

## **EMPLOYER FMLA LEAVE NOTICE AFTER *RAGSDALE***

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Under current Department of Labor regulations, employers have a duty to designate leave as FMLA leave “when the leave commences”. If an employer fails to do so, the DOL says an employer can not do so retroactively. Under early court cases, this resulted in employees receiving 130 or 140 days of FMLA instead of the statutory 12 weeks. The employer’s duty to designate does not start until the employer has knowledge of the basis for the leave, but often this rule does not help. Employees make vague statements to supervisors about “feeling depressed” or “sick child”. At a later date, a court may find that such a statement is enough notice to trigger the employer’s duty to designate.

Several appellate courts said that expanding FMLA for employer lack of notice was a kind of “penalty” not included in the act. In *Ragsdale v Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002), the Supreme Court agreed. It held the DOL regulations imposed a penalty without regard to whether the employer’s failure to give notice caused actual harm to the employee. Since *Ragsdale*, courts have held that employees suffer no harm where they admit they could not have returned to work within the 12 weeks provided by law.

Most employers recognize by now that the FMLA is simply a restriction on an employer’s right to terminate an employee for cause. Perhaps the worst restriction is intermittent leave. An employee with a chronic health problem like depression can take one or two days off a week without notice. In theory this can go on forever. Imagine a bus driver who calls in right before his shift to say “depressed again” and you get the idea. FMLA is like a new tax on employers. The only employer strategy is to minimize the tax by strictly applying the FMLA rules.

The first step many employers have taken is to send an “FMLA” letter to any employee who is absent. The letter says the following.

“You were absent on \_\_\_\_\_. We have temporarily designated your absence Family Medical Leave Act (FMLA) leave. [29 CFR § 825.108(e)(2) says an employer who lacks information can “temporarily designate” leave as FMLA.] Within the next 14[?] days, have your health care provider complete the enclosed Certificate and return it to me. If you did not provide notice of your need for FMLA leave, please explain in writing why you did not do so.

If you do not show that you are entitled to FMLA leave within the next 14 days, we will change the designation of your absence. If your absence was unexcused, this may result in your discharge. Please give this important matter your prompt attention.”

Employers also adopt notice provisions such as a requirement to call an attendance phone before the start of the shift or work day. Courts have denied FMLA and upheld discharge where the employee has not followed and employer's reasonable notice requirement.

Human Resource Managers, and even lawyers, sympathize with supervisors who must deal with unplanned intermittent leave in already understaffed departments. Nevertheless, supervisors should know that retaliation claims are the fastest growing claim under the FMLA. It is important to keep frustration bottled up, and to investigate each claim methodically. However frustrating FMLA leave is, a retaliation claim is worse.