ragsdale v. Wolverine World Wide*, 535 U.S. 81 (2002).

<sup>9</sup> 535 U.S. at 101-03.

The *Ragsdale* case reached the Supreme Court in 2002 after several district and circuit courts split over the validity of various FMLA notice and remedy regulations.<sup>10</sup>

In *Ragsdale*, an employee with cancer took 30 weeks of leave under her employer's more generous leave policy.<sup>11</sup> Her employer did not notify her that her leave would count as FMLA leave.<sup>12</sup> At the end of the 30 weeks, she requested additional leave, but the company denied her request.<sup>13</sup> She was terminated when she did not return to work.<sup>14</sup>

She sued under the FMLA, claiming that under the pertinent regulation, leave does not count as FMLA leave until the employer tells the employee it will. She alleged that, because her employer had not given her notice, she was still entitled to an additional 12 weeks of statutorily guaranteed FMLA leave.<sup>15</sup> The district court and the Eight Circuit disagreed, finding that the regulation was in conflict with the statute and invalid because it essentially required an employer to grant an employee more than 12 weeks of FMLA leave per year.<sup>16</sup>

The Supreme Court first found that the FMLA statute contains only one employer notice requirement – that employers post a notice of FMLA rights on their premises.<sup>17</sup> In terms of penalties for employer notice violations, the Court noted that the FMLA imposes a small fine on employers when notice is not properly posted and provides generally for consequential damages and equitable relief when an employer interferes with the exercise of an employee's FMLA rights.<sup>18</sup> The Court determined, however, that the FMLA statute neither requires notice of the designation of leave as FMLA leave nor specifies a penalty if such notice is not given.<sup>19</sup> Rather, these requirements first appeared in the regulations promulgated by the DOL.<sup>20</sup> These regulations provide that an employer must give written notice to an employee that an absence counts as FMLA leave and specify remedies if notice is not properly given.<sup>21</sup>

The Supreme Court ultimately did not rule on the validity of FMLA notice regulations, stating, "...we do not decide whether the notice and designation requirements are

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<sup>10</sup> See, e.g., *Plant v. Morton International, Inc.*, 212 F.3d 929 (6<sup>th</sup> Cir. 2000)(holding that 29 C.F.R. § 825.208(c) was valid and prohibited an employer from designating FMLA leave retroactively when the employer had not provided proper notice to an employee that his paid leave was designated as FMLA leave); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 940 (8<sup>th</sup> Cir 2000)(invalidated 29 C.F.R. § 825.700(a) as contrary to the FMLA statute when it "always provides an additional twelve weeks of leave unless the employer specifically notifies the employee prospectively that she is using her FMLA leave.").

<sup>11</sup> 535 U.S. at 85.

<sup>12</sup> The employer did hold her position open and maintain her health benefits including paying premiums through most of her absence. *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 29 C.F.R. § 825.700(a).

<sup>16</sup> 535 U.S. at 84-86.

<sup>17</sup> 535 U.S. at 95; see also 29 U.S.C. §2619(a).

<sup>18</sup> 29 U.S.C. §2619(a), §2615(a)(1) & §2617(a)(1).

<sup>19</sup> 535 U.S. at 87.

<sup>20</sup> 535 U.S. at 87-88.

<sup>21</sup> See, e.g., 29 C.F.R. § 825.110(d), 825.208(c), 825. 301, 825.700(a).

themselves valid or whether other means of enforcing them might be consistent with the statute.”<sup>22</sup> Instead, it ruled merely on the regulation defining the remedy for failure to give required notice in the context of more generous employer policies.<sup>23</sup> The Court held 29 C.F.R. § 825.700(a) invalid and contrary to the FMLA because it failed to tailor the penalty to the harm an employee actually suffered.<sup>24</sup>

The Court found that the categorical nature of the penalty completely changed an FMLA cause of action by removing the employee’s burden to show a violation of his/her rights and to show the employee suffered harm because of the violation.<sup>25</sup> In *Ragsdale*, the employee could not have acted differently (e.g., returned to work earlier, taken intermittent leave) had she received notice that her leave counted as FMLA leave because her medical condition precluded her from returning to work until long after the leave she received had ended.<sup>26</sup> Although she would not have acted differently had she received notice and was not harmed by the lack of notice, the penalty in the regulation was “blind to this reality” and both denied her employer any credit for leave granted before notice and exposed it to litigation.<sup>27</sup>

The Court also held that the regulation impermissibly amended the FMLA’s substantive entitlement to a total of 12 weeks of leave per year (a figure that resulted from a legislative compromise that DOL and the courts must respect) by giving those employees who do not get proper notice more than 12 weeks of FMLA leave.<sup>28</sup> In addition, the Court noted that the penalty in the regulation was much harsher than the \$100 fine Congress chose to assess on employers willfully violating the FMLA’s sole statutory employer notice requirement.<sup>29</sup>

The *Ragsdale* dissent, unlike the majority, addressed and validated the individualized notice requirements in DOL’s regulations.<sup>30</sup> The dissent found that individualized notice both indicates to employees that the FMLA applies to them specifically, giving them the opportunity to take advantage of the leave and health and job restoration benefits the law confers, and facilitates planning by informing employees whether their FMLA leave and

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<sup>22</sup> 535 U.S. at 96.

<sup>23</sup> 535 U.S. at 96.

<sup>24</sup> 535 U.S. at 90-95.

<sup>25</sup> *Id.* According to the Court, the regulation created an “irrebuttable presumption” lacking “empirical or logical basis” that all employees’ rights would be impaired by a failure to give notice, rather than tailoring the penalty to the harm done. *Id.*

<sup>26</sup> 535 U.S. at 90.

