COMMENTS

TAKING A STEP FORWARD OR BACKWARD? THE 2009 REVISIONS TO THE FMLA REGULATIONS

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INTRODUCTION

In 1993, President Bill Clinton made history when he signed into law the federal Family and Medical Leave Act (FMLA).[1] The Act had ground breaking effects. For the first time on a national level, Americans would be ensured job security and medical benefits if they needed to temporarily leave work for medical reasons.[2] The Act meant even more to the large population of working class women. It offered women the ability to take leave from work to have children and care for them without the fear of losing their jobs.[3] Fewer women would be shoved out of the workforce upon deciding to have a family in addition to their careers. These women would retain their health coverage throughout their leave, reducing their medical costs for both prenatal care and childbirth.[4]

In addition to the statute, Congress required the Department of Labor to issue regulations to describe how the executive department intended to implement the newly passed law.[5] The Department of Labor followed the direction of Congress, and the final regulations were passed in 1995.[6] These regulations, which are the core of this article, have just recently been reevaluated. At the beginning of 2008, the Department of Labor proposed new regulations[7], and over the course of the next few months revised them.[8] The final regulations were published in November 2008.[9] They became effective in January 2009,[10] and will radically change both how the FMLA statute is administered and how it applies to employee benefits.

This article takes a critical look at the changes in the regulations to determine if the final regulations are taking a step forward or backward in adhering to the purpose of the federal Family and Medical Leave Act of 1993. This article will ultimately argue that the changes in the regulations are indeed a step away from the intended purpose of the FMLA. The new regulations provide a different interpretation of the FMLA which will adversely affect employees', and specifically women's, family and medical leave. The purpose of the FMLA is to prevent employers from forcing employees, especially female employees, to choose between having a family and having a job.[11] But,

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1. ABA SECTION OF LABOR AND EMPLOYMENT LAW, THE FAMILY AND MEDICAL LEAVE ACT 3 (Michael J. Ossip & Robert M. Hale eds., 2006).

2. 29 U.S.C. § 2601 (1994).

3. *Id.* § 2601(b).

4. *Id.* § 2614(c).

5. *Id.* § 2654.

6. Family and Medical Leave Act of 1993, 29 C.F.R. § 825 (1995).

7. Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876 (Feb. 11, 2008) (codified at 29 C.F.R. § 825).

8. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,_934 (Nov. 17, 2008) (codified at 29 C.F.R. § 825).

9. 29 C.F.R. § 825 (2009).

10. 29 C.F.R. § 825 (2009).

11. 29 U.S.C. § 2601(a)(3) (2006).

as I will display in the following pages, the imposition of the new regulations may not continue to accomplish this goal. However, even though most of the changes discussed in this article will ultimately reduce the rights of employees, I will argue that clarification on these regulations was needed, and that the changes provided some clarification which will actually improve the FMLA program and its implementation.

To begin this discovery, Part I will offer a brief glimpse into the FMLA and its purpose. In Part II, I will explore the birth and authority of the regulations issued by the executive branch in response to the passage of the FMLA. In Part III, I will undertake an in-depth examination of a few critical changes made to these regulations. This section will look at both the proposed regulations as initially issued by the Department of Labor as well as the final regulations. Because the final regulations are over 700 pages in length, it would be impossible to discuss all of the changes and their potential effects in this article. Therefore, Part III will focus specifically on three highly significant changes. Of the many changes to the FMLA regulations these three amendments were selected because they appear at first glance to be taking the purpose of the FMLA in the opposite direction by restricting the benefits of FMLA recipients. Part III will begin by describing the old regulations and comparing them to the proposed and final regulations. It will explore the benefits and disadvantages of these adjustments to the regulations for both employees and employers and in particular will analyze the effects on female employees, who are the primary recipients of FMLA benefits. This section will analyze these three changes and discover that although they appear to be adverse to the FMLA purpose, two of the three changes provide needed clarification to the FMLA interpretation. Finally, Part IV will look briefly at the prospect for change in the next few years. The FMLA was a significant topic of conversation in the recent presidential election. This section will discuss the possibility of additional changes made by President Obama both to the FMLA and its corresponding regulations.

I. OVERVIEW OF THE FAMILY AND MEDICAL LEAVE ACT

Before the FMLA was enacted, as early as 1984, there were numerous unsuccessful attempts by both the national and state legislatures to pass an act similar to it.[12] However, it would take a new president and a new congress to finally enact the FMLA in 1993.[13] Those in favor of the law reveled in the idea that Congress had finally recognized the need to help employees dealing with emergency medical situations.[14] They branded those in opposition to the law as "favoring business to such an extent that they did not care if workers had to

12. ABA SECTION OF LABOR AND EMPLOYMENT LAW, *supra* note 1, at 4-14.

13. *Id.* at 14.

14. MARGARET C. JASPER, YOUR RIGHTS UNDER THE FAMILY AND MEDICAL LEAVE ACT ix (Oceana Publications 2005).

make impossible choices between family and work."[15] The Act would prove to be a major stepping stone in a new era of employee rights and treatment. In particular, the new Act would greatly change the way the workforce treated female employees.

So, what exactly is the FMLA and to whom does it offer protection? This is something that even many employees eligible for FMLA leave do not know or understand. First, only businesses with more than 50 employees are required to abide by the FMLA.[16] This means that small businesses are not affected by the FMLA or the corresponding regulations. Second, the Act allows an employee to miss work for up to twelve weeks during a twelve-month period for a number of different medical reasons.[17] Section 2612 of the United States Code lists five different medical reasons for which an employee is eligible for FMLA leave. These include: the birth or adoption of a child; to care for oneself, children, parents, or a spouse with a serious health condition; and for qualifying armed forces reasons.[18] Notice that most of these reasons stem from caretaking and family responsibilities. The time allocated is unpaid unless an employee uses his or her paid vacation time to offset some of the unpaid FMLA leave.[19] While there are other eligibility requirements and further restrictions, to an average employee, this provides the basic picture of what FMLA leave is and who is eligible.

It is important to note that the FMLA is a federal statute, which means every state is forced to follow the minimum provisions mandated by the U.S. Code. Individual states are not preempted from creating their own family and medical leave acts; however, they must incorporate the minimum protections allocated within the federal program.[20] For example, a state could not decrease the duration of an eligible employee's leave, but if the state wishes to incorporate a paid requirement into its program, it has every right to do so.[21] In other words, more benefits are okay, but less is not permissible. The same is true for employers. If employers wish to increase the benefits they offer to employees, they are allowed to do so as long as they are acting in compliance with state and federal FMLA requirements[22] and do not discriminate against their employees.[23]

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15. ALLAN H. WEITZMAN, JOSEPH G. SANTORO & DEANNA R. GELAK, TIME OFF TO REFLECT ON THE FAMILY AND MEDICAL LEAVE ACT iv (Mark G. Ellis & Daren Bakst eds., 2001).

