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To Designate or Not to Designate Under the Family and Medical Leave Act

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by Tory L. Lucas

The human resources manager of one of your firm's biggest clients calls you for some advice on a seemingly straightforward issue. The issue deals with the notice requirements under the Family and Medical Leave Act (FMLA). Specifically, does the FMLA require employers to designate leave as FMLA leave or risk having to provide more than the guaranteed 12 weeks of leave? The manager quickly recites the facts.

The Facts

On March 17, 1999, the employer hired a new employee. In February 2000, the employee was diagnosed with cancer and was unable to work. Under the employer's leave policy, all employees with at least six months of service can take up to seven months of leave. Once leave commences, employees must request a leave extension every 30 days.

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On February 21, 2000, the employee requested medical leave and the employer granted the leave request. The employee then requested extensions monthly through August 15, 2000. All requests were granted.

Today is September 15, 2000. The employee's seven months of leave will be exhausted on September 20, 2000, but the employee will be unable to return to work at that time. In fact, the employee will be unable to return to work until December.

The employer never personally notified the employee of her eligibility for FMLA leave. Furthermore, the employer never designated the seven months as FMLA leave. As soon as the manager said this, you knew what was coming next. The employee has just requested leave under the FMLA, in addition to the seven months already provided. The manager believes they have given the employee all the leave she is entitled to receive and asks you whether she must grant the employee's FMLA leave request. You pull a dusty copy of the U.S. Code off the shelf (or probably fire up your computer) and take a look at the FMLA.

The FMLA

The FMLA entitles eligible employees to take a total of 12 workweeks of leave during any 12-month period (1) to care for a newborn child, (2) to care for a child placed with the employee for adoption or foster care, (3) to care for a spouse, child or parent with a serious health condition, or (4) because a serious health condition makes the employee unable to perform the functions of her position. 29 U.S.C. § 2612(a)(1). In this case, the employee clearly fell within the FMLA's protections as she was unable to work because of her cancer. Therefore, the FMLA entitled her to take a total of 12 workweeks of leave.

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If an employee takes leave under § 2612, the employee is entitled to be restored to the position the employee held before the leave commenced or to an equivalent position. 29 U.S.C. § 2614(a)(1). In this case, however, the employee took seven months of leave as opposed to 12 weeks.

You then come across a provision that seems to apply to this employer's generous leave policy: "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..." 29 U.S.C. § 2653. Again, your client provided the employee seven months of leave as opposed to the mere 12 weeks the FMLA requires.

At this point in your analysis, your research indicates that nothing in the FMLA requires employers to designate employer-provided leave of greater than 12 weeks as FMLA leave or risk having to grant the employee FMLA leave in addition to the employer-provided leave. At a minimum, though, the FMLA clearly mandates that employers provide 12 weeks of leave to eligible employees. Does it matter if the employer did not designate leave as FMLA leave, though, but provided more leave to the employee than required by the FMLA?

As the statute does not clearly address your issue, you decide to take a peek at the implementing regulations. The FMLA directed the Labor Secretary to prescribe regulations to carry out the Act. 29 U.S.C. § 2654. According to the Department of Labor (DOL) regulations, an employer must designate leave as FMLA leave. If an employer does not designate leave as such, an employee's FMLA leave entitlement is not affected and the employee can still request up to 12 weeks of FMLA leave in addition to the employer-provided leave.

The DOL Regulations

The first regulation you read clearly places the burden on the employer to designate leave as FMLA leave:

> An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA…*If an employer provides greater unpaid family leave rights than are afforded by the FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA. 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.*

29 C.F.R. § 825.700(a) (emphasis added).

You then turn to another provision, which also makes it clear that an employer must designate employer-provided leave as FMLA leave and give notice of this designation to the employee. "In 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." 29 C.F.R. § 825.208(a). At this point, it's becoming clear that this employer failed to follow the DOL regulations by not designating the leave as FMLA leave. Therefore, it appears the employee would be entitled to an additional 12 weeks of leave.