<sup>27</sup> 535 U.S. at 90, 95.

<sup>28</sup> 535 U.S. at 93-94. The Court also found that the regulation thwarted the statute’s clear language that nothing in the FMLA should discourage employers from adopting more generous policies. In enacting the FMLA, Congress did not want better leave policies already offered by employers reduced to the minimum standards of the FMLA because of burdensome administrative requirements. The Court here found that a categorical penalty for a notice violation would do just that: “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.” 535 U.S. at 96.

<sup>29</sup> 535 U.S. at 95; 29 U.S.C. §2619.

<sup>30</sup> 535 U.S. at 97-98.

any employer-sponsored leave will run consecutively or concurrently.<sup>31</sup> The dissent also found the remedial regulation 29 C.F.R. § 825.700(a) reasonable and within DOL's authority.<sup>32</sup> In particular, the dissent found that the regulation penalizing employers who did not give notice would not create a substantive right to more than 12 weeks of leave in contravention of the FMLA statute, noting "...nothing requires an employer to provide more than 12 weeks of leave – an employer may avoid this penalty by following the regulation."<sup>33</sup>

As a result of the court's decision in *Ragsdale*, certain FMLA notice cases decided prior to *Ragsdale* may no longer be controlling law. Likewise, going forward, it is unclear how broadly or narrowly courts will interpret the decision. For example, the Court's decision may be interpreted by the lower courts in a number of ways:

- Only the penalty provision at issue in *Ragsdale* (29 C.F.R. §825.700(a)) is invalid, but it is invalid only when individual harm cannot be shown.
- Only the penalty provision at issue in *Ragsdale* (29C.F.R. §825.700(a)) is invalid, but it is invalid in all cases.
- All penalties imposed by the regulations that create a substantive right to leave beyond that found in the statute are invalid.
- All of the notice requirements in the regulations exceed DOL's authority under the statute.

Based on a review of cases post-*Ragsdale* (as discussed in more detail below), the courts thus far have generally required a showing that an employee was prejudiced or harmed by a lack of FMLA notice.<sup>34</sup> Several courts have also extended the Supreme Court's rationale to other FMLA notice and remedy provisions.<sup>35</sup>

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<sup>31</sup> 535 U.S. at 97-98. The dissent also found the requirements reasonable because: (i) employees need to be aware of their rights and responsibilities under the FMLA, and (ii) nothing in the FMLA statute precludes an individualized notice requirement (e.g., the statute does not indicate that the requirement to post notice is meant to be the exclusive notice requirement for the law, and different notice requirements serve different purposes and thus may take different forms). *Id.* at 99.

<sup>32</sup> 535 U.S. at 101-103. See *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 371-72 (1973) ("...where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.").

<sup>33</sup> 535 U.S. at 104. The dissent also dismissed the argument that the notice requirement was onerous, noting that at most, the regulation just moves up the time that the employer must inform the employee what the employer already knows – that the leave is FMLA leave, and that the regulation would discourage employers from offering more generous policies, noting that the statutory provision seeking to encourage more generous policies does not deny DOL the power to promulgate any regulation that may have even a small discouraging effect. *Id.* at 104-105.

<sup>34</sup> See, e.g., *Katekovich v. Team Rent a Car of Pittsburgh*, 36 Fed. Appx. 688, 691, 2002 WL 1288766 (3d Cir. 2002).; *Conoshenti v. Public Service Electric & Gas Company*, 364 F.3d 135 (3<sup>rd</sup> Cir. 2004); *Wright v. Owens-Illinois, Inc.*, 2004 WL 1087359 (S.D. Ind. 2004); *Sims v. Schultz*, 305 F. Supp. 2d 838 (N.D. Ill. 2004); *Felder v. Winn-Dixie Louisiana, Inc.*, 2003 U.S. Dist. LEXIS 22535 (E.D.La 2003). Courts generally do not find harm if the employee is unable to return to work at the end of the leave period. See,

## What notice does the FMLA require from employers and employees?

As noted, the recent *Ragsdale* decision may change the way that FMLA notice and remedy provisions are interpreted by employers, employees and the courts. The discussion below highlights the types of notice required of employers and employees by the FMLA under a typical leave scenario, noting where *Ragsdale* may impact the law.

### Employer Notice of FMLA Rights

First, the FMLA **statute** requires employers to **conspicuously post a notice** about the FMLA for their employees.<sup>36</sup> This notice must include information on employee rights and responsibilities under the law and on how to file a complaint.<sup>37</sup> An employer who **fails** to post such notice is subject to **a fine of up to \$100** for each willful violation of the law.<sup>38</sup>

The **regulations** add that the notice must be **posted whether or not** the employer has any FMLA **“eligible employees”** and requires the employer to provide the notice in the language in which large portions of its employees are literate (if not English).<sup>39</sup> Under the **regulations, employers** must also provide general FMLA information in employee **handbooks** or, if the employer does not have a handbook, the employer must provide a **separate written notice** of the employer’s general FMLA policies and procedures.<sup>40</sup> In addition, the **employer** must give the employee **specific written notice** explaining the specific expectations and obligations of the employee under the employer’s policies, and the **consequences of failure** to meet them.<sup>41</sup> The employer must give this notice in the

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e.g., *Katekovich v. Team Rent a Car of Pittsburgh*, 36 Fed. Appx. 688, 691, 2002 WL 1288766 (3d Cir. 2002). This result is consistent with another FMLA regulation, 29 C.F.R. § 825.214, which provides that if an employee is unable to perform an essential function of the position, the employee has no right to restoration to another position under the FMLA, although the Americans with Disabilities Act may apply.

