



## **U.S. Supreme Court Invalidates FMLA Regulation That Penalized Employers For Failing To Give Notice**

In a recent decision, the U.S. Supreme Court struck down a Department of Labor regulation that denied employers credit under the Family and Medical Leave Act (FMLA) for leave granted where the employer failed to give the employee timely written notice that the leave would be counted against his or her FMLA entitlement. In *Ragsdale v. Wolverine Worldwide, Inc.*, the employer challenged the regulation that effectively required an employer to provide an additional 12 weeks of FMLA leave to an employee who had not received a timely FMLA notice. The court reasoned that, to impose such a penalty on the employer, the employee must show that s/he would have acted differently (e.g., taken intermittent leave, rather than taking 12 consecutive weeks) had the employer given proper notice. The employee in *Ragsdale*, in contrast, did not show that she would have acted differently if her employer had provided the proper notice. The Court also expressed concern that the regulation might deter employers from adopting more generous leave policies than required by the FMLA. After this decision, employers will no longer be required to automatically provide additional leave where they have failed to give timely notice. The Court left open the possibility, however, that an employee could establish an FMLA violation where s/he was prejudiced by the failure to give notice. Accordingly, employers should continue to provide timely FMLA notice.

## **Employer Cannot Require Doctor's Certification after Every Sick Leave**

A federal court in New York recently held that a policy requiring employees to submit a doctor's certification after every sick leave violated the Americans with Disabilities Act. In *Fountain v. N.Y. State Correctional Services Dept.*, the state Correctional Department instituted a new policy that required employees to provide a medical certification after each absence regardless of the length of the absence. The court held that the policy would likely cause employees to reveal a disability, or a condition that could be perceived as a disability, in violation of the ADA. An employer may only lawfully cause an employee to reveal a disability when it has a "reasonable expectation" that its inquiry would reveal that the employee was unable to perform the job or was a danger to the health and safety of others in the workplace. The court held that a short absence from work does not give an employer sufficient cause to suspect that an employee presents a health or safety threat or is unable to perform the job so as to justify requiring a medical certification. The court's decision highlights the importance of requiring a doctor's certification only after absences that generate a reasonable belief that the employee is unable to perform the job or presents a health or safety threat to others.

## **Employee Must Be Allowed to Correct Defective FMLA Request before Terminating For Attendance**

A federal court in New Hampshire held that employers must give employees an opportunity to cure any deficiencies in their request for FMLA leave before imposing discipline for attendance. In *Jiminex v. Velcro USA, Inc.*, the employee submitted a doctor's certification in support of his FMLA request that certified him as excused from work from that date forward, but did not excuse the employee's numerous prior absences. The employer fired the employee for attendance without giving him an opportunity to perfect his FMLA request to cover the prior absences. In opposition to the employee's FMLA lawsuit, the employer argued that the failure of the medical certification to cover the earlier absences defeated FMLA coverage. The court, however, held that the FMLA regulations require employers to give employees an opportunity to fix such deficiencies. This ruling reminds employers that they must afford employees a fair opportunity to correct defective FMLA requests before taking disciplinary measures.

## **U.S. Supreme Court to Decide Whether Disparate Impact Claims Are Permitted under The ADEA**

The U.S. Supreme Court will soon resolve the split in the federal appellate courts as to whether plaintiffs may use the disparate-impact method to prove age discrimination under the federal ADEA. In *Adams v. Florida Power Corp.*, plaintiffs alleged that layoffs disproportionately targeted workers over 40 in violation of the ADEA. The Supreme Court will review the 11th Circuit's holding that age discrimination plaintiffs may not claim that an employer's facially-neutral employment practice disproportionately impacted them. Currently, the 9th Circuit, covering California, allows such disparate-impact claims to be brought under the ADEA, but they are barred in several other circuits.