

THE CONTRACTUAL DIMINISHING OF FMLA EMPLOYEE RIGHTS

BERNADETTE MARCZELY, Ed.D., J.D.
Cleveland State University, Ohio

ABSTRACT

Initially, the Family and Medical Leave Act provided employees with up to 12 work weeks of unpaid, job-protected leave a year, during which time group health benefits were maintained. The FMLA's purpose, as defined by the U.S. Department of Labor was to allow employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. The FMLA sought to do this in a manner that accommodates the legitimate interests of employers and employees. The law said that employees may choose to use, *or* employers may require the employee to use, accrued *paid* leave to cover some or all of the FMLA leave taken. Employees may choose, or employers may require, the substitution of accrued *paid* vacation or personal leave for any of the situations covered by the FMLA. Nevertheless, in the wake of the FMLA's passage in 1993 and the passage of the Family and Medical Leave Clarification Act in 2001, collective bargaining has removed the original options provided individuals under the law, substituting contractual requirements. This article discusses the unforeseen consequences of editing FMLA rights provided through the collective bargaining process.

INTRODUCTION

In the wake of the U.S. Supreme Court's ruling in *Tracy Ragsdale v. Wolverine World Wide, Inc.* [1], unions and employers have apparently agreed to rewrite the Family Medical Leave Act and its accompanying regulations by means of

collective bargaining. Unfortunately, this post-legislative editing has also diminished the intent of the law to accommodate “individual” employee needs for time away from work due to health concerns or family emergencies.

The FMLA’s central provision guarantees eligible employees 12 weeks of unpaid leave in a one-year period following certain events: a disabling health problem, a family member’s serious illness, or the arrival of a new son or daughter [2]. The regulations require the employer to maintain the employee’s group health coverage during the mandatory 12 weeks of leave [3]. In addition, when the employee returns, the employer must reinstate the employee to the same or an equivalent position [4]. The regulations also provide that this leave must be granted on an intermittent or part-time basis when “medically necessary” [5]. Finally, the act makes it unlawful for an employer to “interfere with, restrain, or deny the exercise of an employee’s rights under the law [6], and makes violators subject to consequential damages and appropriate equitable relief” [7].

Congress also mandated that “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” [8]. Indeed, a survey taken in 2001 showed that 22.9% of FMLA-covered establishments allowed more than 12 weeks of leave per year, and 62.7% provided paid disability leave [9]. Basically, as long as policies met the act’s minimum requirements, leave taken could be counted toward the 12 weeks guaranteed by the FMLA [10], and unions came to see paid leave, that is, the substitution of sick, personal, and vacation leave, for some or all of the FMLA unpaid leave, as an employer’s more generous interpretation of the law in its original format.

That being said, the regulations implementing the FMLA make it the employer’s responsibility to tell the employee that an absence will be considered FMLA leave [11]. Essentially, the regulations place the burden of notice on the employer. It is this burden of notice, however, and the subsequent penalty imposed by the Secretary of Labor for the employer’s failure to give adequate notice, which lie at the heart of the *Ragsdale* decision, the pivotal turning point in FMLA implementation.

RAGSDALE

In *Ragsdale*, an employee with cancer was eligible for seven months of unpaid sick leave under her employer’s leave plan. She requested and received a one-month leave of absence on February 21, 1996 and asked for a 30-day extension at the end of each of the seven months that followed. After the employee had taken 30 weeks of leave, the employer denied a seventh 30-day extension and terminated the employee when she did not return to work [1, p. 1]. In response, the employee sued seeking reinstatement, back pay, and other relief provided under a remedial provision of the FMLA [1, p. 1]. She based her claim on the fact that her employer did not inform her that the 30-week absence granted would count against

her FMLA entitlement. In light of this oversight, she claimed that the Secretary of Labor's penalty for failure to give notice entitled her to an additional 12 weeks of unpaid FMLA leave.