<sup>35</sup> See, e.g., *Conoshenti v. Public Service Electric & Gas Company*, 364 F.3d 135 (3<sup>rd</sup> Cir. 2004), *Phillips v. Leroy-Somer North America, et al*, 2003 U.S. Dist. LEXIS 5349 (W.D. Tenn. 2003); *Felder v. Winn-Dixie Louisiana, Inc.*, 2003 U.S. Dist. LEXIS 22535 (E.D.La 2003); *Gurley v. Ameriwood Indus.*, 232 F.Supp.2d 969 (E.D. Mo. 2002).

<sup>36</sup> 29 U.S.C. §2619(a). The committee reports on the FMLA did not address the notice posting requirements. See H.R. Rep. 103-8(I)(1993), S.Rep. 103-3 (1993). Two House committee reports accompanied the FMLA – one by the Committee on Education and Labor dealing with Title I of the Act, and the other by the Committee on Post Office and Civil Service, dealing with Title II. Because this memo focuses solely on Title I of the Act, all references to the House Committee Report refer to the report by the Committee on Education and Labor, unless otherwise noted.

<sup>37</sup> *Id.*

<sup>38</sup> 29 U.S.C. §2619(b). The FMLA also contains notice provisions regarding medical certification of serious health conditions, and notice provisions applicable to key (highly compensated) employees. See 29 U.S.C. §2613, 2614(b) and Workplace Flexibility 2010, *Eligibility for Medical Leave Under the FMLA* (2004).

<sup>39</sup> 29 C.F.R. § 300(a).

<sup>40</sup> 29 C.F.R. § 301(a)&(b). The process for providing separate written notice follows that for specific written notice discussed below.

<sup>41</sup> 29 C.F.R. § 825.301(b). See also 60 Fed. Reg. 2219. The specific written notice must, for example, tell the employee whether leave will be counted as FMLA leave or paid leave will be substituted for unpaid leave, whether medical certification or fitness-for-duty reports will be required, whether the employee is a key employee, and what health insurance liabilities exist. *Id.*

language in which the employee is literate at least the **first time in each six-month period** that an employee gives notice of the need for FMLA leave.<sup>42</sup>

DOL believed that the requirement that specific notice be in writing “ensures that the employee receives critical information and provides appropriate documentation of the information conveyed to the employee in the event of a dispute.”<sup>43</sup> When promulgating the final regulations, DOL rejected suggestions that one generic notice applicable to all employees qualifies as specific written notice.<sup>44</sup> Rather, DOL stated that “the intent of this notice requirement is to insure employees receive the information necessary to enable them to take FMLA leave,” and, therefore, “[i]t would be inappropriate to use a generic notice as much of the information may be employee specific....”<sup>45</sup>

Finally, the regulations also add to the penalty for a violation of the posting requirement, providing that employers who do not post notice cannot take adverse action (including denying FMLA leave) against an employee who does not give notice of a need for leave.<sup>46</sup> The regulations also add a penalty prohibiting employers who fail to provide written notice from taking action against an employee for failure to comply with the requirements in the notice.<sup>47</sup> These regulations have been challenged following the Supreme Court’s decision in *Ragsdale*.<sup>48</sup>

In one well-known pre-*Ragsdale* case, the Ninth Circuit found that an employer’s compliance with general FMLA posting requirements did not satisfy its other notice obligations under the FMLA.<sup>49</sup> Other pre-*Ragsdale* cases ruling on employer notice violations may no longer be controlling following the *Ragsdale* decision.<sup>50</sup>

Following *Ragsdale*, when employers post FMLA information, include information in company handbooks and provide explanatory memos or orientation sessions on the FMLA, courts have generally ruled in favor of the employer when an employee claims an FMLA notice violation.<sup>51</sup> Post-*Ragsdale*, courts have also required a showing of harm to the employee before finding a violation of FMLA posting or written notice requirements.<sup>52</sup>

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<sup>42</sup> 29 C.F.R. § 825.301(b)&(c).

<sup>43</sup> 60 Fed. Reg. 2220.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 29 C.F.R. § 825.300(b).

<sup>47</sup> 29 C.F.R. § 825.301(f).

<sup>48</sup> See, e.g., *Conoshenti v. Public Service Electric and Gas Company*, 364 F.3d 135 (3<sup>rd</sup> Cir. 2004); *Felder v. Winn-Dixie Louisiana, Inc.*, 2003 U.S. Dist. LEXIS 22535 (E.D.La 2003).

<sup>49</sup> *Bachelor v. America West Airlines, Inc.*, 259 F.3d 1112 (9<sup>th</sup> Cir. 2001).

<sup>50</sup> See, e.g., *Wilson v. Lemington Home for the Aged*, 159 F. Supp. 2d 186 (W.D.Pa 2001); *Goodwin-Haulmark v. Menninger Clinic, Inc.*, 76 F. Supp. 2d 1235 (D.Kan. 1999); *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253 (N.D.Cal. 1998).

<sup>51</sup> See, e.g., *Sanders v. May Dept. Stores Co.*, 315 F.3d 940 (8<sup>th</sup> Cir. 2003); *Kelso v. Corning Cable Systems Intern. Corp.*, 224 F.Supp.2d 1052 (W.D.N.C. 2002).

<sup>52</sup> See, e.g., *Conoshenti v. Public Service Electric and Gas Company*, 364 F.3d 135 (3<sup>rd</sup> Cir. 2004); *Phillips v. Leroy-Somer North America, et al.*, 2003 U.S. Dist. LEXIS 5349 (W.D. Tenn. 2003); *Felder v. Winn-Dixie Louisiana, Inc.*, 2003 U.S. Dist. LEXIS 22535 (E.D.La 2003).