16. 29 U.S.C. § 2611(4)(A)(i).

17. *Id.* § 2612.

18. *Id.*

19. *Id.* § 2612(d)(2). In some instances the employers are permitted to force the employee to take vacation pay instead of unpaid FMLA leave. 29 U.S.C. § 2612(a)(2)(A).

20. 29 C.F.R. § 825.700(b) (2009).

21. *See, e.g.,* CAL. UNEMP. INS. CODE § 3300 (West 2004).

22. 29 C.F.R. § 825.700(b).

23. U.S. Department of Labor, Wage and Hour Division, http://www.dol.gov/whd/regs/compliance/1421.htm# (last visited Apr. 21, 2010).

The largest segment of the population utilizing the FMLA is women who become pregnant and need to leave work for a temporary period of time in order to deliver and care for their babies.[24] Congress explained that its primary motive in passing the FMLA was the large number of women entering the workforce and the need to protect a woman's right to both maintain employment and care for her family.[25] Congress noted that the nature of the home was changing, and in order to account for this change, it needed to pass legislation to protect an employee's job should she need to leave work for family obligations.[26] Congress also noted the importance of early childrearing as an incentive to create a program which encourages parents to take time away from work following the birth or adoption of a child.[27]

Before the passage of the FMLA, an employer could fire individuals for being away from work to care for themselves or their family.[28] This had a particularly detrimental effect on women. Pre-FMLA, if a woman became pregnant and needed temporary leave from work to give birth, her employer could hire a replacement while she was on maternity leave and then refuse to rehire her when she was ready to return to work.[29] Congress sought to use the FMLA to alleviate this type of gender discrimination. Congress stated that "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."[30]

II. DEPARTMENT OF LABOR REGULATIONS

One of the obligations that the FMLA placed on the Department of Labor (DOL) upon enactment was the mandate to publish regulations describing how the executive department was going to enforce the requirements of the FMLA. Within the FMLA was a 120-day time limit for the DOL to act.[31] In response, in March of 1993, the DOL asked the public to give comments on what the regulations should entail.[32] On June 4, 1993, the day before the 120-day deadline was due to expire, the DOL published what were called "interim final

24. Amy Armenia & Naomi Gerstel, *Family Leaves, the FMLA and Gender Neutrality: The Intersection of Race and Gender,* 35 SOC. SCI. RES. 871, 873, 879-80 (2006). *See* Jutta M. Joesch, *Paid Leave and the Timing of Women's Employment Before and After Birth,* 59 J. MARRIAGE & FAM. 1008, 1010 (1997).

25. 29 U.S.C. § 2601 (2006).

26. *Id.*

27. *Id.*

28. Joesch, *supra* note 24, at 1008.

29. *Id.* at 1008.

30. 29 U.S.C. § 2601(a)(5).

31. *Id.* § 2654.

32. ABA SECTION OF LABOR AND EMPLOYMENT LAW, *supra* note 1, at 23.

regulations" in order to meet the deadline before passing the final regulations a year and a half later.[33]

In the Supreme Court case of *Chevron v. Natural Resources Defense Council, Inc.*, the Court determined that it would give great deference to the regulations provided by the DOL.[34] The federal regulations set out in the Code of Federal Regulations would be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[35] *Chevron* tells employers who need to comply with the FMLA that they also need to be in compliance with the interpretation expressed by the DOL in the regulations. In other words, even though the regulations are not technically part of the statute, they are controlling law unless the Court deems the regulations to be blatantly in violation of the Constitution or the federal statute to which they pertain.

In February of 2008, the DOL decided to change the regulations. On February 11, 2008, the DOL published proposed new regulations in the Federal Register.[36] At that time, the DOL again solicited public comments and questions on the proposed changes.[37] By the due date for public submission, April 11, 2008, the DOL had received over 2500 comments.[38] Some of the comments praised the DOL for its clarification, while others felt the proposed changes would only exacerbate the problems already evident. Indeed, there were some commentators who did not want changes to the regulations at all, while others wanted even greater changes than those proposed. After reviewing these comments, the DOL submitted final regulations to the Office of Management and Budget on October 20, 2008.[39] The final regulations were published in the November 17th edition of the Federal Register[40] and became effective on January 16, 2009.[41]

III. THE NEW REGULATIONS

The new regulations significantly altered the substance of the FMLA. This section will discuss three major subsections of the regulations in detail, including their benefits and disadvantages. The regulations are clearly extensive and cover many different areas. These three areas are certainly not

33. *Id.* at 23-25.

34. Chevron U.S.A. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 844 (1984).

35. *Id.*

36. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 7876 (Feb. 11, 2008) (codified at 29 C.F.R. § 825).

37. *Id.*

38. Regulations.gov: Your Voice in Federal Decision-Making, http://www.regulations.gov/search/Regs/home.html#docketDetail?R=ESA-2006-0022 (posting all of the comments and questions).

39. Bill Leonard, Society for Human Resource Management, *Final FMLA Rule Changes Sent to OMB,* GBS DIRECTIONS NEWSL. (Gallagher Benefit Services, Inc., Itasca, I.L.), Nov. 2008, at 4.

40. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934 (Nov. 17, 2008) (codified at 29 C.F.R. § 825).

41. 29 C.F.R. § 825.100 (2009).

representative of all the changes, but they will provide a general understanding of the overall trend of the new regulations.

A. Clarifying Eligibility Requirements

The first area of interest in the new regulations is its interpretation of section 2611 of the United States Code. This section of the FMLA, which addresses eligibility requirements, specifies that the employee must have worked for his or her employer for at least twelve months prior to requesting leave from that employer.[42] In these twelve months, the employee must work a minimum of 1,250 hours.[43] It appears that the purpose of this section is to prevent employees from taking advantage of the FMLA's benefits by acquiring a job because they will need FMLA leave in the near future and then quitting the job after they have taken this leave. For example, with the high costs of prenatal care and delivery, it would be tempting for a pregnant woman to start working at a job with full health benefits and take FMLA leave with no intention of returning to work. Some employers offer paid medical leave, which would only increase the temptation. The twelve-month requirement prevents individuals from "taking advantage" of the system in this way. However, the language of this FMLA provision is ambiguous, failing to specify whether the twelve months must be consecutive.

Even though the FMLA is ambiguous, both the old and new regulations specify that the twelve months need not be consecutive.[44] In other words, employers who hire workers for temporary time periods (e.g., seasonal employees) are not exempt from this regulation. They will need to keep records of the amount of time each employee works in order to determine if the employee has been working for at least twelve (whether consecutive or non-consecutive) months and for at least 1,250 hours during those twelve months.

