

II. Ragsdale/Penalties

In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the Supreme Court held that the penalty provision in the Department’s regulation at section 825.700(a) is invalid. That regulation states 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.” 29 C.F.R. § 825.700(a). The Court held the provision is invalid because, in some circumstances, it requires employers to provide leave in excess of an employee’s 12-week statutory entitlement. Although the Court did not invalidate the underlying notice and designation provisions in the regulations, it made clear that any “categorical penalty” for a violation of such requirements would exceed the Department’s statutory authority.

The Request for Information noted that a number of courts have invalidated a similar penalty provision found in section 825.110(d), which requires an employer to notify an employee prior to the employee commencing leave as to whether the employee is eligible for FMLA leave. If the employer fails to provide the employee with such information, or if the information is not accurate, the regulation bars the employer from challenging the employee’s eligibility at a later date, even if the employee is not eligible for FMLA leave pursuant to the statutory requirements.

Therefore, the Department asked commenters what “changes could be made to the regulations in order to comply with *Ragsdale* and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?” The Department received a significant number of comments regarding this issue and related notice issues.

A. Background

The FMLA entitles eligible employees of covered employers to 12 weeks of leave per year for certain family and medical reasons. 29 U.S.C. § 2612(a)(1).

In order to allow employees to know when they are using their FMLA-protected leave, the regulations state that “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.” 29 C.F.R. § 825.208(a). More specifically, “[o]nce the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave.” 29 C.F.R. § 825.208(b)(1). *See also* 29 C.F.R. §§ 825.301(b)(1)(i) and (c). The employer’s designation may be oral or in writing, but if it is oral, it must be confirmed in writing, generally no later than the following payday, such as by a notation on the employee’s pay stub. 29 C.F.R. § 825.208(b)(2).

The categorical penalty provision of the regulations with regard to paid leave provides as follows:

If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee 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. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee’s 12-week FMLA leave entitlement.

29 C.F.R. § 825.208(c). *See also* 29 C.F.R. § 825.700(a) (“If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee’s FMLA entitlement.”).

In *Ragsdale*, 535 U.S. 81, the Supreme Court considered a case in which the plaintiff had received 30 weeks of leave from her employer. At that point, her employer denied her request for additional leave and terminated her employment. She alleged that her employer violated section 825.208(a), which requires an employer to designate prospectively that leave is FMLA-covered and to notify the employee of the designation. Because her employer did not do so, she alleged that she was entitled under section 825.700(a) to an additional 12 weeks of FMLA-protected leave.

The Court found that this “categorical penalty” is “incompatible with the FMLA’s comprehensive remedial mechanism,” which puts the burden on the employee to show that the employer interfered with, restrained, or denied the employee’s exercise of FMLA rights, and that the employee suffered actual prejudice as a result of the violation. *Ragsdale*, 535 U.S. at 89. The Court observed that, according to the regulation, the “fact that the employee would have acted in the same manner if notice had been given is, in the Secretary’s view, irrelevant.” *Id.* at 88. The Court also found that the regulation “subverts the careful balance” that Congress developed with regard to “the FMLA’s most fundamental substantive guarantee” of an entitlement to a total of 12 weeks of leave, which was a compromise between employers who wanted fewer weeks and employees who wanted more. *Id.* at 93-94. Thus, the Court held that the penalty provision of section 825.700(a) is “contrary to the Act and beyond the Secretary of Labor’s authority.” *Id.* at 84.

The Supreme Court did not invalidate the notice and designation provisions in the regulations. Indeed, the Court recognized that there may be situations where an employee is able to show that the employer’s failure to provide the required notice of FMLA rights prejudiced the employee in a specific way (such as depriving the employee of an opportunity to take intermittent leave or to return to work sooner). The Court stated, however, that the

Act’s remedial structure requires a “retrospective, case-by-case examination” to determine “whether damages and equitable relief are appropriate under the FMLA,” based upon the steps the employee would have taken had the employer given the required notice, rather than a categorical penalty. *Id.* at 91. See *Sorrell v. Rinker Materials Corp.*, 395 F.3d 332, 336 (6th Cir. 2005) (remanding the case for a determination of whether the doctrine of estoppel bars the company from challenging the employee’s entitlement to FMLA leave because the employer had unconditionally approved the leave request); *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 493-94 (8th Cir. 2002) (holding that the employer was equitably estopped from asserting that the plaintiff had exhausted his 12 weeks of FMLA leave, based on a letter expressly informing him after 22 weeks of disability leave that he still had 12 weeks of FMLA leave left); *Wilkerson v. Autozone, Inc.*, 152 Fed. Appx. 444 (6th Cir. 2005) (based on the employer’s statement that the employee had six weeks of post-partum FMLA leave, equitable estoppel applied because the employee reasonably relied on it and showed the requisite prejudice).