### Employee Notice of Need for Leave

The **statute** also requires **employees** to provide notice to their employers about their **individual leaves**.<sup>53</sup> **Employees** must provide their employer with **at least 30 days notice for foreseeable leave**.<sup>54</sup> If an employee needs to begin a leave in fewer than 30 days, the employee must provide notice **“as practicable.”**<sup>55</sup>

According to the **committee reports**, the 30-day advance notice requirement was to **apply to “the extent possible and practical.”**<sup>56</sup> The reports explain that employees facing emergency medical conditions or unforeseen changes would not be precluded from taking leave if they could not give 30 days notice.<sup>57</sup> Some examples of situations in which the 30-day employee advance notice requirement would not apply would be premature birth, sudden changes in a patient’s condition that require a change in scheduled medical treatment, or sudden availability of a child for adoption.<sup>58</sup>

The **regulations** expand on what can be **expected from employees when the foreseeable leave starts prior to 30 days or when the leave is simply not foreseeable**. The statutory requirement of providing notice “as practicable” is understood by the regulations to mean “as soon as both possible and practicable.”<sup>59</sup> For foreseeable leave where it is not possible to give 30 days notice, the regulations state that this means providing notice **within one or two days** after the need for leave becomes known to the employee; for unforeseeable leave, the regulations also require that notice be given as soon as possible (generally one or two working days) after the employee learns of the need for leave.<sup>60</sup> Notice need be given **only one time**.<sup>61</sup>

The **regulations** also add that **employees need not mention the FMLA by name** in order to be considered as giving sufficient notice of their need for FMLA leave.<sup>62</sup> According to the regulations, if an employee offers the employer a reason for leave that ultimately is found to be an FMLA-qualifying reason for leave, the employee’s request is sufficient.<sup>63</sup>

Finally, the **regulations** add that if an **employee does not give 30 days notice** of foreseeable leave without reasonable excuse, the **employer may delay** the taking of leave

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<sup>53</sup> 29 U.S.C. §2612(e).

<sup>54</sup> 29 U.S.C. §2612(e)(1).

<sup>55</sup> *Id.* Special notice requirements apply regarding intermittent leave.<sup>55</sup> See Workplace Flexibility 2010, *Intermittent Leave and Reduced Schedule Leave Under the FMLA* (2004).

<sup>56</sup> S.Rep. 103-3 (1993), at 22.

<sup>57</sup> *Id.*

<sup>58</sup> H.R. Rep. 103-8(I)(1993), at 38-39; S.Rep. 103-3 (1993), at 22.

<sup>59</sup> 29 C.F.R. § 825.302(b).

<sup>60</sup> 29 C.F.R. § 825.208(a), 825.302(b)&(c), 825.303(a)&(b).

<sup>61</sup> 29 C.F.R. § 825.302(a).

<sup>62</sup> 29 C.F.R. § 825.208(a)(2), 825.302(a), (c) & (d) & 825.303(b).

<sup>63</sup> 29 C.F.R. § 825.208(a)(1)&(2), 825.302(c) & 825.303(b). This is especially true when an employee is requesting paid leave for a purpose covered by the FMLA, or seeks to extend a period of paid leave using unpaid FMLA leave. 29 C.F.R. § 825.208(a)(2).



by at least 30 days.<sup>64</sup> In addition, if the employee gives **no reasons**, or no FMLA-qualifying reasons, leave **may be denied**.<sup>65</sup>

The “**as soon as practicable**” notice standard has generated **litigation**.<sup>66</sup> For example, the Fifth Circuit found that an employee could meet the “as soon as practicable” standard when a change in her insurance coverage required her to reschedule surgery such that she was unable to give 30 days notice of her need for FMLA leave.<sup>67</sup> The court there acknowledged that a non-medical reason – i.e., a change in insurance – could justify a shortened notice period under the FMLA.<sup>68</sup> Other courts have permitted employees to give notice of their emergency/unforeseeable absences after they were supposed to have reported for work.<sup>69</sup>

The **courts** have also **confirmed** that an **employee need not expressly mention the FMLA** when providing notice of the need for leave. According to the courts, no specific categorical rules define the content of the information an employee must give to the employer to provide notice that leave is for an FMLA reason and should be designated as FMLA leave; the facts and circumstances of each situation control.<sup>70</sup>

**Some courts** have ruled in favor of employees, finding either that the **employee need not specifically invoke the FMLA** to qualify for FMLA leave, or that the employer failed in its obligation to ask for more information needed to make a designation.<sup>71</sup> Other courts have ruled in favor of the employer, finding that the **employer need not be “clairvoyant”** or that the employee failed to provide reasons sufficient to qualify for FMLA leave.<sup>72</sup> In one notable recent case, the Seventh Circuit found **constructive notice** when a model employee suddenly engaged in unusual behavior, like sleeping on the job.<sup>73</sup>

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<sup>64</sup> 29 C.F.R. § 825.304(b); 825.312(a).

<sup>65</sup> *Id.*

<sup>66</sup> When employees give timely notice, courts often simply acknowledge the fact. See, e.g., *Conoshenti v. Public Service Elec. & Gas Co.*, 364 F.3d 135 (3d Cir. 2004) (finding employee gave sufficient notice of need for leave when he notified employer two days after car accident that he was injured and his physician had indicated he would not be able to work for two weeks).

<sup>67</sup> *Hopson v. Quitman County Hosp. And Nursing Home, Inc.*, 126 F.3d 635 (5<sup>th</sup> Cir. 1997).