As to substituting employer-provided paid leave for FMLA leave, the regulations are just as clear. "If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. *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) (emphasis added).

The Pit in Your Stomach

At this point in your analysis, you are definitely starting to feel that this particular employee is entitled to an additional 12 weeks of leave under the FMLA because the employer did not comply with the technical designation and notice provisions of the implementing regulations. As the employer provided 30 weeks of leave as opposed to the FMLA's required 12, you can't believe the employer must provide 12 more weeks of leave or violate the law. Notwithstanding the regulations clear designation requirement, you remember the Chevron case from law school (or a C.L.E. seminar).

In that case, the United States Supreme Court declared that, in the absence of specific statutory language, agency regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). Specifically, the Court provided a two-part analysis of agency regulations. Courts must first determine whether congressional intent is clear. Id. at 842-43. If congressional intent is clear, any agency interpretation contrary to that intent is not entitled to deference. Id. If the statute is ambiguous, then courts must defer to reasonable agency interpretation of the statute. Id. at 843.

You immediately turn to caselaw to see if

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courts have decided whether the DOL regulations properly interpret the FMLA. There just so happens to be a case on point.

The Case

In July 2000, the Eighth Circuit Court of Appeals had this exact fact pattern before it. The employer terminated the employee after she had exhausted her seven months of leave. When the employee requested additional leave under the FMLA, the employer denied her request because she had requested and utilized all of her available leave. The employee sued her employer claiming a violation of the FMLA, as well as the Americans with Disabilities Act and the Arkansas Civil Rights Act. Because her employer never formally designated her seven months of leave as FMLA leave, the employee contended that the DOL regulations properly mandated that the clock never began to run on her FMLA leave, leaving her 12 more weeks of available leave. Addressing the FMLA claim, the court had to determine whether the DOL regulations quoted above, which require an employer to designate leave as FMLA leave or risk having to grant more leave than the required 12 weeks, "are a permissible interpretation of the FMLA." Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 937 (8th Cir. 2000).

The Court began its analysis by discussing the Chevron standard of review for determining whether agency regulations are valid. Id. at 936. The court made it clear that, "although the level of deference afforded an agency interpretation may appear high, the court remains the final authority in matters of statutory interpretation and must reject administrative constructions which are contrary to clear congressional intent." Id. (quotes omitted).

After the court quoted the FMLA substantive provisions (as quoted above), the court stated the following: "Although the FMLA does not itself require that the employer designate leave as FMLA leave, the DOL regulations do require such designation. Seizing on the lack of employer notice provisions in the text of the statute, the DOL has issued a series of regulations requiring that an employer provide an employee with notice that company leave is FMLA leave both in situations where the employee is taking paid leave and where the employee is taking unpaid leave and *providing for severe*

consequences for the failure to give employees such notice." Id. at 936-37 (emphasis added).

Specifically, the court quoted 29 C.F.R. §§ 825.208(a), 825.208(c) and 825.700(a) (as quoted above), highlighting DOL's mandate that employers designate leave as FMLA leave before employees' 12-week FMLA entitlements begin to run.

After quoting the regulatory language, the court immediately announced that "the DOL's regulations improperly convert the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave. *The FMLA was intended only to set a minimum standard of leave for employers to provide to employees. Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum that the statute requires.*" Id. at 937 (quotes omitted/emphasis added).

The court stressed that the FMLA does not interfere at all with employer leave policies giving greater leave rights to its employees. Id. The court also stated that the FMLA does not require granting more leave than the minimum 12 weeks. Id. at 938.

Buttressing this observation, the court quoted 29 U.S.C. § 2652(a), which states that nothing in the FMLA diminishes an employer's obligation under an employment benefit program to provide greater rights. Id. The court also pointed to 29 U.S.C. § 2653(b), which states that nothing in the FMLA should discourage employers from retaining more generous leave policies. Id.