The remaining ambiguity in the language of the FMLA that the old regulations did not address was the question of how long the employer needed to retain its records for any given employee. The following example illustrates a typical scenario. Jane Employee works at Company X for two years (satisfying the twelve month requirement) and then quits her job to become a stay-at-home mom. Twenty years later, after her children have grown and are out of the house, she decides to return to her old job at Company X. Company X rehires Jane, and after she has been there for a month, Jane's husband is diagnosed with cancer. Jane needs to take leave from work to care for her husband. Should Jane be eligible for FMLA benefits because twenty years ago she worked for Company X for more than twelve months? Neither the statute nor the old regulations answered this question, so in 2006 the court decided to step in and decide.

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42. 29 U.S.C § 2611(2)(A)(i).
43. *Id.* § 2611(2)(A)(ii).
44. 29 C.F.R. § 825.110(b) (2009); 29 C.F.R. § 825.110(b) (1995).

Rucker v. Lee Holding Co. involved a car salesman who worked for Lee Holding for five years before he left for a different job.[45] Five years later he decided to apply for a job at Lee Holding again, was hired, and worked for an additional seven months.[46] At that time Rucker ruptured a disc in his back and needed to go on medical leave.[47] During the course of the next two years, Rucker was in and out of work because of back problems.[48] After dealing with his absenteeism for two years, Lee Holding decided to terminate Rucker.[49] Shortly thereafter, Rucker filed suit claiming a violation of his rights under the FMLA.[50] It is quite obvious that, standing alone, the seven months would not qualify for the twelve-month requirement for eligibility. The question before the court was whether Lee Holding was required to count the employment period five years earlier. It appeared that the drafters of the old regulations were only looking at seasonal and temporary employees, because they did not set a strict time limit. By saying that the years did not need to be consecutive, the old regulations opened the door to an unlimited break in employment. It was up to the court in *Rucker* to decide if the DOL meant for this protection to include *all* past employment by the employee for that particular employer.

In reaching its holding, the court first looked at the FMLA and then the regulations interpreting it.[51] The court concluded that both the FMLA and its corresponding regulations were ambiguous.[52] It held that, because the regulations did not require the time to be uninterrupted, any amount of time worked for an employer would count toward the minimum requirement of twelve months.[53] Ultimately, in our above scenario, when Jane Employee returns to work after being away for twenty years, she would still be eligible for FMLA leave.

When working on the new regulations, the DOL decided to clear up this ambiguity. In the first round of revisions to the regulations, this section was revised to state that if an employee's break from a given employer was longer than five years, the employer would not have to include the amount of time the employee worked before she took a break in order to be in compliance with the regulation.[54] If an employer wants to count the time before the five-year (or longer) break, the regulations allow him to do so as long as he does this for all employees in a similar situation.[55] Upon consideration of numerous questions and comments received by the DOL, the final regulations expanded the gap

45. Rucker v. Lee Holding, Co., 471 F.3d 6, 8 (1st Cir. 2006).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 9-12.
52. *Id.* at 10, 12.
53. *Id.* at 13.
54. Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 788 2 (Feb. 11, 2008) (codified at 29 C.F.R. § 825).
55. *Id.*

from five to seven years.[56] Thus, in the aforementioned example, Jane Employee would no longer qualify under the FMLA if she was absent from her job for 20 years, well beyond the 5-7 years permitted by the final regulations.

There is an exception to the proposed regulations that says the seven-year break rule does not apply when there is "a break in service resulting from the employee's fulfillment of military obligations and a period of approved absence of unpaid leave, such as for educational or child-rearing purpose, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee."[57] Basically, this long and somewhat confusing section concludes that there are two exceptions to the seven-year gap rule. First, if the employee needed to leave work for military service and she was gone longer than seven years, the employee's benefits do not disappear. Second, if an employee intends to return to work and she made a written agreement with his or her employer to that effect, the seven-year gap rule also does not apply.

This second exception has the potential to be very beneficial to women, because they can make an agreement with their employer that will allow them to stay home until their children are school-aged, and then return to work. When this person is rehired, her prior work hours carry over because the employer is on notice that the employee will return, and therefore should retain the employee's records. However, the key provision is that the employee has to have an agreement with his or her employer denoting the intention to return to work in order to fall under this exception.

The DOL's new regulations certainly clarify any ambiguity that was evident in *Rucker* regarding the boundaries of the non-consecutive twelve months. However, given Congress' purpose in creating the FMLA, the new regulations definitely reduce employee benefits. A look at arguments both for and against the changes will help us to better understand exactly which direction we will be headed under the new regulations.

1. Negative Implications of the Change in Eligibility

There are certainly some negative repercussions of passing these new regulations. Because the unlimited time frame provided by the *Rucker* decision allowed greater eligibility for employees, many opponents to the creation of a limited time frame are employee advocates. One argument in opposition to this change was the significant effect it would have on women who leave the job force to have children. As stated above, one of the underlying purposes of the FMLA was to eliminate gender discrimination from the work environment.[58] Most of the individuals leaving work for a long period of time and then returning to the same job are women. In a comment submitted to the DOL on the proposed regulations, the National Partnership for Women and Families

56. 29 C.F.R. § 825.110(b)(1) (2009).
57. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 7882.
58. 29 U.S.C. § 2601(b)(5) (2006).

stated that "ironically, this proposed change poses the greatest risk for women, who tend to take longer spells away from the workforce to raise children and provide other forms of care."[59]

Many employee groups may no longer have issues with this section of the final regulations because of the ultimate switch to a seven-year gap. The National Partnership for Women and Families was commenting on the original five-year rule in making its assessment. Their comment suggests that perhaps a six or seven-year rule might be more tolerable.[60] A seven-year rule would allow women to stay at home with children until they are old enough to start kindergarten and then return to work. The American Federation of Labor and Congress of Industrial Organizations suggested that it would accept a seven-year rule, arguing that a five-year gap was inadequate when employers actually retain employee records for seven years in order to conform to regular business practices.[61] If a business is already keeping records for seven years, it would be arbitrary to impose a five-year rule only in FMLA eligibility situations.[62]

Although the difference between the proposed regulation containing a five-year rule and the adopted final regulation containing a seven-year rule appeased some employee advocates, it elicited animosity from some employers. In its explanation of the final regulations, the DOL stated that many of the employer comments in response to the proposed regulations showed dissatisfaction even with the initially proposed, five-year gap. While a shorter time gap is preferable to the indefinite time gap set forth in *Rucker*, some employers wanted an even shorter time gap and others wanted no time gap at all, advocating that the twelve months be consecutive.[63] Although the new DOL regulations decrease the record keeping responsibilities imposed on the employer following *Rucker,* the seven-year gap might still be too burdensome to pacify the strongest critics of the *Rucker* decision.

2. Positive Implications of the Change in Eligibility

Nonetheless, the DOL did receive comments from employers who praised this change because it removed a serious administrative burden on them. It is understandably very difficult for an employer to keep accurate records for an indefinite period of time for all of the employees that have ever worked for the company. The DOL cited this explanation as one of the main reasons for

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59. National Partnership for Women and Families, Letter to Department of Labor on Proposed FMLA Regulations, at 4 (Apr. 11, 2008), http://www.regulations.gov (search "ESA-2008-0001-1446.1").

