

## FMLA regs update

**John F. Emerson**  
**Nexsen Pruet, LLC**

Way back in 2002, the U.S. Supreme Court decided a little case we like to call *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S.81 (2002), which invalidated a Department of Labor (DOL) regulation regarding employer notice to employees that leave is being counted towards the Family and Medical Leave Act (FMLA) limit. This regulation, which is still reflected in the Federal Register, states “[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). More on this in a minute.

So, since 2003, the DOL has been promising the masses some new FMLA regulations—or maybe just one new regulation—in response to this momentous decision. The Court’s decision arose from some extreme facts. Tracy Ragsdale, an employee of Wolverine Worldwide, Inc., found herself battling Hodgkin’s disease. Wolverine had what most would consider a very generous leave policy, which allowed qualifying employees to take up to seven months of unpaid leave. Ragsdale used her seven months of leave, during which time her position remained open and all of her benefits continued. At no time, however, did her employer notify her that the leave would be counted against the 12 weeks to which she would have been entitled under the FMLA. At the end of the seventh month, Ragsdale’s request for an additional 30 days was denied. When she failed to show up for work, her employment was terminated.

Ragsdale filed suit against Wolverine, citing 29 C.F.R. 825.700(a). She claimed that, since she had never been notified that her absence counted as FMLA leave, she was entitled to 12 more weeks of leave and Wolverine was in violation of the FMLA by refusing her request and by terminating her employment. The district court found the regulation at odds with the statute, which only requires that covered employers provide a *minimum* of 12 weeks per year. 29 U.S.C. § 2601 et seq. The Court of Appeals for the Eighth Circuit affirmed, as did the U.S. Supreme Court, rendering 29 C.F.R. 825.700(a) invalid. In so holding, the Supreme Court noted, among other things, that the regulation did not take into consideration whether the employee had been prejudiced in any way by the employer’s failure to notify.

In its regulatory agenda of May of 2003, the year after the decision was handed down, the DOL announced changes would be forthcoming. But they were not. The agenda published in December 2004 forecasted new rules within the next four months. Nothing happened. In May 2005, the DOL once again announced that changes would be out any minute. Nope. In October 2005, the DOL once again placed FMLA changes on its regulatory agenda. According to Alfred B. Robinson Jr., Esq., Deputy Administrator, Wage and Hour Division of the DOL, the only information available at this time is what appears there. It says, simply, “Family and Medical Leave Act of 1993; Conform to the Supreme Court’s Ragsdale Decision.” According to Robinson, the agenda is intended to suggest change could be expected by October of this year.

## FMLA regs update, *continued*

Meanwhile, FMLA aficionados on both sides of the aisle are also hoping for a variety of other changes when the oracle speaks. Employer representatives, like the Society for Human Resource Management and the U.S. Chamber of Commerce, are hoping for a reduction in the minimum number of days of incapacity from 10 to three. They also have on their wish list a change in the regulations allowing employers to measure intermittent leave by half days instead of by the smallest increment of time used by the individual employer. Employee representatives such as the United Auto Workers and United Steel Workers are calling for a reduction, from 50 to 25, in the minimum number of employees required to bring employers under the FMLA. They also seek the inclusion of domestic partners in the definition of family and are offering a variety of plans that would provide some income during FMLA leave.

But the DOL makes no predictions. Stay tuned.

*Mr. Emerson is a certified specialist in Employment and Labor Law. He is Special Counsel with Nexsen Pruet, LLC.*

*This article appeared in the Spring 2006 issue of "Employment & Labor Law," a newsletter for the South Carolina Bar's Employment and Labor Law Section.*