The District Court, in granting summary judgment for the employer, concluded that the penalty regulation, as applied, was in conflict with the FMLA and thus invalid since the Act required the employer to grant the employee no more than 12 weeks of FMLA leave in one year [1]. Any additional leave was left to employer generosity. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's finding [12]. Finally, the case was heard by the U.S. Supreme Court, and, on March 19, 2002, in a 5-4 decision, the Court affirmed the findings of the lower courts. The Court found that assigning an additional 12 weeks of leave as a penalty for failure to give notice, after six months of leave had already been taken, amended the FMLA's fundamental substantive guarantee of 12 weeks of unpaid leave in a given year and thus subverted Congress' careful balance of the needs of families and the legitimate interests of employers [1, p. 2].

In defense of its finding, the Court noted that the sole notice provision in the FMLA itself merely imposed a \$100 fine, enforced by the Secretary of Labor, on employers who willfully failed to post a general notice informing employees of their FMLA rights [13]. The Court further argued such a severe penalty as the assignment of an additional 12 weeks of FMLA leave could lead employers, like the defendant Wolverine, to actually discontinue the more generous leave programs encouraged by the FMLA and cited in this case.

The four dissenting judges in the Ragsdale Case, however, believed that the Secretary of Labor's decision to require "individualized" and personal notice of an employee's specific rights under the FMLA was not arbitrary or capricious as the majority asserted. The dissenting judges stated that nothing in the FMLA constrained the Secretary of Labor from securing compliance with an "individualized" notice requirement. This requirement would provide that leave would *not* count against the employer's 12-week FMLA obligation unless the employer fulfilled this individualized notice requirement before leave was taken [1, p. 2].

RAGSDALE'S IMPACT ON THE FMLA

The pivotal benefits of the FMLA are continued insurance coverage during FMLA leave and the assurance that the same or equivalent position will be available to the employee on return from FMLA leave. The pivotal problem evolving from the Ragsdale decision is the question of notice delineating "individual" use of FMLA leave and whether failure to give "individual" notice should result in the reinstatement of the FMLA's 12 weeks of unpaid leave no matter how much other leave had already been taken. There are essentially two types of notice: general and specific. General notice is a posting provision [1, p. 16] informing all employees of their FMLA rights. At issue in Ragsdale is

the employer/employee “specific” agreement delineating and/or merging company leave policies and “individual” FMLA leave requests.

The 5-4 Supreme Court decision in *Ragsdale* is disconcerting in that it has given rise to collective bargaining agreements that now require employees to take their earned sick leave, personal leave, and vacation leave as part or all of their requested FMLA leave. Thus, for example, a public school teacher with 30 days of accumulated sick, personal, and vacation leave would only be entitled to an additional six weeks of FMLA unpaid leave.

THE FAMILY AND MEDICAL LEAVE CLARIFICATION ACT

The Family and Medical Leave Clarification Act introduced into the Congressional Record on March 8, 2001 [14, 15] amended the original Family and Medical Leave Act of 1993 regarding the substitution of such paid leave.

SEC. 6. SUBSTITUTION OF PAID LEAVE “(C) PAID ABSENCE – . . . where an employer provides a paid absence under the employer’s collective bargaining agreement . . . or under any other sick leave, sick pay, or disability plan, program, or policy of the employer, the employer *may require the employee to choose* between the paid absence and unpaid leave provided under this title” [16].

While the operative words used in the amendment language are “may” and “choose,” employers, through collective bargaining, have made the use of other paid leave as part of FMLA leave a *must*, not left to employee choice. Rather, the implementation of the FMLA and its overlap with other types of leave is prescribed by collectively bargained requirements that other paid leave must be used as part of the FMLA leave. From an employer’s perspective, the required use of other paid leave as part of FMLA leave prevents the stacking of leave and excessive employee absence during which health benefits must be maintained and jobs held in abeyance. From the standpoint of the individual employee, however, such contractual restrictions may actually undermine the intent of FMLA leave in several significant respects.