The *Ragsdale* decision addressed only the penalty provision in section 825.700(a), which is applicable to both unpaid leave and paid leave (*Ragsdale* involved unpaid leave). The penalty provision in section 825.208(c) (applicable only to paid leave) is virtually identical. A number of courts have held that the rationale of the *Ragsdale* decision applies equally to section 825.208(c), and that an employee must show prejudice from the lack of notice to establish a violation of the Act. See, e.g., *Miller v. Personal-Touch of Va., Inc.*, 342 F. Supp. 2d 499, 513-14 (E.D. Va. 2004); *Donahoo v. Master Data Ctr.*, 282 F. Supp. 2d 540, 554-55 (E.D. Mich. 2003); and *Phillips v. Leroy-Somer N. Am.*, No. 01-1046-T, 2003 WL 1790941, *5-7 (W.D. Tenn. Mar. 28, 2003).

As discussed above, a number of courts also have found that the “deeming” provision in section 825.110(d) of the regulations is invalid and contrary

to the statute. The FMLA establishes that employees are eligible for FMLA leave only if they have been employed by the employer “for at least 12 months” and have “at least 1,250 hours of service with such employer during the previous 12-month period.” 29 U.S.C. § 2611(2)(A). The regulations generally require an employer to notify an employee whether the employee is eligible for FMLA leave prior to the employee commencing leave. If the employer confirms the employee’s eligibility, “the employer may not subsequently challenge the employee’s eligibility.” 29 C.F.R. § 825.110(d). Furthermore, “[i]f the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee’s notice.” *Id.*

Thus, even if an employee fails to satisfy the statutory eligibility requirements, the regulation “deems” the employee to be eligible for FMLA-protected leave. The courts have held that this regulation is invalid. *See, e.g., Woodford v. Comty. Action of Greene County, Inc.*, 268 F.3d 51, 57 (2d Cir. 2001) (“The regulation exceeds agency rulemaking powers by making eligible under the FMLA employees who do not meet the statute’s clear eligibility requirements.”); *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 796-97 (11th Cir. 2000), *cert. denied*, 532 U.S. 1037 (2001) (“There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be filled.”); *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 582 (7th Cir. 2000) (“The statutory text is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months.” Therefore, the

Department “has no authority to change the Act,” as the regulation attempts to do, by making ineligible employees eligible for family leave).

The courts have concluded that an employee may pursue a case, based on the principle of equitable estoppel, where the employer’s failure to advise the employee properly of his/her FMLA eligibility/ineligibility is determined to have interfered with the employee’s rights, and the employee could have taken other action had s/he been properly notified. *See, e.g., Dormeyer*, 223 F.3d at 582 (“an employer who by his silence misled an employee concerning the employee’s entitlement to family leave might, if the employee reasonably relied and was harmed as a result, be estopped to plead the defense of ineligibility to the employee’s claim of entitlement to family leave.”); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 722-27 (2d Cir. 2001). *See also Wage and Hour Opinion Letter FMLA2002-1* (Aug. 6, 2002).

B. Comments on *Ragsdale*: Notice and Designation Issues

A number of commenters addressed the *Ragsdale* categorical penalty issue and responded to the Request for Information’s question regarding what “changes could be made to the regulations in order to comply with *Ragsdale* and yet assure that employers maintain proper records and promptly and appropriately designate leave as FMLA leave?”

The National Coalition to Protect Family Leave stated that section 825.700(a) and the similar penalty provision in section 825.208 should be removed from the regulations, and that “any ‘penalty’ that DOL wants to impose on employers for failure to follow certain notice obligations dictated by the regulations must be tailored to the specific harm suffered by the employee for failure to receive notice.” National Coalition to Protect Family Leave, Doc. 10172A, at 43. The Coalition asserted that retroactive designation should be permitted, so that employees “could receive the FMLA protections despite their failure to

adequately communicate that the FMLA is at issue, and employers who inadvertently fail to timely designate leave can have the opportunity to count the absence toward the employee's FMLA leave bank. Retroactive designation should be permitted in all cases where the employee is eligible, the condition qualifies, and the employee has adhered to his/her FMLA notice obligations that FMLA leave is at issue." *Id.* at 44. *See also* Proskauer Rose LLP, Doc. 10182A, at 9 (the regulations should allow an employer "who initially fails to designate a leave as FMLA leave, but nevertheless grants the employee the leave, to retroactively designate the leave as FMLA leave"); Coolidge Wall Co. LPA, Doc. 5168, at 1 (the regulations should state that an employer that has an FMLA policy in its handbook, for which an employee has acknowledged receipt, can send out the FMLA notice "mid-leave and can retroactively count the employee's time"); Commonwealth of Pennsylvania, Doc. FL95, at 2-3 (retroactive designation should be allowed "when an employee's FMLA rights were provided during the period of absence," because the two-day verbal notification requirement is difficult to achieve, although the written notification/designation requirements "usually can occur . . . within the timeframes prescribed by the Regulations").