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., *Mora V. Chem-Tronics, Inc.*, 16 F.Supp.2d 1192 (S.D.Cal 1998).

<sup>70</sup> See, e.g., *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5<sup>th</sup> Cir. 1995); *Collins v. NTN-Bower Corp.*, 272 F.3d 1006 (7<sup>th</sup> Cir. 2001).

<sup>71</sup> See, e.g., *Xin Liu v. Amway Corp.*, 347 F.3d 1125 (9<sup>th</sup> Cir. 2003); *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7<sup>th</sup> Cir. 1998); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5<sup>th</sup> Cir. 1995).

<sup>72</sup> See, e.g., *Brennerman v. MedCentral Health System*, 366 F.3d 412 (6<sup>th</sup> Cir. 2004); *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7<sup>th</sup> Cir. 2001); *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973 (5<sup>th</sup> Cir. 1998).

<sup>73</sup> *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7<sup>th</sup> Cir. 2003) (precluding summary judgment when genuine issue of material fact as to whether employee’s severe depression rendered him unable to work or to give employer notice of condition and whether employee’s change in behavior manifested by falling asleep on the job constituted constructive notice, given that notice was not “feasible” for person with major depression and was unnecessary even if change in behavior was not enough to alert employer to need for medical leave).

In addition, the oft-referenced “**ingrown toenail**” case demonstrates the courts’ application of FMLA notice and leave designation requirements. In *Manuel v. Westlake Polymers Corporation*, the Fifth Circuit found that, **for unforeseeable leave, an employee need not specifically mention the FMLA in order to invoke its protections.**<sup>74</sup> This was true even if the condition at issue might not ordinarily trigger the employer to seek more information about the underlying need for leave.<sup>75</sup>

The employee in *Manuel*, who had a long history of absenteeism, was terminated under a no-fault attendance policy. Over a month of her leave was taken for a procedure to remove an ingrown toenail and to recover from complications (an infection) from the procedure that required her to be on crutches. Upon her termination, she filed suit under the FMLA claiming that these absences were unlawfully counted as an additional step in her employer’s no-fault attendance policy.<sup>76</sup>

The district court concluded that when the leave is unforeseeable and the condition not the type that would normally trigger an employer to inquire further whether FMLA leave is needed, the employee must make some attempt to refer to the FMLA in order to benefit from its protections. The Fifth Circuit disagreed, declining to make categorical rules about the kinds of notice required for foreseeable and unforeseeable leave.<sup>77</sup> It held that an employee need not make specific reference to the FMLA when requesting leave: “Congress, in enacting the FMLA, did not intend employees like June Manuel to become conversant with the legal intricacies of the Act.”<sup>78</sup> The court noted that employers have protection against employees who seek to abuse the FMLA’s “generous provisions,” namely, the certification and second opinion procedures that permit further inquiry into the seriousness of the health condition.<sup>79</sup>

#### Employer Notice of FMLA Eligibility

The **statute** defines “eligible employees” under the FMLA, but contains **no explicit requirements** regarding **notice of eligibility** by the employer.<sup>80</sup>

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<sup>74</sup> *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5<sup>th</sup> Cir. 1995). This case was decided under the interim regulations, though the court discussed both the interim and final regulations.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* In the Appellant’s Reply Brief, the employee pointed out the infection “presumably could have led to gangrene and amputation if not treated properly.” Reply Brief of Appellant, June Manuel, *Manuel v. Westlake Polymers Corp.* (filed April 21, 1995) at 7, available at 1995 WL 17116703. FMLA absences do not count in no-fault attendance policy calculations. 29 C.F.R. § 825.220(c).

<sup>77</sup> 66 F.3d at 763-64.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 29 U.S.C. §2611(2). Under the statute, an “eligible employee” is one who has been employed for at least 12 months by the employer from whom leave is requested and who has worked for at least 1,250 hours of service during the previous 12-month period. 29 U.S.C. §2611(2)(A). The hours of service requirement relies on the legal standards set forth in the Fair Labor Standards Act, 29 U.S.C. §207. 29 U.S.C. §2611(2)(C). Excluded from the definition are certain federal employees and employees who work for small businesses (specifically, businesses that employ less than 50 employees within 75 miles of the employee’s worksite). 29 U.S.C. §2611(2)(B). The committee reports explain the “eligible employee”

The **regulations** add that the employer must give **timely notice** that an employee is eligible for FMLA leave.<sup>81</sup> If the employer does not give this notice, the employer cannot later challenge the employee's FMLA eligibility, and, in certain cases, **the employee** is deemed **automatically eligible** and the **employer may not deny** FMLA leave.<sup>82</sup> These regulations **have been challenged** following the Supreme Court's decision in *Ragsdale*.<sup>83</sup>

Prior to *Ragsdale*, the **courts** often applied **equitable estoppel** theory to determine whether an employee was eligible for FMLA leave when the employer gave faulty notice of eligibility.<sup>84</sup> **Post-Ragsdale**, these FMLA eligibility notice and remedy provisions **have been challenged** in court.<sup>85</sup>

In addition, courts have applied *Ragsdale* to require a **showing of prejudice** or harm to the employee when an **employer makes a mistake** regarding the length or timing of leave periods.<sup>86</sup> In some of these "employer mistake" cases, however, courts have relied on equitable estoppel theory to prevent employers from contesting an employee's FMLA eligibility when they have erred.<sup>87</sup> One district court also found an employer not protected for its erroneous calculations of a leave period even when an employee who was improperly terminated while on FMLA leave had informed the employer prior to the end of the leave period that she would not return to work until after the FMLA period expired.<sup>88</sup>

### Employer Designation of Leave as FMLA Leave

The **statute** is **silent** with respect to **designation** of leave requirements.<sup>89</sup>

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definition in more detail, but also do not discuss any requirements regarding notice of FMLA eligibility by employers or employees. See H.R. Rep. 103-8(I)(1993); S.Rep. 103-3 (1993).