60. *Id.*

61. American Federation of Labor and Congress of Industrial Organizations, Comments on the Notice of Proposed Rulemaking by the Department of Labor to Revise the Regulations Implementing the Family and Medical Leave Act, at 9 (Apr. 11, 2008) http://www.regulations.gov (search "ESA-2008-0001-1383).

62. *Id.*

63. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,940 (Nov. 17, 2008) (codified at 29 C.F.R. § 825).

making the proposed change.[64] *Rucker* required employers to keep accurate records on all past employees over a very long time period.[65] This created an even larger administrative burden on employers who only hire seasonal employees, where keeping track of the required 1,250 hours becomes even more important.[66] The seven-year gap alleviates the burden of having to keep employee records for an unlimited period of time. Even if the employer is not satisfied with the length of the time limit, at least there is some certainty as to how long an employer needs to keep employee records.

Another argument in favor of the changes is that employers are not the only ones hurt by the endless time limit. The old law established in *Rucker* could also have a detrimental effect on employees who choose to leave their jobs for a significant period of time. If an employee chooses to leave work for a long period, it is unlikely that an employer will rehire him or her out of fear that the employee will take FMLA leave right away.[67] The employer might not have adequate records to ensure that the individual is not eligible for FMLA leave, and this uncertainty might prevent the employer from rehiring the individual. With a set, seven-year time limit, the employer knows either that an employee will be eligible for FMLA leave or that she does not have to worry because the employee has been gone for longer than seven years.

On the other hand, if an employer is discriminating against employees who have previously worked for its company in order to avoid FMLA benefits, the new regulations may do little to prevent discrimination against employees who were only gone for a short period of time. For example, it would be less risky to rehire someone who worked for you more than seven years ago then someone who worked for you only two years ago. With the former, the employer is assured that the employee is not eligible for FMLA leave for at least twelve months.

It is important to remember that the primary objective of the twelve-month requirement is to prevent employees from abusing the FMLA program. If there was no seven-year rule, employees who have been away from the job for seven years or more might return to work only because they know that they will be in need of FMLA leave soon. Because the employee is eligible for leave, she may return only to receive FMLA benefits. If the employee were to start a new job she would not be eligible until twelve months have passed, so why should the employee be allowed to trick a prior employer into rehiring him or her just to receive FMLA benefits immediately? The new regulations limit this gaming of the system.

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64. Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7881 (Feb. 11, 2008) (codified at 29 C.F.R. §825).

65. Benjamin R. Davis, Case Comment: *Labor and Employment Law – First Circuit Upholds Department of Labor's Broad Construction of the FMLA – Rucker v. Lee Holding Co.,* 471 F.3d 6 (1st Cir. 2006), 41 SUFFOLK U.L. REV. 425, 433 (2008) (describing the burden that the holding in Rucker will have on employers).

66. *Id.* at 431-32.

67. *Id.* at 432.

3. Do the Benefits of a Set Time Limit Outweigh the Burdens?

Although this change is in opposition to the purpose of the FMLA, it appears that a seven year time gap is a reasonable compromise between the competing interests of employers and employees. This law will create a disincentive for women who want to leave work for extended periods of time to take care of children, and will take away rights that the law has already given women and other employees. However, even though it is a step away from the original purpose of the FMLA, the *Rucker* standard, in my opinion, is far too burdensome on employers to justify an unlimited time frame. The final regulation's increase of the requirement from five years to seven years reduces many of the disadvantages that working women will face.

Inserting the seven-year rule in the regulations is in line with the purpose underlying the twelve-month requirement by allowing employers to prevent abuse of the FMLA benefits. Requiring an employee to work for at least twelve months for a particular employer before she can become eligible prevents employers from having to deal with new employees who take FMLA leave. A brand-new employee who has never worked for the employer can be fired if she takes leave before the twelve-month period is up. By inserting the seven-year rule in the regulations, we allow employers to deal with this group of employees who are much like new employees working under twelve months. The logic here is that after employees have been gone from the business for more than seven years they are more like new employees. This makes sense, because both a new employee and one who leaves work for seven years or more will have to be retrained and reintegrated into the work environment before they will become profitable to the company. If, on the other hand, the employee has been gone for less than seven years, there is probably less training involved in his or her return. Employees who require retraining are a hardship on employers because employers need to pay the employee's benefits during this re-training time, and may have to train yet another employee to provide coverage while the person is on leave.

The new regulation makes it easier on employers while taking away some of the rights an FMLA recipient would have received before the change. This is indeed a step away from the purpose of the FMLA when it was established in 1993; however, a seven-year time gap strikes a good balance between the competing interests of the employers and its employees. This change gives employers the necessary clarity to implement the program effectively and uniformly.

B. Timing of Notice

A second area of interest in the new regulations are the sections discussing notice requirements. According to the regulations, FMLA notice is broken down into two categories: notice for foreseeable and unforeseeable leave.[68] Both categories have notice requirements built into them specifying when it is

68. 29 C.F.R. §§ 825.302, 825.303 (2009).

necessary for an employee to notify her employer of the need for FMLA leave. Within these two categories there are also requirements on how employers should notify employees of eligibility. It is easiest to break these two categories of leave apart and study each separately.

1. Foreseeable Leave

Foreseeable leave is defined in the regulations as leave that is "based upon an expected birth, placement for adoption or foster care, [or] planned medical treatment for a serious health condition."[69] In other words, foreseeable leave is that which can be planned. The regulations require that when an employee has a foreseeable reason for leave, she needs to give 30 days' notice when possible.[70] If the employee is unable to give the 30 days' notice for a foreseeable event, she is required by the regulation to notify the employer "as soon as practicable."[71]

This is where the new changes come in, as there was some uncertainty as to what "as soon as practicable" means. The old regulations said that "as soon as practicable" meant "ordinarily…within one or two business days."[72] This meant that the employee had one or two business days from the time he learned of the need to take FMLA leave to notify his employer. Suppose Joe Employee is scheduled to have surgery on Friday. He learns on Monday that his doctor is going to be out of town on Friday and he needs to reschedule the surgery for Thursday instead. Under the old regulations, Joe would theoretically have until Wednesday to tell his employer that he needed to take FMLA leave on Thursday. The hypothetical becomes more complicated if Joe was informed of the need to miss work on Wednesday instead of Monday. Technically, under this scenario Joe would have until Friday to inform his employer that he missed work on Thursday.

