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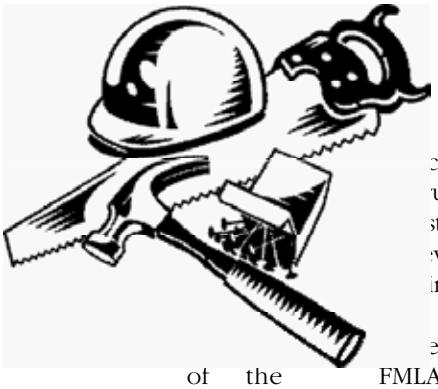
Developments in the FMLA

The times may be a-changing for the Family and Medical Leave Act (FMLA) of 1993 as a result of the Department of Labor's contemplated examination of the federal regulations in the act. On Dec. 1, 2006, the Department of Labor issued a request for public comments regarding the FMLA.[1] Specifically, the Department of Labor outlined 12 issues for comment:

1. employee eligibility;
2. the meaning of a "serious health condition";
3. the definition of a "day";
4. substitution of paid leave for unpaid FMLA leave;
5. the effect of the FMLA on employers' attendance policies;
6. the impact of various types of FMLA leave on employers;
7. whether an employee's light-duty work should factor into that employee's entitlement to leave under the FMLA;
8. the impact of job duties modified for an employee's health limitations on what is considered to be an essential function;
9. employees' waiver of rights regarding past FMLA claims;
10. communication between employees and employers in regard to eligibility, classification of leave, and unforeseeable leave;
11. the process for medical certification; and
12. the impact of FMLA leave on retention, morale, and productivity in the workplace.



The Department of Labor identified these issues from cussions that took place at sev- ums, including a series of meet- sted by the department, a review veloping case law in the federal nce the enactment of the FMLA, Department of Labor's own erience in the administration of the FMLA, and various congressional hearings.

Congress enacted the Family and Medical Leave Act in 1993 for the purpose of providing eligible employees the opportunity to take unpaid leave. The meat of the act's substantive force is contained in 29 U.S.C. § 612(a), which allows eligible employees to take up to 12 weeks of unpaid leave for the birth or adoption of a child; to care for an ill spouse, child, or parent; or because of the employee's serious health condition. This opportunity to take unpaid leave allows employees to care for the medical needs of their families and themselves and entitles these employees to be restored to their former job positions or equivalent positions upon return from leave. Congress made several findings regarding the importance of providing working parents with the flexibility necessary to provide care for their children, spouses, and parents. These findings also noted that employment policies in place at that time were inadequate in allowing working parents to care for their children without jeopardizing job security. Congress thus crafted the FMLA in such a way as to balance both the practical needs of working parents and the business needs of affected employers. To that end, Congress gave the secretary of labor the authority to develop regulations necessary to carry out the provisions of the FMLA. The Department of Labor published and implemented those regulations in 1995. The request for information issued on Dec. 1, 2006, constitutes the first analysis of these regulations in their 11-year existence.[2]

Since the enactment of the FMLA, federal courts, employers, and employees alike have engaged in a dialogue interpreting the finer points of the act. In the process, some federal court decisions have invalidated regulations developed by the secretary of labor. Most notably, in its 5-4 decision in *Ragsdale v. Wolverine World Wide* in 2002, the U.S. Supreme Court invalidated a Department of Labor regulation relating to the penalty to be imposed on employers who fail to notify employees in a timely manner that their leave is designated as FMLA leave.[3] The regulation in question, 29 C.F.R. § 825.700, provided that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." In *Ragsdale*, the employer had provided 30 weeks of unpaid leave to an employee who was undergoing treatment for Hodgkin's disease.[4] The employer did not notify the employee that 12 of these 30 weeks would be designated as FMLA leave. When the employee requested four additional weeks of leave, the employer refused and terminated her employment. The employee filed suit, arguing that the regulation entitled her to 12 weeks in addition to the 30 weeks of leave already provided to her,

because her employer had not given proper notice that her previous leave counted as FMLA leave.

The Supreme Court held that the regulation was beyond the secretary of labor's authority and contrary to the FMLA. Without requiring any proof from the employee, the Court found that the penalty had created an irrebuttable presumption that the employee had been prejudiced and her rights to FMLA leave had been impaired. Furthermore, the Court found the regulation to be incompatible with the policies underlying the FMLA, one of which recognized the FMLA's compromise between employees and employers as to the length of leave required. Another policy sought to encourage employers to provide generous amounts of leave above and beyond the minimum amount required under the FMLA. As such, the Court found that the secretary of labor had exceeded his discretion in enacting this regulation.

