CHAPTER 1

Development of FMLA and Related Regulations

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§ 1.01 Introduction

The Family and Medical Leave Act of 1993 (“FMLA” or the “Act")¹ was enacted on February 5, 1993, and became effective for most covered employers on August 5, 1993.² All private employers with fifty or more employees are covered by the FMLA. Public employers are covered without regard to the number of employees. An employee working for a covered employer is eligible for FMLA leave if he or she has worked for the employer for one year, has worked 1,250 hours in the previous twelve months, and there are at least fifty employees within seventy-five miles of the employee’s work site.

² For employees covered by a collective bargaining agreement in effect on August 5, 1993, the FMLA became effective on the earlier of the expiration of that agreement or February 5, 1994. 29 C.F.R. §§ 825.102, 825.700(c).
The FMLA entitles eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to a total of twelve workweeks in a twelve-month period for the following: (1) the birth of the employee’s child and to care for the newborn child; (2) the placement of a child with the employee for adoption or foster care; (3) to care for the employee’s spouse, parent or child with a serious health condition; (4) when the employee is unable to work due to the his or her own serious health condition; (5) to care for a family member with a serious injury or illness arising out of military service; or (6) for a qualifying exigency arising out of a family member’s call to active duty or assignment overseas.3

In addition to providing leave time, the FMLA requires that a covered employer maintain group health benefits while an employee is on FMLA leave. An employee returning from FMLA leave is entitled to reinstatement to his or her previous or a similar position. In addition, an employer cannot discriminate or retaliate against an employee for requesting or taking FMLA leave.

Although Congress has considered a number of amendments to the FMLA since its passage in 1993, the Act remained in its original form until January 2008, when it was expanded for the first time to include rights for family members of individuals serving in the Armed Forces.4 The 2008 amendments were amended to again expand the rights of such family members in October 2009.5

In addition, the Airline Flight Crew Technical Corrections Act was passed, making minor modifications to the eligibility requirements of the FMLA.6

The final Department of Labor regulations, which went into effect on April 6, 1995,7 remained unchanged until revised regulations were issued in November 2008, taking effect on January 16, 2009.8 The revised regulations include provisions regarding the 2008 amendments.

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3 29 U.S.C. §§ 260 et seq.
to the FMLA but were issued prior to the 2009 amendments. To date, there are very few cases addressing either the amendments to the FMLA or the revisions to the regulations.

On April 1, 2011, the Department of Labor (“DOL”) announced that it was conducting a survey of both employers and employees regarding their experiences with the FMLA and the possible need for any changes to the statute or its regulations. Responses were due on June 17, 2011. It is widely believed that this survey signals that the DOL may be drafting regulations regarding not only the most recent FMLA amendments relating to family members of military personnel, but may also be considering a more thorough overhaul of the regulations.

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§ 1.02 Legislative History

[1]—Previous Attempts to Pass the FMLA

The FMLA was first introduced into Congress in 1986.¹ Both the Senate and the House of Representatives passed it in 1990² and again in 1992.³ However, on both occasions President George H.W. Bush vetoed it.⁴

[2]—Legislative History of the 1993 Act

The FMLA was prompted by a number of congressional findings, including the increased number of single-parent households and households with both parents working and the lack of job security for working parents and employees temporarily unable to work due to serious health conditions.⁵ In passing the FMLA, Congress recognized the importance of parents participating in early childrearing and in caring for close family members with serious health conditions.⁶ The FMLA was therefore designed to provide the job security needed to help preserve family integrity and stability:

“The FMLA was predicated on two fundamental concerns - the needs of the American workforce, and the development of high performance organizations. Increasingly, America’s children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.”⁷

While the FMLA generally creates obligations for employers and rights for employees, Congress intended that the Act would benefit employers due to the direct correlation between stability in the family and productivity in the workforce.⁸

¹ H.R. 4300 (introduced March 4, 1986); S. 2278 (introduced April 9, 1986).
² Family and Medical Leave Act of 1990, H.R. 770.
⁶ Id.
⁷ 29 C.F.R. § 825.101(b).
⁸ 29 C.F.R. § 825.101(c).
[3]—Amendments to the FMLA

On January 16, 2008, President George W. Bush signed the National Defense Authorization Act for Fiscal Year 2008.9 The budget bill included a significant expansion of the FMLA, creating two new kinds of leave: (1) leave for the care of a parent, spouse, child or next of kin on active military duty who suffered a serious injury or illness as a result of military service, and (2) leave for “qualifying exigencies” arising out of the call of a family member to active duty from the National Guard or Reserves.