Although paid leave might initially seem preferable to unpaid leave under any circumstances, there can be times when a contract’s prescription to use paid leave as part of FMLA leave may undermine the underlying purpose of the act. Paid sick leave, personal leave, and vacation leave have always been a part of collectively bargained contracts, and their use was usually defined within the contract. On the other hand, FMLA leave was to be a special kind of leave designed to address personal and family medical issues that may require attention beyond allotted leave. The FMLA is sensitive to the deleterious effect the threat of job loss and loss of benefits can have when an employee is trying to deal with personal issues that may not be resolved quickly or easily. The required use of

sick, personal, and vacation leave as a part of FMLA leave can indeed shorten the time allotted for resolving the problems addressed by the FMLA. The act's original assurance of 12 weeks of unpaid leave can be significantly shortened by contractual restrictions requiring that other leave be exhausted first as part of FMLA leave.

EXAMPLES OF FMLA SHORTFALLS

In practice, collectively bargained procedures for implementing the FMLA have caused the law to fall short of its intended altruistic outcome. For example, an employee caring for a sick family member could conceivably use up all sick, personal, and vacation leave, and be left with only minimal FMLA leave to see a terminal illness through to the end, a period of time which often demands the greatest amount of care and presence. A pregnant employee going through a difficult pregnancy and the subsequent birth of a child with health issues under existing policies may also have used up all sick, personal, and vacation leave options as well as FMLA leave and be forced to leave a job without health coverage or career options for the future. In these examples, collectively bargained clauses mandating the use of sick, personal, and vacation leave as part of FMLA leave, not in addition to it, may eliminate "leave stacking," thereby decreasing an employer's consequential costs in extended benefit coverage and in maintaining a stable work force, but such collectively bargained agreements also undermine the act's intent to give employees in the midst of family crises control over how they will deal with these crises. In work environments where the contract prescribes the use of sick, personal, and vacation leave as part of FMLA leave, the employee loses the option of deciding how to distribute leave to best cover all eventualities. Although, as noted above, The Family and Medical Leave Clarification Act says the employer *may* require the employee to *choose* between the paid absence and unpaid leave provided, more and more collectively bargained agreements allow employers to contractually mandate the use of sick, personal, and vacation leave as part of the FMLA's 12-week allotment.

OTHER ISSUES

As a result of this practice of collectively bargaining FMLA procedures, other contractual issues have also come to the fore regarding the contractual prescription that sick, personal, and vacation leave be used as part of the 12-week FMLA leave. Sick leave in many work places can be accrued from one year to another. This accrued sick leave seriously impacts both retirement and severance pay in many work places. In some collective bargaining agreements, accrued sick leave can be used to secure early retirement. Two veteran female Albuquerque police officers who sought time off for childbirth in 2000 (and who were told to exhaust their accrued sick leave before tapping into vacation time) argued they were being

required to sacrifice retirement benefits to leave time for birthing. The plaintiff officers were also told that in no event could they use accrued compensatory time (paid time off awarded for overtime work and in lieu of a cash payment) as part of the FMLA leave requested [17]. Although the plaintiffs brought their case under The Pregnancy Discrimination Act, the practices cited deal more directly with how the contractual requirement to use or not to use other types of leave as part of FMLA leave can seriously impact other contractual aspects of employment. Requiring the plaintiffs to use their accrued sick leave had a deleterious effect on their retirement rights. Restricting use of earned compensatory time further restricted their FMLA rights and impacted their earning power.

In the contract at issue, vacation and compensatory time were capped, and the employee was required to either use or lose them [17, p. 3]. The plaintiffs in this case, with more than 250 hours of compensatory time, were not allowed to accumulate additional compensatory time until the 250 hours were used, but they were not allowed to use compensatory time as part of FMLA leave. In a virtual “Catch 22” conflict of contract, policy, and law, the plaintiffs in this case were required to use sick leave accrued toward retirement, but they could not use their compensatory time as part of FMLA leave; they were also prohibited from working overtime and earning overtime pay when they returned to work [17, p. 4]. One might assert they were being punished for exercising their rights under the FMLA. More to the point, they were being asked to pay for FMLA leave with other contractually earned benefits.

After the plaintiffs initiated proceedings before the Equal Employment Opportunity Commission in November, 2000, the City of Albuquerque entered into an agreement with the Albuquerque Police Officer’s Association in June, 2001, to allow women seeking maternity leave (and all others taking leave for FMLA-qualifying purposes) to use compensatory time; the agreement also eliminated the requirement that they use sick days before other kinds of leave [17, p. 4]. Unfortunately, the implications of restricting how FMLA and other leaves overlap is often overlooked or traded off during the collective bargaining process that defines the overlap.