The new regulations tighten this requirement of notification, requiring employees to give notice to their employers the same day they learn of the need to reschedule foreseeable leave.[73] If the employee does not become aware of a scheduling change until after business hours, she has until the next day to give her notice.[74] Going back to our example above, if Joe Employee became aware of the rescheduled surgery on Wednesday before the close of business, he would need to inform his employer that day. In addition, the new regulation provides the employer the right to question the employee about the reason she was unable to give 30 days' notice in order to determine whether the reason is acceptable.[75]

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69. 29 C.F.R. § 825.302(a).

70. *Id.*

71. *Id.*

72. 29 C.F.R. § 825.302(b) (1995).

73. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,003-04 (Nov. 17, 2008) (codified at 29 C.F.R. § 825).

74. *Id.*

75. *Id.* at 68,001.

2. Unforeseeable Leave

The second category, unforeseeable leave, refers to leave that has not been planned. In the proposed regulations the DOL analogized unforeseen leave to when an employee's child suffers a "severe asthma attack."[76] The old regulations also required that this notice be "as soon as practicable" and gave the employee one or two business days.[77] The new regulations again tighten this requirement to ensure employees will make employers aware of their need for leave as early as possible.[78] The proposed regulations stated that in the absence of "extraordinary circumstances," the employee must give notice before his or her shift ends for the day.[79] In response to numerous comments urging the DOL to clarify the definition of "within one or two business days," the DOL decided that it was better to replace this phrase with the word "promptly" and stated that notice was to comply with the "usual and customary" procedures of the employer.[80] The DOL did specify that in emergency situations the employee is not required to leave the emergency in order to call the employer.[81] However, when the emergency has abated, she needs to provide notification right away.[82] For example, if a child is having a minor asthma attack and it is enough to ensure that the child rests and uses his inhaler, the employee would be required to call as soon as she was assured the child had used the inhaler and was resting.[83] However, if the situation was more severe and the child needed to go to the emergency room, the employee could wait until the child had been treated to notify the employer.[84]

The new regulations also provide employers with additional time to determine whether an employee requesting FMLA leave is eligible and notify the employee of her eligibility. Under the old regulations the employer had two days in the absence of "extenuating circumstances" to notify the employee of his eligibility.[85] The proposed regulations eliminated the extenuating circumstances clause and increased the time from two to five days.[86] The final regulations also include the "absent extenuating circumstances" clause.[87] Although the phrase "extenuating circumstances" is defined by an example in a

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76. Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7981 (Feb. 11, 2008) (codified at 29 C.F.R. § 825).

77. 29 C.F.R. § 825.303(a) (1995).

78. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 7910.

79. *Id.* at 7981.

80. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 68,007.

81. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 7981.

82. *Id.*

83. *Id.*

84. *Id.*

85. 29 C.F.R. § 825.110(d) (1995).

86. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 7905 (Feb. 11, 2008) (codified 29 C.F.R. § 825).

87. 29 C.F.R. § 825.300(b)(1) (2009).

different section,[88] the DOL does not give an explanation of what extenuating circumstances would mean in this type of unforeseen situation.[89]

3. Negative Implications of the Changes Regarding Notification

Decreasing the amount of time that the employee has to give notice is a negative aspect of this change because it will arguably decrease access to leave. The National Partnership for Women and Families stated that one of the largest problems with FMLA eligibility is that the employee is unaware of FMLA benefits and whether or not they apply to her.[90] If the employee is unaware of eligibility, it will likely take them longer to notify the employer.[91] Therefore, decreasing the amount of time the employee has to notify his or her employer greatly disadvantages those who are unaware of the law. In addition, the Partnership argues that there is no indication from the DOL or employers that late notice has been a problem.[92]

Another argument in opposition to decreasing the time for an employee to notify her employer of FMLA leave is that it hurts employees who have emergency situations. In situations of unforeseeable leave, the regulations require prompt notification, which is usually before a shift begins (depending on the employer's practices).[93] Should the employee be worried about calling her employer when she is in the emergency room? Although the employer would argue that the new regulations allow the employee to wait until the emergency has abated, what does this really mean? If a spouse just went through emergency surgery and is waiting in recovery to awake is the emergency over? If a woman just gave birth unexpectedly early, should she ask someone to call her employer? Another question is what exactly the word "promptly" means within the new regulations. The "DOL's proposal fails to take into account that the very nature of unforeseeable leave is that employees cannot predict when they will need it and how severe the situation will be."[94] Furthermore, the Legal Aid Society has pointed out that in order to comply with the strict notification procedures, an employee made aware of a serious

88. *Id.* § 825.115.

89. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,058 (Nov. 17, 2008) (codified 29 C.F.R. § 825).

90. National Partnership for Women and Families, *supra* note 59, at 13. *But see* Jane Waldfogel, *Family and Medical Leave: Evidence from the 2000 Surveys,* 124 MONTHLY LAB. REV. 17, 20 (2001) (stating that a 2000 study concluded that 15% of those eligible for leave did not know whether they were eligible). Is 85% of all eligible a low number? *Cf.* Chardie L. Baird & John R. Reynolds, *Employee Awareness of Family Leave Benefits: The Effects of Family, Work, and Gender,* 45 SOC. Q. 325, 336, 343 (2004) (concluding that 91% of women and 72% of men were knowledgeable of FMLA benefits after breaking down percentages by gender).

91. National Partnership for Women and Families, *supra* note 59, at 13.

92. *Id.* at 14.

93. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 68007.

94. National Partnership for Women and Families, *supra* note 59, at 15.

health condition may have to tell her employer the reason leave is needed before she is able to notify close family and friends.[95]

Finally, women in general are more likely to be negatively impacted by this new regulation. In addition to the fact that women are more likely to take FMLA leave for pregnancy and child rearing, women are also generally more likely to take on caretaking responsibilities. A study conducted in 1999 showed that both men and women believed it to be the woman's responsibility to "keep in touch with and care for kin."[96] The same study showed that a larger percentage of females took FMLA leave. Approximately 86% of women utilized FMLA leave while only 80% of men did.[97] The inference to draw from these two figures is that a change in the regulations which increases the burdens on FMLA recipients by decreasing the amount of time to report FMLA leave disproportionately affects women who are seeking either foreseeable or unforeseeable leave.

There are also individuals who oppose increasing the time frame that employers have to notify employees of their FMLA eligibility. One issue revolves around what an employee should do in the instance that she is unsure of eligibility. Should she continue to go to work for fear of losing her job if it turns out she is not eligible? In its comment on the proposed regulations, the Legal Aid Society stated that in reality the five-day rule could easily be extended to a week or more if it falls on a holiday.[98] In this instance is it fair to make an employee wait and worry about eligibility for FMLA leave? The employer has the right to terminate an employee who misses work and is not eligible for FMLA leave even if the employee was under the impression that he was eligible.