The Air Transport Association of American, Inc., and the Airline Industrial Relations Conference suggested that the regulations be revised in light of *Ragsdale*, because employers do not know which regulations they must follow and which are no longer valid, and employees who read them also are confused about which regulations their employers must follow. Doc. FL29, at 15. *See also* Association of Corporate Counsel, Doc. FL31, at 10 (section 825.700 should be deleted to clarify that an employer's failure to timely designate leave does not increase the statutory leave period).

United Parcel Service suggested that the Department should clarify in section 825.208 the effect of an employer's mistaken designation of

FMLA leave, because some courts have held that the doctrine of equitable estoppel prevents an employer from denying protected leave based on a subsequent determination that the employee was not eligible. Doc. 10276A, at 2. The United States Postal Service similarly suggested that both sections 825.700(a) and 825.208(c) should be revised to clarify that "a technical violation of the notice provisions does not result in a windfall of surplus FMLA protection for an employee who suffered no harm as a result." Doc. 10184A, at 4. A large provider of human resources outsourcing services commented that "by deleting the 'penalty' provision and simply reinforcing employer notification obligations," the Department would appropriately respond to *Ragsdale*. Hewitt Associates, Doc. 10135A, at 8. Hewitt stated that employers benefit by providing more notice because they: educate employees about their rights, responsibilities, and benefits; maximize the likelihood that employees will return to work promptly; maintain or enhance their engagement; minimize the impact on other HR administrative processes; minimize the impact on business operations; and reduce available time off balances accurately. *Id.* at 7-8.

Finally, as discussed in detail in Chapter V, a number of commenters stated that the two-day time frame for designating leave is inadequate, or that the designation requirement should apply only when employees expressly request FMLA leave. The National Association of Convenience Stores suggested that, in light of *Ragsdale*, "DOL should consider eradicating all formal employer designation requirements." Doc. 10256A, at 7.

Other stakeholders, however, presented views in support of the current notice and designation requirements and had suggestions for changes that would provide improved and prompt information to employees. One commenter stated that the data show that two days is sufficient to allow employers to review and respond to employees' leave requests. "Most organizations spend only between thirty and

120 minutes of administrative time per FMLA leave episode to provide notice, determine eligibility, request and review documentation, and request a second opinion. Therefore, no change to the current two-day response requirement is warranted.” National Partnership for Women & Families, Doc. 10204A, at 21 (citation omitted). That commenter also noted that while the Supreme Court struck down the “categorical penalty” in the current regulations, it left intact the requirement that employers designate leave, and it “did not prohibit DOL from imposing *any* penalties on employers for failing to properly designate and notify employee about leave.” *Id.* at 18. Therefore, in light of the overall purposes of the notice and designation requirements, this commenter suggested that any changes to the regulations should:

- “Emphasize that the Court did not alter the obligation of employers to both designate leave promptly and notify employees of how that leave has been designated. Thus, employers must continue to adhere to these designation and notice requirements or risk penalties.”
- “Reaffirm and modify current recordkeeping requirements that require employers to keep accurate and complete records of how leave has been designated, and when the employee was notified of the designation.”
- “Prohibit employers from making any retroactive changes to how leave has been designated without notification and consultation with the employee, and require maintenance of records documenting such notification and consultation.”
- “Establish new penalties for employer non-compliance that are not automatic, but can be imposed following a complaint by the affected employee and an independent determination of the harm caused by the employer’s violation.”

Id. at 18-19. *See also* Letter from 53 Democratic Members of Congress, Doc. FL184, at 2 (noting that *Ragsdale* invalidated only the penalty provision of the regulations and that any changes in the regulations should be limited to remedying that problem and should go no further).

Another commenter suggested that “fines should be imposed” on employers that do not maintain accurate records, and they “should not be able to retroactively change how leave was originally designated without notice and consultation with the employee.” OWL, The Voice of Midlife and Older Women, Doc. FL180, at 2.

A number of commenters emphasized the hardships employees suffer when they do not know promptly whether the employer believes they are entitled to protected leave. Employees then either feel compelled not to take the time off that they need, or else they take off but are afraid because they do not know whether they will be subject to discipline for being off work. *See, e.g.,* Frasier, Frasier & Hickman, LLP, Doc. FL60, at 1-3. As discussed in detail in Chapter V, a number of commenters therefore suggested that employers be required to inform employees promptly when they are using FMLA leave.