Again, the FMLA "contemplate[s] only that the employer will be required to provide a 'total' of twelve weeks of unpaid leave." Id. The court underscored the fact that nothing in the FMLA indicates that an employee is entitled to more than 12 weeks of leave if the employer's plan already provides at least 12 weeks of FMLA qualifying leave. Id.

The court then discussed a provision on the relationship between FMLA leave and paid leave, which could be interpreted as forcing an employer to designate leave as FMLA leave before the clock on that leave begins to run: "An eligible employee may elect, or *an employer may require the employee*, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee…for any part of the twelve-week period of such leave…" Id. (quoting 29 U.S.C. § 2612(d)(2)(B)) (emphasis added).

The court rejected any contention that this provision mandates an employer to designate leave as FMLA leave or be forced to grant more than the 12 weeks of leave required by the FMLA. The court stated that this provision's obvious purpose is to ensure

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that the FMLA does not disadvantage either the employer or employee. Id. Specifically, this provision protects the employee by enabling the employee to take paid employer-provided leave. Id. It also protects the employer by allowing the employer to require the employee to take employer-provided leave, which saves itself from extending more leave than required. Id.

Honing in on the DOL's apparent justification for the designation provisions, the court stated that the "DOL has failed to appreciate and differentiate those circumstances when notice should be required from employers in order to protect employee's substantive FMLA rights from those situations where notice is not necessary to protect FMLA rights…the Secretary of Labor has apparently seized upon the 'employer may require' provision in § 2612(d)(2)(B) to justify the imposition of a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave." Id.

The court also showed that the FMLA's statutory scheme reveals Congress knew exactly how to provide for notice provisions when it intended, along with consequences for violating those provisions. Id. (citing §2612(e)(1) (employee's notice obligations); §2614(b)(1)(B) (employer's obligation to give notice to highly compensated employees refusing to restore them to their positions); and § 2619 (employer's obligation to post FMLA notices on the premises)).

Finally, the court determined that the FMLA's legislative history also supports the conclusion that the FMLA "was intended only to be a statute that provided a minimum labor standard; an assurance that employers would provide employees with twelve-weeks of leave every year…Any other view…would likely upset the careful compromise reached by Congress when it passed the FMLA." Id. at 939 (cites omitted).

Therefore, based on the FMLA's plain meaning, statutory scheme and legislative history, the court declared that the "DOL regulations must be struck down" because they "create rights which the statute clearly does not confer." Id.

In the court's opinion, "Congress only intended to mandate a minimum of 12 weeks of leave for employees, *it did not* "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." " Id. at 940 (emphasis added).

> *"are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"*

Applying these rules to the facts, the court stated that the employer's 30 weeks of leave was far more generous than the rights granted to the employee under the FMLA and "[t]o find that [the employer's] technical violation of the designation regulations functions as a denial of the [employee's] FMLA rights would be an egregious elevation of form over substance; a result clearly not contemplated by the FMLA." Id.

As the DOL designation regulations directly contradict the FMLA by increasing the amount of leave employers must provide, the court held "29 C.F.R. § 825.700(a) invalid insofar as it purports to require an employer to provide more than twelve-weeks of leave time." Id.

The "But"

Notwithstanding the court's clear holding that § 825.700(a) is invalid because it requires employers to provide more than the statutorily required 12 weeks of leave if the employer fails to give proper notice, the court included one paragraph in its opinion that may cause some confusion. Id. at 939-40.

The court stressed that not all "DOL regulations requiring employers to designate leave as FMLA leave would be invalid." Id. at 939. According to the court's dicta, an employer's failure to give notice could impact an employee's substantive FMLA rights in certain situations. Id.

The court then gave two examples of when an employer's failure to give notice could result in an FMLA violation. "For example, notice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve-weeks. See Longstreth v. Copple, 189 F.R.D. 401 (N.D. Iowa 1999). Also, in some cases where the leave was anticipated, an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave." Ragsdale, 218 F.3d at 939-40.

