Living with Leave Part II: Notice, Designation, and Substitution of Leave Issues

Note: We have developed our understanding of the assertions and concerns of various family and business groups from our reading of FMLA cases, from materials developed by the groups, and through individual conversations with group representatives. Where comments have appeared in writing, we have included at least one source for each concern or assertion, even if we have heard similar information from additional sources. For purposes of this chart, the term "family and labor groups" includes: AFL-CIO, D.C. Employment Justice Center, Labor Project for Working Families, National Partnership for Women and Families, and the National Women's Law Center. For purposes of this chart, the term "business groups" includes: HR Policy Association (formerly LPA), National Association of Manufacturers, Society for Human Resource Management, and the U.S. Chamber of Commerce.

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An employer is required to post a written notice regarding an employee's FMLA rights. 29 U.S.C. § 2619(a) 29 C.F.R. § 825.300 An employer is also required to provide written notice regarding the employees' FMLA rights and obligations in its employee handbook; provide general written guidance regarding employees' FMLA rights and obligations if no such handbook or manual exists; and provide an individualized notice to an employee of his or her rights and responsibilities under the law when the employee requests leave.	These requirements ensure that workers have the timely information they need to make informed judgments about when, whether, and how to assert their rights under the FMLA.	The only notice the statute requires of employers is that they post a notice about employees' FMLA rights.	

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29 C.F.R. § 825.301 See *Sanders v. May Dept. Stores Co.*, 315 F.3d 940 (8th Cir. 2003); *Conoshenti v. Public Service Electric and Gas Company*, 364 F.3d 135 (3rd Cir. 2004).			
An employee is required to provide 30 days notice (or, when the request is less than 30 days, "as practicable") when the need for leave is foreseeable. 29 U.S.C. § 2612(e) 29 C.F.R. § 825.302(a) The employee need not mention the FMLA explicitly when requesting leave. The employee must provide "at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave." 29 C.F.R. § 825.302(c)	These notice requirements sufficiently protect employers and give them a way to handle their workforce issues. Many workers are not familiar with or are confused about the FMLA's protections. (DOL 2000 study) It therefore makes sense that employees not be required to specifically request FMLA leave or be required to prove that their condition meets the regulatory test for a serious health condition.	Employees are required only to provide oral notice, not written notice. An employee is not required to specifically mention the FMLA; the employee need only state that time off is needed and provide a general reason that might plausibly meet the FMLA standard. The obligation then shifts to the employer (often a low level supervisor) to get the necessary information to determine whether the leave qualifies under the FMLA. This requires employers to pry unnecessarily into an employee's private matters. (LPA) "If a supervisor does not ask the necessary probing questions and improperly fails to classify the	

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See *Brennerman v. MedCentral Health System*, 366 F.3d 412 (6th Cir. 2004); *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002); *Satterfield v. Wal-mart Stores, Inc.,* 135 F.3d 973 (5th Cir. 1998); *Manuel v. Westlake Polymers Corp*., 66 F.3d 758 (5th Cir. 1995).		leave as covered by the FMLA, he or she could be personally liable for the FMLA violation." (LPA)	
An employer may require that the employee submit a health care provider's certification of the employee's or family member's serious health condition. 29 U.S.C. § 2613 29 C.F.R. § 825.305, 306, 307 See *Perry v. Jaguar of Troy*, 353 F.3d 510 (6th Cir. 2003); *Miller v. AT&T,* 250 F.3d 820 (4th Cir. 2001); *Henderson v. Whirlpool Corp.,* 17 F. Supp.2d 1238 (N.D. Okla. 1998).	It is sometimes difficult for employees to get doctors' appointments and/or get doctors to complete and submit paperwork in a timely fashion.	The regulations include an overly expansive regulatory definition of health care provider. An employer is prohibited from contacting the health care provider without the employee's permission, even in order to clarify or authenticate the doctor's certification. Even with the employee's permission, an employer may not directly contact the employee's health care provider. Rather, a health care provider hired by the employer must contact the employee's health care provider to get the information. This is very difficult, costly and time-	Regulations suggest that employers may delay or deny FMLA leave if employee fails to provide timely certification. Courts, however, generally have given employees leeway in correcting untimely or inadequate certifications. The only time there appears to be an express prohibition on contacting health care providers is after the employee already has submitted a completed medical certification. (*See* 29 C.F.R. § 825.307) 29 C.F.R. § 825.208 contemplates that a doctor will talk directly to a supervisor and 29 C.F.R. § 825.302(c) has no express prohibition on a supervisor calling a doctor with the employee's consent.

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		consuming for employers to obtain clarification or authentication of certifications. (Chamber)	
The employer has the right to require an employee to get second and third opinions. These opinions must be paid for by the employer. 29 U.S.C. § 2613(c), (d) 29 C.F.R. § 825.307 See *Stekloff v. St. John's Mercy Health Systems*, 218 F.3d 858 (8th Cir. 2000); but see, *Miller v. AT&T*, 60 F. Supp. 2d 574 (S.D. W.Va. 1999); *Sims v. Alameda-Contra Costa Transit District*, 2 F. Supp. 2d 1253 (N.D. Ca. 1998).	Regulation is insufficient – allows the employer to deny leave without seeking a second or third opinion. Employers who fail to exhaust the option to seek second and third opinions should be precluded from challenging an employee's serious health condition in subsequent litigation. (AFL-CIO)	Getting second and third opinions at the employer's expense is costly for employers.	
For pregnancy or chronic conditions, employer may request recertification no more often than every 30 days unless the circumstances described in the previous	These recertification rules are reasonable and appropriate. An employer should not be permitted to harass employees for recertifications. Moreover, the employee bears the cost of	These recertification rules do not allow employers sufficient management control. Once an employee gets a "note from the doctor" stating the need for intermittent leave because of	Employer may request recertification in less than 30 days if "the employer receives information that casts doubt upon the continuing validity of the certification" (per 29 C.F.R. § 825.308).