Another commenter noted that his employer “is able to delay, and many times deny, for many weeks and months the benefits and protections which the Act affords,” because it repeatedly asks for more information on the certification form. An Employee Comment, Doc. 10094A, at 2. During this “very lengthy approval process, the employee is subjected to attendance-related discipline when the absence should have been approved or at the very least be treated as ‘pending.’” *Id.* *See also* An Employee Comment, Doc. 5335, at 1 (noting that she had gone out on short-term disability leave for surgery but, despite her regular contact with the benefits specialist, she was not notified that the company had placed her on FMLA leave). This issue is addressed in more detail in Chapter VI relating to medical certifications.

C. Deeming Eligible Issues

A number of commenters also addressed issues related to the provision in 29 C.F.R. § 825.110(d) deeming employees eligible for FMLA leave if an employer either fails to advise them of their eligibility status within the allotted time period, or incorrectly advises them that they are eligible when they have not satisfied the statutory requirements of 12 months of employment and 1,250 hours of service in the preceding 12 months.

One commenter stated that “[t]he Supreme Court’s decision in the *Ragsdale* case casts grave doubt on the validity of other categorical penalties in the Regulations.” National Coalition to Protect Family Leave, Doc. 10172A, at 13. It noted that a number of courts have struck down both the provision in section 825.110(d) stating that an employer may not later challenge an employee’s eligibility if it mistakenly confirms that an employee is entitled to leave, and the provision deeming an employee eligible if the employer fails to notify the employee that the employee is not eligible prior to the start of leave (if the employer had advance notice) or within two business days of receiving notice. This commenter stated that it “urges DOL to delete the language in section 825.110(d) that [the] federal courts have invalidated.” *Id.* at 14.

Another commenter stated that, in light of the *Ragsdale* decision, the penalty provision for an employer’s failure to timely notify employees that they are eligible for FMLA leave should be deleted; however, the regulation should continue to require that the employer notify employees whether they are/are not eligible, but either delete the consequences from the regulation or incorporate the interference/estoppel theory approved by the Supreme Court in *Ragsdale*. “That is, if the employee can demonstrate that the failure to provide notice caused actual harm to the employee’s FMLA rights the employer’s notice failure is actionable interference.” Carl C. Bosland, Esq., Preemptive Workforce Solutions, Inc., Doc. 5160, at 2-3.

Another commenter suggested that, if an employer has a handbook, bulletin board, orientation materials, etc., that show employees were provided information about the FMLA, which leaves are protected, and how to apply for protected leave, “the employer should be exempted from consequences under this part of the act.” Ken Lawrence, Doc. 5228, at 1.

Hewitt Associates noted that while equitable estoppel provides some guidance, it does not provide a rule. “In fact, an employer that wishes to ‘undeem’ a leave is now required to make a subjective review of the employee’s circumstances (if the employer knows them) and analyze whether it would be fair to revoke the designation. . . . [R]evoking § 825.110(d) allows employers to correct their errors by undesignating these leaves but, considering the analysis required, at an overly burdensome administrative price. The Department should craft a bright-line rule that balances the right of employers to revoke an ‘inappropriate’ FMLA designation, with fairness to employees who have relied upon that designation.” Hewitt Associates, Doc. 10135A, at 10. This commenter suggested a rule that both allows employers to count the time that an ineligible employee is permitted to remain on leave against that employee’s eventual 12-week entitlement, and gives employees a “grace period” to return to work (the length of which would turn on circumstances such as the length of time left in the leave, the reason for the leave, travel, etc.). The commenter also would require the employer to provide an “immediate and thorough notification to the employee” explaining that the employee was not eligible for leave, how the absences would be treated, the length of the grace period, etc. *Id.* at 11.

As discussed in detail in Chapter V, a substantial number of employers emphasized the difficult and time-consuming nature of making eligibility determinations, with regard to calculating both the number of hours worked in the past 12 months and the amount of FMLA leave used. They objected

to any revision to the regulations that would require employers to provide periodic reports to employees about the amount of FMLA leave they have remaining. *See, e.g.,* United Parcel Service, Doc. 10276A, at 7-8. On the other hand, a few employers noted that they use payroll tracking systems that tell them whether employees are eligible for FMLA leave.

Other commenters emphasized the importance to employees of knowing promptly whether they are eligible for leave, and they suggested that the FMLA regulations should encourage employers to provide accurate, thorough and timely information about FMLA eligibility and procedures. As discussed in Chapter V, these commenters emphasized that many employees still do not know whether they are protected by the FMLA; they do not have information about their leave options; and they do not know whether their leave is being designated as FMLA leave. Therefore, a number of commenters suggested that the Department should consider regulations that require employers to provide notice to employees, when they have worked for one year and on an annual basis, explaining their eligibility status, their leave entitlement, and the procedures for applying for FMLA leave. *See, e.g.,* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 40.