<sup>81</sup> 29 C.F.R. § 825.110(d).

<sup>82</sup> *Id.*

<sup>83</sup> See, e.g., *Gurley v. Ameriwood Indus.*, 232 F. Supp. 2d 969 (E.D. Mo. 2002).

<sup>84</sup> See, e.g., *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706 (2nd Cir. 2001); *Scheidecker v. Arvig Enterprises, Inc.*, 122 F. Supp. 2d 1031 (D. Minn. 2000). *Post-Ragsdale*, these cases may no longer be controlling.

<sup>85</sup> See, e.g., *Gurley v. Ameriwood Indus.*, 232 F. Supp. 2d 969 (E.D. Mo. 2002). In addition, one district court has allowed an employee to use vacation time to become eligible for FMLA leave. *Ruder v. Maine General Medical Center*, 204 F. Supp. 2d 16 (D. Me. 2002).

<sup>86</sup> See, e.g., *Farina v. Compuware Corp.*, 256 F. Supp. 2d 1033 (D. Ariz. 2003); *Medoza v. Micro Elecs., Inc.*, 2003 U.S. Dist. LEXIS 15249 (N.D. Ill. Sept. 2, 2003). The courts often have found that if an employee could not return to work at the end of the FMLA leave period the employee could not show the requisite harm. See, e.g., *Strykowski v. Rush North Shore Medical Center*, 2003 U.S. Dist. LEXIS 13206 (N.D. Ill. 2003).

<sup>87</sup> See, e.g., *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002); *Gurley v. Ameriwood Indus.*, 232 F. Supp. 2d 969 (E.D. Mo. 2002).

<sup>88</sup> *Medoza v. Micro Elecs., Inc.*, 2003 U.S. Dist. LEXIS 15249 (N.D. Ill. Sept. 2, 2003).

<sup>89</sup> The committee reports for the FMLA describe the FMLA's notice provisions as "extensive," but also contain no explicit discussion of designation of leave requirements. See H.R. Rep. 103-8(I)(1993), at 38; S.Rep. 103-3 (1993), at 22.

Under the **regulations** the burden is on the **employer to designate** a requested leave as “FMLA leave,” even if the employee has not requested “FMLA leave” by name.<sup>90</sup> The employer is also required to seek the information necessary to make this determination from the employee if needed.<sup>91</sup> **Employers generally may not retroactively designate** leave as FMLA leave.<sup>92</sup>

In addition, under **regulations** covering employers who offer **more generous benefits** than those under the FMLA, employers must observe any internal policies that offer more generous benefits, and may **not diminish FMLA rights** through internal company policies.<sup>93</sup> Employers are not required, however, to extend FMLA entitlements (such as maintenance of health benefits) to additional leave periods offered by employers but not covered by the FMLA.<sup>94</sup>

Finally, according to the **regulations**, an **employer may not count** leave as FMLA leave in certain circumstances if the employer has **not provided proper notice** to the employee that the leave will count as FMLA leave.<sup>95</sup> These regulations **have been challenged** following the Supreme Court’s decision in *Ragsdale*.<sup>96</sup>

Pre-*Ragsdale*, some **courts affirmed** the **right of employers to impose FMLA leave** on employees even if they did not request it, if FMLA-qualifying conditions were met.<sup>97</sup> Significant **case law**, including a **split amongst the circuit courts**, also exists regarding the various remedial regulations that **prohibit an employer from counting leave as FMLA leave** until it gives notice to the employee that leave is FMLA-qualifying.<sup>98</sup> As discussed above, the Supreme Court in *Ragsdale* invalidated one of these regulations, 29 C.F.R. § 825.700(a)(related to more generous employer leave policies), but left open the question of how its holding applied to other FMLA notice and remedy provisions.

**Post-Ragsdale**, some courts have interpreted the decision narrowly, declining to apply it to other FMLA provisions.<sup>99</sup> Other courts have not only applied *Ragsdale* to 29 C.F.R. §

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<sup>90</sup> 29 C.F.R. §825.208(a). For intermittent or reduced leave, only one such notice is required unless the leave circumstances have changed. *Id.*

<sup>91</sup> 29 C.F.R. § 825.208(a), 825.302(c), 825.303(b). The designation must be based solely on information from the employee or the employee’s spokesperson (e.g., if the employee is incapacitated). *Id.* Employers may also request medical certification to verify the existence of a “serious health condition.” 29 C.F.R. § 825.302(c). See Workplace Flexibility 2010, *Eligibility for Medical Leave Under the FMLA* (2004).

<sup>92</sup> 29 C.F.R. § 825.208(d)&(e).

<sup>93</sup> 29 C.F.R. § 825.700(a).

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., 29 C.F.R. § 825.208(c), 825.700(a).

<sup>96</sup> See, e.g., *Katekovich v. Team Rent a Car of Pittsburgh*, 36 Fed. Appx. 688, 691, 2002 WL 1288766 (3<sup>rd</sup> Cir. 2002); *Farina v. Compuware Corp.*, 256 F. Supp. 2d 1033 (D. Ariz. 2003); *Roberson v. Cendant Travel Services, Inc.*, 252 F.Supp.2d (M.D. Tenn. 2002).

<sup>97</sup> See, e.g., *Havender v. Norton Co.*, 1997 WL 793085 at 7 (N.D.N.Y. 1997).