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certification have changed dramatically or the employer receives information that casts doubt on the employee's stated reason for absence. Certifications for intermittent or reduced schedule leave should include the minimum period necessary for such leave. Employers may not require recertification in less than this minimum period, unless one of the circumstances noted above applies. Recertifications are at the employee's expense. Employers may not require second and third opinions at the recertification stage. 29 U.S.C. § 2613(e) 29 C.F.R. § 825.308	the recertification.	some medical condition, that employee can continue to use that certification. An employer may not require the employee to provide a certification for each absence. The fact that an employer may not request a second or third opinion on recertification is very problematic. It means that employers have no real recourse for challenging the validity of recertification even when the employer suspects abuse. (NAM)	
An employer is required to			

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advise an employee who requests FMLA leave whether s/he is eligible (e.g., meets the 1250 hours and one year threshold). 29 C.F.R. § 825.110(d) See *Babcock v. Bellsouth Advertising and Publishing Corp.*, 348 F.3d 73 (4th Cir. 2003); *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002); *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706 (2nd Cir. 2001); *Gurley v. Ameriwood Indus.*, 232 F. Supp. 2d 969 (E.D. Mo. 2002).			
An employer is required to designate leave as FMLA leave. An employer is also required to notify the employee if paid leave will be substituted for the FMLA leave (and designated as FMLA leave). As a general matter, this designation and	Putting this burden on the employer is appropriate. This protects employees who are unsure about whether their leave is FMLA qualifying (i.e., whether, if they choose to take leave, it will be job-protected). It also gives the employees the information they need to decide	The burden on the employer is unrealistic. Once a request for leave has been made, an employer has only two days to determine whether the leave is FMLA qualifying and then to notify the employee. This is difficult to administer, particularly when HR departments are in different	Query: How do the designation and certification requirements work together in practice? If employer has to designate leave as FMLA leave within 2 days, but employer also has the right to seek certification of the request, does the preliminary designation process set forth in the regulations (29 C.F.R. § 825.208(e)(2)) work well for employers?

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notice must occur within two days of the leave being requested. 29 C.F.R. § 825.208 See *Conoshenti v. Public Service Elec. & Gas Co.,* 364 F.3d 135 (3rd Cir. 2004); *Katekovich v. Team Rent a Car of Pittsburgh*, 2002 WL 1288766 (3rd Cir. 2002); *Hicks v. Leroy's Jewelers, Inc.*, 225 F.3d 659 (6th Cir. 2000); *Phillips v. Leroy-Somer North America, et al.,* 2003 U.S. Dist. LEXIS 5334 (W.D. Tenn. 2003); *Blankenship v. Buchanan General Hospital, Inc.*, 999 F. Supp. 832 (W.D.Va 1998).	how to use their leave. Allowing employers to require substitution of paid leave (to run concurrently with the FMLA leave) benefits employers. It ensures that an employee's overall leave will not exceed 12 weeks. (National Partnership)	locations than the employee's worksite. Employers are not sure who is really entitled to FMLA leave; it is difficult to make a quick determination. (See discussion in Chart I re definition of serious health condition; see also discussion above re the fact that employees need not expressly request FMLA leave.) Apparently the change/fix in the Gregg bill (re substitution of paid leave) is not something all business groups are asking for: "Employers generally support the existing provisions of the FMLA that authorize them to run FMLA leave concurrently with existing employer-provided paid leave benefits. While there was some discussion that the provisions of [the Gregg bill] addressing paid leave substitution might help with those employees trying to game the system, most LPA members did not see this provision as offering substantial help or clarification to them." (LPA)	

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Impact of *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002).	*Ragsdale* struck down 29 C.F.R. § 825.700(a) because the penalty was not tailored to the harm suffered by the particular employee. The holding in that case is strictly limited to 29 C.F.R. § 825.700(a) and to the facts of that case. Thus, the general regulatory designation and notice requirements are still valid. DOL has the authority to issue an enforcement provision that would make it possible for an employee to prove that a failure to designate and/or notify constitutes "actual harm." (National Partnership)	DOL's notice provisions are no longer valid. (NAM)	The lower courts appear to be applying *Ragsdale* to invalidate the penalty provisions of the notice or designation requirements (i.e., leave taken is not counted as FMLA leave) only when individual harm cannot be proven. Long term impact of *Ragsdale* is unknown. Could be interpreted by the lower courts to mean: Only the penalty provision at issue in *Ragsdale* (29 C.F.R. §825.700(a)) is invalid, but it is invalid only when individual harm can't be shown; -OR- Only the penalty provision at issue in *Ragsdale* (29 C.F.R. §825.700(a)) is invalid, but it is invalid in all cases; -OR- All penalties imposed by the regulations that create a substantive right to leave beyond that found in the statute are invalid. In addition, as noted above, some business groups also believe all of the notice requirements in the regulations exceed DOL's authority under the statute.