Similarly, many states and school districts allow public school teachers to accrue sick leave with the promise of a cash payment for some percentage of that accrued leave upon retirement or separation. In Ohio, for example, a teacher with ten or more years of service may elect upon retirement to receive pay for one-fourth of accrued, but unused, sick leave, up to a maximum of 30 days [18]. Boards of Education are permitted to adopt local policies that are more generous than the state statute. Thus, Boards of Education frequently adopt policies or negotiate contracts that allow teachers to receive payment for more than one-fourth of accumulated sick leave or for more than 30 days [19]. In order to control teacher absenteeism and the need for substitutes, such contractual policies can be quite lucrative, particularly for teachers who have been in a school district for a long time and have remained relatively healthy during that time.

Requiring veteran employees with extensive accrued sick leave to exhaust that sick leave as part of FMLA leave, literally requires them to pay for the use of FMLA leave with accrued severance and retirement benefits.

CONCLUSION

The law's initial statement regarding the substitution of paid leave for FMLA leave was not decisive. Essentially the law provided that:

“Employees may choose to use, *or* employers may require the employee to use, accrued *paid* leave to cover some or all of the FMLA leave taken. Employees may choose, *or* employers may require, the substitution of accrued *paid* vacation or personal leave for any of the situations covered by FMLA. The substitution of accrued sick or family leave is limited by the employer's policies governing the use of such leave” [20].

What has ensued is a collectively bargained capitulation to employer wishes that often ignores or jeopardizes FMLA and other employee rights under the contract. Essentially, that part of the Compliance Guidance cited above that gives employees the right to choose how they use their accrued and FMLA leave has been eliminated, thus ultimately diminishing the effectiveness of the FMLA. The freedom to deal with personal and family emergencies from the perspective of confidential insight and personal responsibility has been sacrificed to collectively bargained corporate and contractual interests. A sought-after effect of the FMLA, namely, the support of personal and family interests in tough times, has been routinely sacrificed in collective bargaining. Only when the “or” in both the law and its guidance is restored, will the law truly function as it was intended. Only by restoring individual choice in how leave is used can the humane purpose of the FMLA be achieved.

REFERENCES

1. *Tracy Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, March, 19, 2002.
2. 29 U.S.C. § 2612 (a) (1).
3. 29 U.S.C. § 2614 (c) (1).
4. 29 U.S.C. § 2614 (a) (1).
5. 29 U.S.C. § 2612 (b) (1).
6. 29 U.S.C. § 2615 (a) (1).
7. 29 U.S.C. § 2617 (a) (1).
8. 29 U.S.C. § 2653.
9. D. Cantor et al., *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys*, U.S. Dept. of Labor, pp. 5-12, (2001).
10. 60 Fed. Reg. 2230 (1995).
11. 29 CFR § 825.208 (a) 2001.

12. 218 F3d 933.
13. 29 U.S.C.S. 2619.
14. Congressional Record of 107th Congress, 1st Session, Vol. 147, No. 30.
15. S. 489, *Family and Medical Leave Clarification Act*, 2001.
16. Section 102 (d) (2) 29 U.S.C. 2612 (d) (2) (C) Amendment.
17. *Cynthia Orr; Patricia Paiz v. City of Albuquerque, Mary Beth Vigil*, 531 F.3d 1210; 2008 U.S. App. LEXIS 14505; 103 Fair Empl. Prac. Case (BNA) 1249, filed July 8, 2008.
18. Ohio R.C. § 124.39 (B).
19. Ohio R.C. §124.39 (C).
20. FMLA Compliance Guidance, www.dol.gov/esa, accessed Feb. 12, 2007.

Direct reprint requests to:

Bernadette Marczely, ED.D., J.D.
Professor
Cleveland State University
College of Education and Human Services
2121 Euclid Ave., RT 1445
Cleveland, OH 44115
e-mail: B.MARCZELY@csuohio.edu