The court inserted this cautionary statement as dicta to limit the impact of striking down the DOL designation regulation. The court made clear that it simply held that the DOL cannot expand the rights granted under the FMLA. Specifically, the DOL was without authority to increase the entitlement of 12 weeks by forcing employers who provide greater than 12 weeks of leave to provide an additional 12 weeks of leave just because they failed to comply with a technical requirement to provide notice. Notwithstanding, the court left open the possibility of finding a violation of the FMLA when an employee's substantive FMLA rights are impacted by an employer's failure to designate the employee's leave as FMLA leave.

The Other Circuits

The Eighth Circuit is not the only circuit that has reviewed the DOL's designation requirements. The Sixth and Eleventh Circuit Courts of Appeals have also squarely addressed the DOL's designation regulations. As could be expected, the circuits are split on whether these regulations are a valid exercise of agency power.

Last summer, the Eleventh Circuit struck down 29 C.F.R. § 825.208 on paid leave because it converts the FMLA's minimum leave requirements from 12 weeks to more than 12 weeks unless the employer designates the leave as FMLA leave. McGregor v. Autozone, Inc., 180 F.3d 1305, 1308 (11th Cir. 1999). In fact, the Eighth Circuit agreed with the Eleventh Circuit on this issue and relied heavily on the reasoning found in McGregor. Ragsdale, 218 F.3d at 937.

In McGregor, a supervisor took fifteen weeks off work when she gave birth. Upon returning to work, she found out she had been demoted. Claiming her FMLA rights had been violated by her employer's failure to restore her to her previous position, the employee sued. Because her employer never notified her that her paid disability leave and FMLA leave would run concurrently, the employee contended that she was entitled to thirteen weeks of employer-provided paid disability leave and then 12 weeks of unpaid FMLA leave.

The court analyzed the FMLA's plain meaning, construction, purpose and legislative history and determined that the FMLA simply provides for a baseline of 12 weeks of leave and in no way suggests that this 12 week entitlement may be extended. McGregor, 180 F.3d at 1308.

Noting that the FMLA's purpose is to "balance the demands of the workplace with the needs of families…in a manner that accommodates the legitimate interests of employers," the court stated that the DOL regulations are inconsistent with the stated purpose by adding requirements and granting entitlements beyond those found in the statute. Id.

Revealing a disgust for the position in which the DOL regulations place a generous employer, the court stated the following: "Where an employer such as defendant exceeds the baseline 12 weeks by providing not only more leave than the FMLA but also paid leave, the employer should not find itself sued for violating FMLA." Id.

The court then struck down the DOL designation provisions as "invalid and unenforceable" because they are contrary to the FMLA, holding that the defendant employer properly exercised its FMLA rights by requiring its employee to substitute her paid leave for her 12 weeks of FMLA leave. Id. As the employee was absent for more than the FMLA protected time, the FMLA did not mandate restoration to her prior position. Id.

The Sixth Circuit Court of Appeals, on the other hand, upheld the DOL designation provisions in Plant v. Morton International, Inc., 212 F.3d 929 (6th Cir. 2000). Accord Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 300 (4th Cir. 1998) (citing § 825.700(a) for the proposition that, "although an employer has the option of requiring an employee to designate vacation or other leave as FMLA leave, that option is waived if the employer fails to give proper notice of its intentions"); Price v. City of Fort Wayne, 117 F.3d 1022, 1026 (5th Cir. 1997) (citing § 825.208(a) with approval); Ritchie v. Grand Casinos of Mississippi, Inc., 49 F.Supp.2d 878, 881 (S.D. Miss. 1999) (upholding § 825.208 because the DOL permissibly "filled in the gaps" of the FMLA).