<sup>98</sup> See, e.g., *Plant v. Morton International, Inc.*, 212 F.3d 929 (6<sup>th</sup> Cir. 2000); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 940 (8<sup>th</sup> Cir 2000).

<sup>99</sup> See, e.g., *Conti v. CSX International*, 2003 U.S. Dist. LEXIS 2520 (E.D.Pa 2003)(finding on issue of disregarding employer testimony that *Ragsdale* “holds nothing more than the voiding of this specific regulation [29 C.F.R. § 825.700(a)], which was not at issue; court noted that employer was inferring from the *Ragsdale* holding “additional legal principles that may become part of the FMLA legal landscape down

825.700(a), but also **extended the reasoning of *Ragsdale*** to apply to other FMLA notice and remedy provisions, including 29 C.F.R. § 825.208 (providing for designation of FMLA leave and substitution of paid leave for FMLA leave, and prohibiting employers from counting leave as FMLA leave prior to notice to employees of their designation that paid leave is being substituted for FMLA leave).<sup>100</sup> Relying on *Ragsdale*, the courts have generally required a showing that an **employee was prejudiced** or harmed by the lack of notice.<sup>101</sup> Courts generally do not find harm if the employee is unable to return to work at the end of the leave period.<sup>102</sup>

### Employer or Employee Notice of Substitution of Leave

Many (although not all) employers offer their employees paid leave in the form of vacation, personal, family, medical or sick leave. The **FMLA does not require paid sick leave** when an employer does not normally provide it.<sup>103</sup> Under the **statute**, when an employer makes paid leave days available to its employees, the **employer may require** that an employee **substitute** the paid leave days for the FMLA-qualifying days.<sup>104</sup> An **employee** may also **choose**, on his or her own initiative, to **substitute** the employer-provided paid leave days for the statutorily provided unpaid FMLA leave days.<sup>105</sup> Thus the 12 weeks of FMLA unpaid leave will not accrue in addition to an employee's existing paid leave days if an employer requires or the employee requests to substitute paid leave for FMLA leave.

According to the **committee reports**, Congress included paid leave substitution provisions in the FMLA in order to **“mitigate the financial impact of wage loss due to**

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the line.”; court denied reconsideration of denial of summary judgment for employer); *Schmauch v. Honda of Am. Mfg.*, 259 F. Supp.2d 823 (S.D. Ohio 2003)(finding employer's reliance on *Ragsdale* to support summary judgment on damages issue misplaced when *Ragsdale* concerned regulation that “relieved employees of the burden of proving any real impairment of their rights and resulting prejudice” while regulations at issue (29 C.F.R. § 825.220(b)&(c)) each provided employees with ways to prove impairment of rights, not to circumvent the requirement to do so; court denied summary judgment for employer and for employee).

<sup>100</sup> See, e.g., *Katekovich v. Team Rent a Car of Pittsburgh*, 36 Fed. Appx. 688, 691, 2002 WL 1288766 (3d Cir. 2002); *Smith v. Blue DOT Servs. Co.*, 283 F. Supp. 2d 1200 (D. Kan. 2003). Some of these courts have acknowledged that the *Ragsdale* holding was limited to a single regulation, but applied its reasoning to other regulations based on the similarity, or similar effect, of the provisions. Other courts have merely extended the holding without mentioning its explicitly narrow focus.

<sup>101</sup> See, e.g., *Conoshenti v. Public Service Electric & Gas Company*, 364 F.3d 135 (3<sup>rd</sup> Cir. 2004); *Wright v. Owens-Illinois, Inc.*, 2004 WL 1087359 (S.D. Ind. 2004); *Sims v. Schultz*, 305 F. Supp. 2d 838 (N.D. Ill. 2004); *Felder v. Winn-Dixie Louisiana, Inc.*, 2003 U.S. Dist. LEXIS 22535 (E.D.La 2003).

<sup>102</sup> See, e.g., *Katekovich v. Team Rent a Car of Pittsburgh*, 36 Fed. Appx. 688, 691, 2002 WL 1288766 (3d Cir. 2002); *Roberson v. Cendant Travel Services, Inc.*, 252 F.Supp.2d (M.D. Tenn. 2002); *Hill v. Steven Motors, Inc.*, 228 F. Supp. 2d 1247 (D. Kan. 2002), *aff'd by Hill v. Steven Motors, Inc.*, 2004 U.S. App. LEXIS 8849 (10<sup>th</sup> Cir. Kan., May 5, 2004). This result is consistent with another FMLA regulation, 29 C.F.R. § 825.214, which provides that if an employee is unable to perform an essential function of the position, the employee has no right to restoration to another position under the FMLA, although the Americans with Disabilities Act may apply.

<sup>103</sup> 29 U.S.C. §2612(d)(2)(B).

<sup>104</sup> 29 U.S.C. §2612(d)(2)(A)&(B). If paid leave is provided for fewer than 12 weeks, the additional leave to equal the 12-week FMLA entitlement may be unpaid. 29 U.S.C. §2612(d)(1).

<sup>105</sup> 29 U.S.C. §2612(d)(2)(A)&(B).