In the National Defense Authorization Act for Fiscal Year 2010, signed by President Barack Obama on October 28, 2009,10 the 2008 amendments were modified to expand the recently created leave for family members of those in military service. Caregiver leave for service members with a serious injury or illness was extended to allow care for retired military personnel who suffered serious injuries or illness as a result of military service in the last five years. Qualifying exigency leave was extended beyond family members recently called to active duty to include regular active duty military personnel sent to a foreign country.

In addition to these significant amendments, Congress passed the Airline Flight Crew Technical Corrections Act, which was signed into law on December 21, 2009.11 This amendment to the FMLA was, as its title suggests, relatively minor, changing the eligibility rules for pilots and flight attendants to reflect the fact that many such employees are considered “full time” and paid as such but often do not work enough hours to meet the regular FMLA requirement of 1,250 hours in the previous year.

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§ 1.03 Department of Labor Regulations

[1]—Original Regulations

The FMLA required the Department of Labor to issue initial regulations to implement Titles I and IV of the FMLA within 120 days of enactment, or by June 5, 1993, with an effective date of August 5, 1993.\(^1\)

After considering the comments received from a wide variety of stakeholders, including employers, trade and professional associations, advocacy organizations, labor unions, state and local governments, law firms, employee benefits firms, academic institutions, financial institutions, medical institutions, members of Congress and others, the DOL issued an interim final rule on June 4, 1993, which became effective on August 5, 1993.\(^2\) The final DOL regulations went into effect on April 6, 1995.\(^3\)

[2]—Ragsdale Decision by the United States Supreme Court

In 2002, in its decision in *Ragsdale v. Wolverine Worldwide, Inc.*,\(^4\) the United States Supreme Court held that the Department of Labor had overstepped its authority when it issued a regulation providing that an employee’s seven months off did not count as FMLA leave if the employer did not so designate it within two days and that the employee was therefore entitled to take an additional twelve weeks of leave. Finding that the plaintiff had been granted more than twelve weeks of leave for a serious health condition, regardless of how it was designated, the Court held that the DOL could not, through its notice regulations, require that an employer provide more than the twelve weeks set forth in the statute.

A number of lower courts agreed with the analysis used by the Supreme Court in *Ragsdale* and held that a number of provisions in the DOL regulations, such as those creating eligibility for an otherwise ineligible employee based on an employer’s action or inaction, were similarly invalid.\(^5\)

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\(^1\) 73 Fed. Reg. 67934-67935 (Nov. 17, 2008).
\(^2\) *Id.* at 67935.
\(^3\) *Id.*
\(^5\) *Second Circuit*: Woodford v. Community Action of Greene County, Inc., 268 F.3d 51 (2d Cir. 2001).

As a result of \textit{Ragsdale} and its progeny, the Department of Labor needed to revise its regulations. In addition, because the original regulations were issued under the Clinton administration, the DOL undertook a more thorough review of all of the regulations, not just those relating to the invalidated provisions.

\section*{3—2008 Revised Regulations}

On December 1, 2006, the DOL published a Request for Information ("RFI") in the Federal Register requesting the public to comment on its experiences with, and observations of, the DOL’s administration of the law and the effectiveness of the FMLA regulations.\footnote{\textit{Fifth Circuit:} Hunt v. Rapides Healthcare System, LLC, 277 F.3d 757 (5th Cir. 2001) (stating in dicta, “If an employee has received her entitlements under the FMLA, she does not have an FMLA claim regardless of the quality of notice that she received”). \textit{Seventh Circuit:} Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579 (7th Cir. 2000). \textit{Tenth Circuit:} Knapp v. America West Airlines, 207 Fed. App’x 896 (10th Cir. 2006). \textit{Eleventh Circuit:} Brungart v. BellSouth TeleCommunications, Inc., 231 F.3d 791 (11th Cir. 2000), \textit{cert. denied} 532 U.S. 1037 (2001); McGregor v. Autozone, Inc., 180 F.3d 1305 (11th Cir. 1999).} The DOL received more than 15,000 comments in response to the RFI from workers, family members, employers, academics and other interested parties, ranging from personal accounts, legal reviews, industry and academic studies and surveys to recommendations for regulatory and statutory changes to address particular areas of concern.\footnote{6 71 Fed. Reg. 69504 (Dec. 1, 2006). \footnote{7 73 Fed. Reg. 67935 (Nov. 17, 2008). \footnote{8 73 Fed. Reg. 7876 (Feb. 11, 2008). \footnote{9 Id.}}}