In Plant, an employee's injuries required him to take a paid leave of absence from work. He did not request FMLA leave and his employer did not designate that his leave would count against his FMLA entitlement. While the employee was still on leave due to his medical problems, he was terminated. The employee claimed his termination violated the FMLA, while the employer contended his termination was for poor performance. Notwithstanding, his employer argued that he would not have been able to return to work within 12 weeks anyway, so he would have exhausted all of his FMLA leave at that time. Admitting that he would have been unable to return to work within 12 weeks, the employee countered by arguing that his FMLA leave had never started because his employer never notified him that it was designating his leave as FMLA leave.

Based on these facts, the court addressed whether the DOL's designation provisions are valid, *i.e.*, whether an employee's FMLA leave entitlement does not begin to run until the employer designates the leave as FMLA leave.

Although the court readily accepted the fact that the "FMLA itself is silent as to the notice an employer must give to an

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employee before designating his paid leave as FMLA leave," the court stated that the DOL designation provision (§ 825.208(c)) "evinces a reasonable understanding of the FMLA, reflecting Congress's concerns with providing ample notice to employees of their rights under the statute." Id. at 935. In support of this contention, the court cited 29 U.S.C. § 2619(a), which simply mandates that employers post FMLA notices in conspicuous work places. Nothing in Plant suggests the employer failed to post FMLA notices in violation of § 2619.

The court also highlighted that, because the FMLA was intended to set out minimum labor standards, the DOL designation provision is consistent with legislative intent even though "it creates the possibility that employees could end up receiving more than 12 weeks of leave in one twelve-month period, due to an employer's failure to notify them that the clock has started to run on their allotted period of leave." Id. at 935-36.

Rejecting the Eleventh Circuit's analysis and holding in McGregor, the court concluded that the DOL's designation regulations "are valid and forbid employers from retroactively designating FMLA leave if they have not given proper notice to their employees that their statutory entitlement period has begun to run." Id. at 936.

The Future

As a clear split in authority has developed on this issue, the United State Supreme Court may be forced to take an FMLA case in the near future to determine whether the DOL designation regulations are a valid exercise of agency power when they require an employer to provide more than 12 weeks of leave. Of course, another possibility is that the DOL could change its regulations under another administration. At this point, though, employers must comply with the law in their circuit.

Although employers in the Eighth Circuit (Nebraska, North Dakota, South Dakota, Minnesota, Iowa, Missouri and Arkansas) and Eleventh Circuit (Alabama, Florida and Georgia) who provide more leave than required under the FMLA may not be legally required to designate that leave as FMLA leave or risk having to grant an additional 12 weeks, they may want to do so anyway.

An employer should provide all employees with a clear leave policy, which addresses FMLA leave and how it relates to employer-provided leave (whether paid or unpaid). Employees should read and understand the policy. Leave-granting supervisors and human resource managers must understand and correctly implement the policy.

Finally, determining an employee's eligibility for FMLA leave and designating leave as FMLA leave certainly would not hurt the employer-employee relationship. Clear communication regarding the employer's leave policy would help erase misunderstandings and alleviate misinformation, which oftentimes cause employment disputes.

Designating leave as FMLA leave would also avoid depriving an employee of her FMLA entitlements. Of course, any leave policy could also say that the failure to designate leave as FMLA leave does not grant an employee greater rights than those granted under the FMLA. This would, in essence, simply reiterate the Ragsdale holding so that an employer would not be required to grant more leave than required under the FMLA if it failed for some reason to designate leave as FMLA leave.

Notwithstanding, the FMLA certainly does not condemn employers who provide greater leave benefits to its employees than required under the FMLA. It even encourages this policy. It also does not punish them for failing to designate employer-provided leave as FMLA leave, as long as the employee's substantive FMLA rights have been protected. However, a clear leave policy consistently applied would erase the need to have courts determine whether a technical violation of the DOL regulations actually violates the FMLA. Your job is to help your client save those fights for other employers and employees.

This article expresses the views of Tory L. Lucas and does not reflect or represent the views of the Department of Defense or the United States Air Force.