Another Department of Labor regulation that has come under scrutiny by federal courts is one concerning employees' eligibility for FMLA leave. For example, in *Woodford v. Community Action of Greene County*,[5] the Second Circuit Court of Appeals invalidated 29 C.F.R. § 825.110(d), because the regulation resulted in a broader pool of eligible employees than the level outlined by Congress' language in the FMLA. To be eligible for FMLA leave, an employee must be employed for at least one year by the employer granting such leave and must have worked at least 1,250 hours within the previous year for that employer. The regulation in question in the *Woodford* case provided the following:

> If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility.[6]

Therefore, as the facts in *Woodford* illustrated, an employer may mistakenly confirm an employee's eligibility, later discover that the employee had not worked the number of hours required for eligibility, and ultimately be prevented from challenging the employee's right to unpaid leave. The Second Circuit found that this regulation was invalid, because its application would force employers to provide leave to employees who had not met the eligibility standards expressly laid out by Congress.[7] By doing so, the court found, the regulation created a pool of "eligible" employees beyond what was intended in the text of the FMLA itself.[8]

Another case, which is pending, illustrates the need for clarification within the FMLA: *Taylor v. Progress Energy*, which involves the scope of an employee's ability to waive his or her rights under the act.[9] In that case, the Fourth Circuit examined the meaning of 29 C.F.R. § 825.220(d), which provides that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." The employee in *Taylor* had signed a release, which included language waiving all claims and rights the employee may have under federal law.[10] The district court granted summary judgment to the employer, finding that the release effectively waived her FMLA claims. In so doing, the district court held that the regulation in question applied only to a prospective waiver of her substantive FMLA rights, not to any past claims the employee may have had under the FMLA. Therefore, because the employee's claims arose before she signed the release, the district court found that the release was enforceable under the regulation. The Fourth Circuit disagreed, holding that "[t]he regulation's plain language prohibits both the retrospective and prospective waiver or release of an employee's FMLA rights."[11] This decision has been vacated, and a rehearing was granted on June 14, 2006.[12] The Department of Labor's position on this regulation is that it "should be interpreted solely to bar the waiver of prospective rights."[13] However, in its request for information, the Department of Labor specifically asked for public comment regarding whether an employee should be allowed to waive retrospectively any claims he or she may have under the FMLA.

Even though these cases highlight the legal debates surrounding the FMLA and its corresponding regulations, a significant portion of the comments sought by the Department of Labor indicate an interest in the practical implications of its FMLA regulations on both employers and employees.

Even though these cases highlight the legal debates surrounding the FMLA and its corresponding regulations, a significant portion of the comments sought by the Department of Labor indicate an interest in the practical implications of its FMLA regulations on both employers and employees. For example, the department believes that the following issues should be addressed:

- Does the FMLA affect how employers structure their leave policies?

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- Are employers shying away from offering attendance rewards as a result of perceived complications posed by employees who take FMLA leave?
- How do employers deal with FMLA in a business sense, so that employers can continue to operate efficiently and productively?
- What effect does intermittent leave have on an employer's operations?
- How many employees actually know what their rights are under the FMLA?
- Are both employers and employees respecting the framework of FMLA rights as established by the act?

The feedback from the public—employers and employees alike—should provide topics for an interesting discussion about the direction that the Family and Medical Leave Act of 1993 will take in the future. **TFL**

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[1]71 Fed. Reg. 69504, 69504-69514 (Dec. 1, 2006).

[2]*Id.* at 69504; 231 Daily Lab. Rep. AA-1 (Dec. 1, 2006).

[3]535 U.S. 81, 96 (2002).

[4]*Id.* at 84–85.

[5]268 F.3d 51 (2d Cir. 2001).

[6]29 C.F.R. § 825.110(d) (1995).

[7]268 F.3d at 55.

[8]*Id.* at 56–57. As the Department of Labor noted in its request for information, "the majority of courts addressing this notice provision have found it to be invalid, even prior to the *Ragsdale* decision." 71 Fed. Reg. at 69506. Cases cited by the Department of Labor include *Brungart v. BellSouth Telecomm. Inc.*, 231 F.3d 791, 796-97 (11th Cir. 2000) and *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000).

[9]415 F.3d 364 (4th Cir. July 20, 2005), *vacated and rehearing granted in* 2006 U.S. App. LEXIS 15744, at *1 (June 14, 2006).

[10]415 F.3d at 367.

[11]*Id.*

[12]*Taylor v. Progress Energy*, No. 04-1525, 2006 U.S. App. LEXIS 15744 (4th Cir. June 14, 2006).

[13]The Department of Labor filed an amicus brief for the Fourth Circuit's rehearing. 71 Fed. Reg. at 69509.