On February 11, 2008, the DOL published a Notice of Proposed Rulemaking ("NPRM") inviting public comment on proposed changes to the FMLA regulations.\footnote{8 In addition to regulatory revisions prompted by the Supreme Court’s decision in \textit{Ragsdale} and public comments provided in response to the RFI regarding the effectiveness of the original regulations, the DOL requested public comment on issues to be addressed in final regulations to implement the 2008 amendments to the FMLA providing for military family leave. Also, because many of the National Defense Authorization Act provisions providing for military family leave under the FMLA adopt existing provisions of law generally applicable to the military, the DOL engaged in extensive discussions with the Departments of Defense and Veterans}
Affairs, as well as a number of military service organizations, in an effort to have the final regulations reflect an understanding of and appreciation for the unique circumstances facing military families when a service member is deployed in support of a contingency operation or injured in the line of duty on active duty, as well as providing appropriate deference to existing military protocol.\textsuperscript{10}

On November 17, 2008, the DOL issued its first revisions to the FMLA regulations since the initial regulations became effective in 1995.\textsuperscript{11} These revised regulations went into effect on January 16, 2009.\textsuperscript{12} Many of the revisions in the revised regulations are minor and do not have a significant impact on the way employers conduct business. Others are not really revisions at all, but instead were simply clarifications of previous provisions.

The DOL made more substantive changes to the definition of “serious health condition.” The DOL rejected requests from employers to make significant changes to the definition to narrow the conditions covered by the FMLA,\textsuperscript{13} but the DOL did agree to put some parameters on the time frames for “continuing treatment” under the “three days of incapacity” and “chronic conditions” definitions of “serious health condition,”\textsuperscript{14} trying to strike a balance between employee groups, which thought that no minimum number of doctor visits should be required, and employer groups, which wanted even tighter restrictions.\textsuperscript{15} The DOL also increased the specificity of the information that the employer can obtain through certification forms and enhanced the employer’s ability to get follow-up information from the employee’s physician.\textsuperscript{16}

The DOL also made a number of significant substantive changes with regard to the administration of intermittent leave, such as allowing an employer to require that an employee stay on leave longer than the time actually needed when the employee chooses to be paid for the time off under a policy that requires that paid leave be taken in increments greater than an hour.\textsuperscript{17} However, the DOL rejected the request of employers to allow for temporary transfer of an employee taking unforeseeable intermittent leave.\textsuperscript{18}

\textsuperscript{10} 73 Fed. Reg. 67935 (Nov. 17, 2008).
\textsuperscript{11} 73 Fed. Reg. 67934.
\textsuperscript{12} Id.
\textsuperscript{13} 73 Fed. Reg. 67945-67946 (Nov. 17, 2008).
\textsuperscript{14} 29 C.F.R. § 825.115.
\textsuperscript{15} 73 Fed. Reg. 67947-67949 (Nov. 17, 2008).
\textsuperscript{16} 29 C.F.R. §§ 825.305-825.312.
\textsuperscript{17} 29 C.F.R. § 825.207.
\textsuperscript{18} 29 C.F.R. § 825.204; 73 Fed. Reg. 67974-67975 (Nov. 17, 2008).
A number of the DOL’s revisions reflect an understanding of the attendance challenges posed by the FMLA. Therefore, the DOL reversed its previous position that an employer could not condition bonuses on attendance and now allows an employer to disqualify an employee from a bonus or other payment based on the achievement of a specified goal when the employee has not met the goal due to FMLA leave, so long as the employer does so in a non-discriminatory manner.\(^{19}\)

The DOL also changed its position regarding the notice that employees must give in order to trigger their FMLA rights, requiring much more specific information than the previous “I’m sick” before placing a burden on the employer to determine whether FMLA leave is appropriate and allowing employers to enforce “usual and customary” notice procedures absent extenuating circumstances.\(^{20}\) While the DOL did not make any major modifications to the thirty-day “or as much notice as is reasonable practicable” requirement, the comments to the revised regulations make clear that an employer can enforce the notice requirement, delaying or denying leave when an employee fails to comply.\(^{21}\)