In addition, do employers really need the extra three days to determine eligibility? A recent study concluded that it takes an employer less than thirty minutes to analyze a request for FMLA leave and provide notice to the employee.[99] Forty-nine percent of those surveyed said it took them approximately ten to thirty minutes to notify the employee.[100] In just determining whether the employee was eligible for FMLA leave, fifty-one

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95. Comments from the Legal Aid Society to Dep't of Labor's Proposed Revised Regulations to the Family and Medical Leave Act, at 7 (Apr. 11, 2008) http://www.regulations.gov/fdmspublic/component/main?main=DocketDet ail&d=ESA-2008-0001 (select "public submissions"; then search "Legal Aid Society"; then follow hyperlink to pdf).

96. Naomi Gerstel & Katherine McGonagle, *Job Leaves and the Limits of the Family and Medical Leave Act: The Effects of Gender, Race & Family,* 26 WORK & OCCUPATIONS 510, 512 (1999).

97. *Id.* at 521.

98. Legal Aid Society, *supra* note 95, at 6.

99. WORLDATWORK, FMLA PERSPECTIVES AND PRACTICES 6-7 (2005), http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064801e88a1 (follow hyperlink to pdf).

100. *Id.*

percent admitted it took them less than ten minutes.[101] In other words, it seems very unlikely that an employer needs a significant amount of extra time to process eligibility verification and notify the employee. Since the burden is so light, the employer should notify the employee as soon as she can to decrease the amount of stress and worry placed on employees who do not know if they are eligible. Perhaps the regulations should require that this notification be done "promptly" as well.

4. Positive Implications of the Changes Regarding Notification

Many proponents of the changes ushered in by the new regulations point to the fact that there has been a great deal of litigation arising over the meaning of "as soon as practicable."[102] By clarifying the term, both for foreseeable and unforeseeable leave, the new regulations will prevent some of the uncertainty surrounding notification requirements.

Another convincing argument involves the hardship faced by employers when the employee needs to miss work and does not give them adequate notice. For foreseeable leave, giving the employee one or two business days when they do not necessarily need that much time places a considerable burden on employers to find last minute replacements. Changing the requirements to giving notification the same or next day in the case of foreseeable leave, and "promptly" in the case of unforeseeable leave gives the employer as much time as possible to research coverage and notify the employee of FMLA eligibility, which somewhat alleviates the employer's burden.[103] This is also beneficial to employees' relationships with other employees, because often when the employer is unable to find a replacement, the burden of the extra work is placed on co-workers. Giving the employer more time to take into account an FMLA absence will allow for better relations among the workforce.

In addition, increasing the employer's response time to notify employees of eligibility also presents many benefits to employers, particularly for small businesses. The DOL received many comments "noting that the two-day turnaround time is in practice very difficult to meet."[104] In response to the above argument that employers take only a small amount of time to process FMLA eligibility verifications, employers argue that this is not always true for small businesses. "Small business owners . . . often lack dedicated human resource personnel thus making two days an extremely limited timeframe for

101. *Id.*

102. *See, e.g.,* Sprangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847 (8th Cir. 2002); Carter v. Ford Motor Co., 121 F.3d 1146 (8th Cir. 1997).

103. Chuck Halverson, Note, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act,* 18 WIS. WOMEN'S L.J. 257, 268 (2003).

104. Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7904 (Feb. 11, 2008) (codified at 29 C.F.R. § 825).

owners."[105] Even if the process itself only takes thirty minutes, the administrative department, especially in smaller businesses, is burdened by more work than just processing FMLA claims. It will take the employer even longer if the people processing the claims are not sure of the rules and need to read the recently updated regulations to determine eligibility. If there are a number of FMLA requests, it might be difficult to find time within two days to process all of the requests. Employers may need to incur additional costs in hiring more administration in order to process all of these claims in a timely fashion. Perhaps because of the larger burden placed on small businesses future changes to the regulations should consider different rules for small businesses.

5. Does the Benefit for Employers Outweigh the Burden on Employees?

Overall, the new regulations on notice requirements are taking a definitive step away from the FMLA's purpose of ensuring employee rights in a situation where medical leave is needed. Although the old regulations placed a considerable burden on employers, the new regulations shift too much of this burden to employees. The changes are stretching the purpose of the FMLA beyond its means in order to alleviate minor burdens on employers. Under the old regulations, an employee still had to tell his or her employer rather quickly when she became aware of impending leave.[106] Requiring employees to notify employers either the same or next day is too burdensome. In a stressful situation, especially an emergency, the last thing on an employee's mind is the need to notify his or her employer as soon as possible. In my view, the need to ensure productivity in the workforce is not more important than an employee's health or that of his parent, spouse, or child.

Finally, if the employee is expected to deal with the time constraints of notifying his or her employer "promptly," the regulation should require the same prompt response from employers. It is understandable if an employer does not have the administrative capabilities to provide prompt notification of eligibility, especially in small businesses. However, those businesses that have the ability to provide such notification should be required to do so. Perhaps the answer is to require prompt notification by employers and allow exceptions for those small companies that do not have the administrative power to provide such prompt notice. Requiring prompt notification and then allowing employers who do not meet the deadlines to provide an explanation for the delay is another potential solution. With the new changes the DOL is placing too much emphasis on how difficult the regulations make it for employers without taking into consideration how difficult it can be for an employee to notify her employers when an FMLA situation arises.

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105. National Roofing Contractors Association, NRCA Issues Comments About DOL's Proposed Changes to the Family & Med. Leave Act, at 2 *(*Apr. 2008) http://www.nrca.net/rp/government/update/0408_fmla.aspx.

106. 29 C.F.R. § 825.302(b) (1995).

C. *Perfect Attendance Awards*

The third area of interest in the changes to the FMLA regulations is what has been termed "perfect attendance awards," which are awards granted to employees for not being absent from work. If an employer is suffering from large numbers of absenteeism, an incentive program, such as offering bonuses or gift cards for perfect attendance, will hopefully increase productivity and quality of work. A study conducted in 2002 concluded that there is about a 6% rate of absenteeism even in large U.S. Fortune 100 companies.[107] For these companies absenteeism costs an average of $75 million per year.[108] This same study concluded that perfect attendance programs were effective in curbing these absentee costs. The study showed a decrease in absenteeism of 29%-52% in one particular group.[109]

One concern with perfect attendance awards is whether a recipient of FMLA leave should be entitled to such bonuses. At first it would seem almost counterintuitive that an individual on FMLA leave would qualify under such programs. However, the FMLA states that an employee is entitled to "any right, benefit, or position… to which the employee would have been entitled had the employee not taken leave."[110] Under the old regulations this meant that employers could not refuse to give awards for attendance (or similar bonuses) to FMLA beneficiaries as long as they were otherwise eligible.[111]

The final provisions of the new regulations eliminate this requirement. The new provisions state that perfect attendance awards are allowed to exclude otherwise eligible individuals because they take FMLA leave.[112] There is a built-in exception to this regulation in the instance where an employer allows other types of leave to still qualify for the perfect attendance awards. The language of the regulations states that an FMLA recipient can be excluded from the benefits unless the benefits are "paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave."[113] Equivalent leave is defined by the DOL as vacation leave, paid time off, or sick leave.[114]

As with other provisions of the FMLA regulations, the section on perfect attendance awards is best explained using an example. Suppose an employer offers a gift card to any employee who has not missed a day of work since the beginning of the year. Anyone missing a day, for whatever reason, is not eligible for the gift card. In this scenario, the employee on FMLA leave can

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107. Steven E. Markham, K. Dow Scott, & Gail H. McKee, *Recognizing Good Attendance: A Longitudinal, Quasi-Experimental Field Study,* 55 PERSONNEL PSYCHOL. 639, 639 (2002).