**family and temporary medical leaves.”**<sup>106</sup> The substitution provisions also assured that an employee was entitled to the benefits of applicable paid leave plus any remaining leave time available through the FMLA’s unpaid leave entitlement.<sup>107</sup> Congress, however, reiterated in the committee reports that nothing in the FMLA required an employer to provide paid sick leave in any situation where it normally did not do so.<sup>108</sup>

Under the **regulations**, **employers** must give employees **notice** that paid leave must be substituted for FMLA leave within **two days** of **employee notice of the need for leave**.<sup>109</sup> In addition, the **regulations** state that **paid leave will not count as FMLA leave until notice** of such substitution has been given.<sup>110</sup> This regulation **has been challenged** following the Supreme Court’s decision in *Ragsdale*.<sup>111</sup>

If the employee does not elect or the employer does not require the employee to substitute paid leave for FMLA leave, the **employee remains entitled** to all of the paid leave earned under the employer policy.<sup>112</sup> Similarly, if paid leave is not FMLA-qualified leave, the **employee retains** his/her full 12-week FMLA leave entitlement.<sup>113</sup>

**Pre-Ragsdale**, some courts noted the complexity of the substitution provisions and gave **leeway to the employee** when determining whether proper notice was given that paid leave would be substituted for unpaid FMLA leave.<sup>114</sup> Following *Ragsdale* these cases may no longer be controlling. **Post-Ragsdale**, some courts have **invalidated** 29 C.F.R. § 825.208(c), which denies employers the right to count leave as FMLA-leave prior to giving employees notice that paid leave has been designated as FMLA leave.<sup>115</sup>

#### Employee Notice of Intent to Return to Work

The **statute** allows an employer to require an employee on FMLA leave to **report periodically** on the **employee’s status** and **intent to return to work**.<sup>116</sup> According to the **committee reports**, Congress intended to limit the frequency of these periodic status reports to **“reasonable intervals.”**<sup>117</sup> Notably, an amendment to the legislation

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<sup>106</sup> H.R. Rep. 103-8(I)(1993), at 38; S.Rep. 103-3 (1993), at 24.

<sup>107</sup> *Id.* When paid leave of less than 12 weeks’ duration is substituted for unpaid leave “the employer need only provide an additional period of unpaid leave so that the total of paid and unpaid leave provided equals 12 weeks.” *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 29 C.F.R. § 825.208(c).

<sup>110</sup> *Id.*

<sup>111</sup> *Phillips v. Leroy-Somer North America, et al.*, 2003 U.S. Dist. LEXIS 5349 (W.D. Tenn. 2003).

<sup>112</sup> 29 C.F.R. § 825.207(f).

<sup>113</sup> 29 C.F.R. § 825.207(g).

<sup>114</sup> See, e.g., *Strickland v. Water Works and Sewer Bd.*, 239 F.3d 1199 (11th Cir. 2001); *Blankenship v. Buchanan General Hospital, Inc.*, 999 F. Supp. 832 (W.D.Va 1998).

<sup>115</sup> See, e.g., *Phillips v. Leroy-Somer North America, et al.*, 2003 U.S. Dist. LEXIS 5349 (W.D. Tenn. 2003).

<sup>116</sup> 29 U.S.C. § 2614(a)(5).

<sup>117</sup> S.Rep. 103-3(1993), at 27.

introduced by FMLA opponents requiring advance notice of an employee's return to work failed.<sup>118</sup>

The **regulations** add that **employers may require periodic reports** so long as their policies are **not discriminatory** and take into account all relevant facts and circumstances regarding the employee's leave situation.<sup>119</sup> The **employer is not required** to maintain the employee's **health benefits** or hold open the employee's **job** for him/her if an employee tells the employer **unequivocally** that he/she will **not return to work**.<sup>120</sup> In addition, the employer may require **notice** generally within **two business days** of a **change in circumstances** (e.g., when an employee needs more leave than anticipated or decides to return to work earlier than anticipated).<sup>121</sup> The **employee**, however, may **not** be required to take **more leave than necessary** to resolve the circumstances that required the leave in the first place.<sup>122</sup>

**DOL explained** that the two-day advance notice requirement **balanced** two conflicting interests: that of the **employee** to take **no more FMLA leave than necessary**, and that of the **employer** to obtain **"reasonable advance notice of changed circumstances."**<sup>123</sup> Accordingly, DOL decided that "employees may be required to report periodically on their status and intent to return to work..."<sup>124</sup> At the same time, DOL limited the frequency of the reports, noting the "intent of the statute and the regulations that employers not use the entitlement to require status reports in a manner that is burdensome and disruptive to the employee while on FMLA leave ... such requests [should] be reasonable under the existing circumstances."<sup>125</sup>

Few cases regarding notice of intent to return to work have reached the courts. **Courts** have generally **confirmed** the regulatory requirement that **employees provide two days notice** of their planned return.<sup>126</sup>

## CONCLUSION

The FMLA places notice requirements on both employers and employees. These provisions help ensure communication between the parties regarding employee leave to allow both sides to plan for the employee's absence. The Supreme Court indicated in *Ragsdale*, however, that, with respect to one particular FMLA remedial provision, employers could not be penalized for failure to follow certain FMLA notice requirements without some showing of harm to the affected employee. Since *Ragsdale*, the validity of

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<sup>118</sup> H.R. Rep. 103-8(I)(1993)(minority views), at 75-76.

H.R. Rep. 103-8(I)(1993)(minority views), at 70-71.

<sup>119</sup> 29 C.F.R. § 825.309.

<sup>120</sup> 29 C.F.R. § 825.309(b).

<sup>121</sup> 29 C.F.R. § 825.309(c).

<sup>122</sup> *Id.*

<sup>123</sup> 60 Fed. Reg. 2214.

<sup>124</sup> 60 Fed. Reg. 2225.

<sup>125</sup> *Id.*

<sup>126</sup> See *Hoge v. Honda of America Mfg., Inc.*, 2004 WL 2056227 (6th Cir. 2004).

various FMLA notice and remedy provisions has been challenged under *Ragsdale's* reasoning, with courts generally requiring this showing of prejudice or harm to the employee before providing relief when employers violate FMLA notice provisions.