The DOL did not significantly change the general employer notice requirements, although it did make minor changes to reflect the increased use of electronic communication to employees and the internationalization of the workforce.\(^{22}\) However, in response to the Supreme Court’s \textit{Ragsdale} ruling that the DOL’s notice requirements required more than allowed by statute, the DOL established \textit{more} notice requirements at the time leave is requested, not fewer. An employer now must convey specific information, in writing, regarding eligibility, the coordination of FMLA with paid leave, certification requirements, the continuation of benefits, return to work procedures, and the like, within certain time limits (generally five business days from the triggering event).\(^{23}\) Although increasing, not diminishing, its notice requirements, the DOL acknowledged the \textit{Ragsdale} ruling by adding a provision stating that when an employer fails to comply with a notice requirement, there is no violation of the statute unless the employee was harmed by the lack of notice.\(^{24}\)

\begin{itemize}
  \item \(^{19}\) 29 C.F.R. § 825.215; 73 Fed. Reg. 67984-67985 (Nov. 17, 2008).
  \item \(^{20}\) 29 C.F.R. §§ 825.302, 825.303.
  \item \(^{21}\) 73 Fed. Reg. 679800-679808 (Nov. 17, 2008).
  \item \(^{22}\) 29 C.F.R. § 825.300, 73 Fed. Reg. 67991 (Nov. 17, 2008).
  \item \(^{23}\) 29 C.F.R. § 825.300.
  \item \(^{24}\) 29 C.F.R. § 825.301(e).
\end{itemize}
While the new regulations regarding caregiver leave for a family member with a serious injury or illness suffered in military service largely tracked the statutory amendments, the new regulation regarding “qualifying exigencies” created from scratch the types of activities for which such leave could be taken.\textsuperscript{25} The DOL incorporated as many specific qualifying events as possible, but also included an “additional activities” category, which would be agreed upon by both the employer and the employee, in order to provide some flexibility for both employers and employees to address unforeseen circumstances.\textsuperscript{26}

In addition to its substantive changes, the DOL reorganized its regulations. While this reorganization has made the regulations significantly easier to navigate, it has also resulted in a renumbering that makes it difficult for attorneys and human resources professionals to use briefs drafted prior to 2009 and to compare old and new regulatory provisions.

\textsuperscript{25} 29 C.F.R. § 825.126.
\textsuperscript{26} 73 Fed. Reg. 67959 (Nov. 17, 2008).
§ 1.04 Related State Statutes

This book discusses the provisions of the federal Family and Medical Leave Act. However, employers must beware that many states have their own family and medical leave laws. Some state laws provide benefits similar to the FMLA’s but extend those benefits to employees of companies with fewer than fifty employees.¹ A number of states have an expanded definition of “family,” including relationships such as same-sex partners or grandparents.² Several states provide leave for conditions not specifically covered by the FMLA.³

¹ See, e.g.:
  Minnesota: Minn. Stat. § 181.940.
  Washington: Wash. Rev. Code §§ 49.86.010(6)(a), 50.50.080(1).

² See, e.g.:
  Maine: domestic partners and their children, siblings (26 Me. Rev. Stat. § 843(4)(D)).
  Oregon: domestic partners, parents-in-law, grandparents, grandchildren (Or. Rev. Stat. § 659A.150(4)).
  Rhode Island: parents-in-law, domestic partners of state employees (R.I. Pub. Laws § 24-48-1(5)).
  Wisconsin: parents-in-law (Wis. Stat. § 103.10(1)(f)).

³ California: child school activities (Cal Lab. Code § 230.8).
  Colorado: effects of sexual assault or domestic violence (Colo. Rev. Stat. § 24-34-402.7).
  Connecticut: organ or bone marrow donation (Conn. Gen. Stat. § 31-51ll(2)(E)).
  Florida: effects of sexual assault or domestic violence ( Fla. Stat. §§ 741.313.
  Maine: organ donation, death of a family service member killed on active duty (26 Me. Rev. Stat. § 843(4)).
Employers doing business in these states will need to comply with both federal and state law, giving employees the best benefits of both.

Massachusetts: child school activities, routine medical visits for family members (Mass. Gen. Laws Ch. 149, § 52(D)(b)).

Minnesota: child school activities (Minn. Stat. § 181.9412).

Oregon: care for a child with a non-serious injury or illness if the child requires home care (Or. Rev. Stat. § 659A.159(d)).


Vermont: child school activities, routine medical visits for family members (23 Vt. Stat. Ann. § 472a(a)(2)).