108. *Id.*

109. *Id.* at 649.

110. 29 U.S.C. § 2614(a)(3)(B) (2006).

111. 29 C.F.R. § 825.215(c)(2) (1995).

112. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,984 (Nov. 17, 2008) (codified at 29 C.F.R. § 825).

113. 29 C.F.R. § 825.215(c)(2) (2009).

114. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 67,985.

also be denied the gift card, even if she is otherwise eligible. On the other hand, if the employer allows employees to take vacation time and still be eligible for the gift card program, then the employer must also allow the FMLA recipient to be eligible.

1. Negative Implications of the Perfect Attendance Regulations

The proposed revisions to this section faced strong opposition from employee rights groups. The first argument centers on the idea that the purpose of the FMLA is to ensure equal pay and to prevent discrimination by employers against employees eligible for FMLA leave. Section 2614 of the FMLA states that the employee is guaranteed to return to his job or an "equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment."[115] An individual cannot be returned to the same place he was before he took leave if his employer refuses to allow him bonuses he would have received had he not taken that leave. It might not be of great significance if the perfect attendance reward is a gift card, but it might be if the perfect attendance reward is a large bonus. The purpose of the statute is to prevent employers from discouraging FMLA leave. Allowing employers to disqualify individuals on the basis of FMLA leave means that they are effectively using an individual's FMLA leave status against them.[116] The National Partnership for Women and Families argued in its comment to the proposed regulations that it is unfair to punish individuals for taking the leave which federal law clearly authorizes them to take.[117]

Again, these perfect attendance awards discriminate against women, not just because women are the primary caregivers, but also because the awards create an incentive for men to return to work and leave women to take care of the children. The problem with perfect attendance awards often becomes apparent when a child is born to two working parents. Let us assume that both the mother and father are eligible for FMLA leave. The mother, who just gave birth to the child, will probably need to take FMLA leave because she is not in a position to return to work immediately after the birth of the child. If both employers offer perfect attendance bonuses, the father may choose to forego FMLA leave in order to be eligible for the bonus. There is a financial incentive for him to return to work and pass on the caretaking responsibilities.[118] The mother is left to care for the child and will miss out on any extra bonuses offered by her employer.

The changes might not be as beneficial as some employers had hoped, however. The new regulations put FMLA leave in the same category as paid vacation time.[119] If an employer wants to exclude FMLA recipients from the

115. 29 U.S.C. § 2614(a)(1)(B).

116. Anne Wells, Note, *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers,* 77 S. CAL. L. REV. 1067, 1084 (2004).

117. National Partnership for Women and Families, *supra* note 59, at 9.

118. Halverson, *supra* note 103, at 264.

119. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 67,985.

attendance rewards, it will also have to exclude employees who take their paid time off. For some employers this might be requiring too much, and they will just discontinue the awards altogether.

2. Positive Implications of the Perfect Attendance Regulations

On the other hand, many people feel as though the decrease in regulation of perfect attendance awards solves one of the most counterintuitive problems of the old regulations: requiring employers with incentive programs rewarding perfect attendance to give the awards to employees who are away from work for up to twelve weeks. HR Magazine quoted one employer as saying, "It's ridiculous to get folks on a stage and say thanks for being here every day when they're out for 12 weeks. It's illogical."[120] However, under the old regulations this was exactly what an employer needed to do if they intended to keep perfect attendance programs. In this sense, the old regulations created a disincentive for employers to provide these bonus programs in the first place.[121] This hurts everyone involved. It hurts employers who wish to create an incentive for employees not to miss work, and it also hurts employees who continue to come to work every single day without any special reward for doing so.

In its comment on the proposed regulations, the National Roofing Contractors Association (NRCA) argued that perfect attendance awards used in the fashion allowed under the old regulations decreased employee morale.[122] These incentive-type programs are often meant by employers to increase morale, but because workers felt that FMLA recipients were being unfairly compensated, the program actually had the opposite effect.[123] Employees who were away from work for other reasons – ordinary sick leave, for example – felt that their excuse for being away from work was "just as good" as someone who was out for FMLA leave.[124] Many wondered why an employee who missed twelve weeks should receive a bonus when others that only missed two days would not. In fact, FMLA beneficiaries who get these perfect attendance awards sometimes share this sentiment. HR Magazine showed that some FMLA recipients actually returned perfect attendance rewards to their employers, feeling they did not deserve the awards.[125]

The new regulations will prevent employers from having to face the issue of unfairness evident in allowing FMLA recipients to be beneficiaries of these awards. In fact, without this change, many employers would be at risk of being sued by FMLA recipients. Before the change, some employers had such programs and yet refused to give rewards to FMLA recipients, or found ways of wording the awards to specifically exclude employees on leave for FMLA

120. Kathryn Tyler, *All Present and Accounted For?,* HR MAGAZINE, Oct. 2001, at 101.

121. *Id.* at 106.

122. National Roofing Contractors Association, *supra* note 105.

123. Tyler, *supra* note 120, at 102.

124. *Id.*

125. *Id.*

reasons.[126] The new regulations will provide employers with a means to lawfully avoid giving perfect attendance awards to FMLA employees without getting rid of the benefits that such incentive programs bring.

3. Is this New Regulation of Perfect Attendance Awards Justified?

As with both of the prior sections, this section clearly moves away from the general purpose of the FMLA. It is making it easier on employers at the expense of discriminating against employees. The FMLA specifically states that employees who take FMLA leave should not be discriminated against for their choice to do so.[127] Despite its mandate, I agree that it seems very strange that employees who are away from work should still be awarded with "perfect attendance." In this respect, the employers favoring these new regulations have a better argument. While some perfect attendance awards may greatly discriminate against FMLA recipients, the great majority of these awards will be small, such as gift cards or small presents, which will have little impact on the employee's status in the company. In this respect the changes to the regulations area welcome reprieve from the old system.

IV. THE NEAR FUTURE OF THE FMLA

Since the November 2008 election of President Obama, there have been rumors of his intention to make changes to the FMLA, and the topic was a major aspect of President Obama's campaign speeches.[128] It is not surprising, then, that the DOL pushed for the adaptation of the new regulations before President Obama took office. It will be interesting, however, to see if the regulations remain in effect or if the President will make additional changes that will further the FMLA purpose.

One of the major changes that President Obama has been discussing involves the definition of "employer" under the FMLA. Recall that an employer has to have at least 50 employees before it is required to comply with the statute.[129] President Obama has suggested lowering this requirement to 25 employees.[130] Other proposed changes include providing leave for elder care and domestic violence, as well as allowing parents up to 24 hours per year of leave to attend school functions.[131]

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126. Christopher S. Miller & Brian D. Poe, *Attendance-Based Bonus Plans and the FMLA: Does Coming to Work Still Pay Off?,* 48 LAB. L.J. 59, 63 (1997).

127. 29 U.S.C. § 2601(b)(4) (2006).

128. *See, e.g.,* Organizing for America, Strengthening Families and Communities, http://www.barackobama.com/issues/family/index_campaign.php (last visited May 9, 2010).

129. 29 U.S.C. § 2611(4)(A)(i).

130. Diane Stafford, *Updates Coming for the Family and Medical Leave Act,* KAN. CITY STAR, Nov. 15, 2008, *available at* http://infoweb.newbank.com.ezproxy.library.wisc.edu/iw-search/we/InfoWeb.

131. Philip M. Berkowich, *Obama Victory Means Changes for Employers,* N.Y. L.J., Nov. 17, 2008, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202426048184.

President Obama's ideas are in contrast with the current trend in the new regulations. Obama would increase benefits to employees while providing some serious restrictions on employers. The first suggestion, for example, of decreasing the requirement to 25 employees will massively increase the number of employees that are covered under the FMLA. Presently there are a lot of small businesses which fall between the cracks of the current FMLA statute primarily because of the size of their offices. However, many of the administrative burdens discussed above (researching and notifying employees of eligibility) will be even more difficult for companies with between 25 and 50 staff members. The smaller the company the less likely it will have the staff to complete the FMLA requirements in a timely fashion.

President Obama's proposals are sure to have a beneficial impact on the lives of working women. The last proposal cited above will give employees the right to take off up to 24 hours per year to attend a child's school functions.[132] This means a mother can leave work early to take her children to ballet practice, attend a baseball game, or even attend holiday music concerts during the day. In total, this proposal will greatly increase the FMLA's purpose of encouraging parents to play a bigger role in the lives of their children. It will be interesting to see to what extent President Obama pushes that goal.

However, this proposal to allow parents 24 hours of leave for school functions also has the potential to greatly harm businesses. Often in small communities the various extracurricular activities overlap in time. Many employees will have children in those same activities. This means that the employer will have to deal with large numbers of absenteeism on the same dates and times, decreasing productivity of the company.

The potential impact of President Obama's suggested changes to the FMLA statute are endless. The passage of the final regulations at the very end of President Bush's term may prove to be a setback to President Obama's plans to change the FMLA, however, it will be particularly interesting to see exactly how President Obama reacts to the new regulations which became effective only days before he took office.

CONCLUSION

After the DOL published the proposed revisions to the FMLA regulations in February of 2008, there were many rumblings on both sides of the employee/employer divide. Some employers felt that the proposed regulations were fairly disappointing.[133] These employers had anticipated that the regulations would provide what they considered to be much needed clarification on major problems they were experiencing with the

132. *Id.*

133. Marc Fleischauer, *Proposed FMLA Regulations Largely Disappointing for Employers,* EMPLOYER L. REP. , Feb. 12, 2008, http://www.employerlawreport.com/2008/02/articles/leave-administration/proposed-fmla-regulations-largely-disappointing-for-employers.

implementation of the FMLA.[134] Other employers praised the proposed changes saying that they would "clear up confusion."[135]

On the other hand, the general consensus among employee advocates is that the new regulations "take us in the wrong direction."[136] Many individuals were accepting of some of the changes, especially simple changes in verbiage to solidify the DOL's intent. However, many requested that the DOL leave the regulations as they were. One comment on the proposed regulations by the American Postal Workers' Union stated, "Leave the FMLA alone and do not allow employers to tare [sic] it apart, one regulation at a time."[137] Many employees were afraid that allowing any type of leeway in the FMLA regulations would create a future incentive for the DOL to restrict benefits. This was particularly important to women's rights groups, because any potential decrease in benefits would impact women the most, as they are the larger population of FMLA recipients.[138]

In my analysis of three major changes to the regulation I discovered that two of the three changes could very well improve the FMLA system. The new regulations certainly move the FMLA statute away from the FMLA's purpose of increasing the rights of employees. But, the rights granted to employees at the onset of the FMLA statute were not perfectly created. The DOL could not have anticipated all of the possible effects of the regulations or especially how the courts would interpret the language of the regulations to apply in certain situations. Before the new regulations were passed, the old regulations had been in effect for fourteen years.[139] The DOL has learned from many of their mistakes and has, in my opinion, successfully used this opportunity to make needed clarifications to the old regulations. Even though the changes are taking away rights once given to FMLA recipients, these two changes will improve the system overall.

The second change discussed in this paper is more contentious. I believe the DOL has overstepped its bounds and taken this change too far. Of all three of the regulation changes, the modification to the notification requirements will have the most detrimental effect on employees and will add little, if any, benefit to employers. The two other changes discussed in this paper have each provided a legitimate reason for the clarification. The DOL has not provided such justification for the change to notification requirements. Just how much of a benefit or burden this new regulation will have is yet to be revealed, however,

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134. *Id.*

135. Stafford, *supra* note 130.

136. *Id.*

137. Letter Am. Postal Workers' Union, Sacramento Local, to U.S. Dep't of Labor regarding Proposed FMLA Regulations (Mar. 7, 2008), http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=ESA-2008-0001 (select "Public Submissions"; then search "2008-0001-0121"; then follow "APWU, Sacramento Local" hyperlink).

138. *See, e.g.,* National Partnership for Women and Families, *supra* note 59, at 4.

139. 29 C.F.R. § 825.100 (1995).

I anticipate the burden on employees will outweigh the benefit to employers for this particular change.

The new regulations are very young, and right now our nation is at a crossroads. Only time will tell exactly where the FMLA will be in the next few years. The old regulations had not been altered for fourteen years. Perhaps the new regulations will have a similarly long life, or perhaps President Obama is already thinking of ways to rewrite them. In either case, it is important to look at the new regulations because of the impact this law has on the lives of many employees, and in particular women wanting to take time away from work to have and raise children or care for loved ones. Even though the new regulations are by no means perfect, they are providing some much sought after clarification to the FMLA interpretation. The changes implemented by the DOL are clearly in opposition to the legislative intent of the 1993 FMLA, however, the majority of these changes are more efficient without taking away too many employee rights. It is unclear how the courts will interpret and apply these new regulations, so future modifications may be necessary to improve the regulations still further. Despite this, I think, at least for now, the DOL is moving closer to perfecting the law.