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INTEREST OF AMICI CURIAE[1]

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs before this Court, singly or jointly with other amici. Some recent cases include Pollard v. E. I. du Pont de Nemours & Co., 121 S.Ct. 1946 (2001); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); and Kolstad v. American Dental Association, 527 U.S. 526 (1999).

AARP is a nonprofit membership organization of more than 34 million persons, age 50 or older, working or retired, that is dedicated to addressing the needs and interests of older Americans. In 1993 the Family and Medical Leave Act (FMLA) was enacted with strong support from AARP because of the horror stories of AARP members who lost their jobs either when they became ill themselves or when they cared for their ill spouse, children, or parents. Many AARP members are in that "sandwich" period of their lives where the responsibility for rearing their own child while caring for parents, grandparents and other members of their extended family falls on their shoulders. AARP, "IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES."

Equal Rights Advocates ("ERA") is a San Francisco-

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[1]Copies of the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. In accordance with Supreme Court Rule 37.6, amici state that no persons other than the amici curiae, its members or its counsel made a monetary contribution to the preparation and submission of this brief, other than the counsel for Petitioner, Luther O. Sutter, who has been a member of NELA and as such has paid general membership dues.

based human and civil rights organization dedicated to securing legal and economic equality for women through litigation. Since its inception in 1974, ERA has focused much of its effort on ensuring family-friendly workplaces, representing plaintiffs in two of the first pregnancy discrimination cases heard by the Supreme Court, Geduldig v. Aiello, 417 U.S. 484 (1974), and Richmond Unified School District v. Berg, 434 U.S. 158 (1977). More recently, ERA has advised and represented individual women on the application and interpretation of the Family and Medical Leave Act.

The Legal Aid Society - Employment Law Center ("The LAS-ELC") is a non-profit public interest law firm that focuses exclusively on employment-related issues affecting the working poor throughout the nation. The LAS-ELC litigates enforcement actions under the FMLA to protect the rights of low-income, working women and men to take family/medical leave. For example, The LAS-ELC successfully litigated Mora v. Chem-tronics, Inc., 16 F. Supp.2d 1192 (S.D. Cal. 1998) which decided a myriad of issues of first impression in the Ninth and other Circuits, including what constitutes adequate notice by both the employer and employee when the employee requests FMLA leave. The LAS-ELC continues its efforts to promote and to protect workplaces that allow employees to balance the demands of work and family.

The National Depressive and Manic-Depressive Association is a nonprofit organization, based in Chicago, which is dedicated to more than 20 million adults with depression, 2.5 million adults with manic depression (bipolar disorder), and their families. Its mission includes improving access to care. The FMLA advances this goal by protecting the jobs of patients and families during periods of illness.

The National Women's Law Center ("Center") is a nonprofit legal advocacy organization dedicated since 1972 to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. The Center focuses on major policy areas of importance to women

and their families, including employment, education, family economic security, reproductive rights and health—with special attention to the needs of low-income women. Fair and adequate family and medical leave policies and programs, which allow women to balance their work and family responsibilities, are central to the Center's goals.

The interest of amici in this case is to protect the rights of the clients of NELA members, ERA and The LAS-ELC and to promote the mission of each Amici, by ensuring that the FMLA's goal of providing protected designated leaves of absence is fully realized. This cannot happen when the FMLA is interpreted in a way which makes it more difficult for employees to understand their rights under the Act.

INTRODUCTION

The Secretary of Labor's notice regulations fill gaps in the statutory scheme of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 et seq. These regulations reasonably prescribe what information employers must provide to employees and when and how they must provide it.

This brief presents a detailed application of Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), to the regulations in question. When Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 938 (8th Cir. 2000), cert. granted (June 25, 2001) invalidated the notice regulations, the Eighth Circuit failed to consider whether "Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 841. The court of appeals below failed to recognize that there are gaps in the statute because the FMLA itself is silent as to the specifics of the "notice an employer must give to an employee before designating his paid leave as FMLA leave." Plant v. Morton International, Inc., 212 F.3d 929, 935 (6th Cir. 2000), rehearing and suggestion for rehearing en banc denied (July 25, 2000). Consequently, Ragsdale fails to give the requisite deference to the notice regulations in question.

SUMMARY OF ARGUMENT

Congress enacted the FMLA to provide eligible individuals with assurance that an employee's job, or an equivalent one, would be waiting upon his or her return to work. Price v. City of Fort Wayne, 117 F.3d 1022, 1023 (7th Cir. 1997).

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 841 (1984), states that when "Congress has directly spoken to the precise question at issue" and the "intent of Congress is clear" then the agency's regulations must be set aside. However, if the agency's view "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," a court must defer to the agency's judgment. Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995).

In the instant matter, the Eighth Circuit erroneously concluded that Congress unambiguously expressed its intent with respect to notice issues and the FMLA. Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 938-39 (8th Cir. 2000), citing 29 U.S.C. §2612(e)(1). Consequently, the court of appeals failed to give "controlling weight" to the agency's judgment. 513 U.S. at 257.

The court of appeals disregards the fact that there are gaps in the FMLA. "The FMLA does not specify when the 12 weeks of FMLA leave begin or how FMLA leave is initiated. The FMLA provides that an employer or an employee may substitute paid leave for unpaid leave, but it does not specify how or when an employer or employee must inform the other that paid leave will be substituted for unpaid leave." Chan v. Loyola University Medical Center, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 7 (N.D. Ill. Nov. 23, 1999) (Gottschall, D.J.); Plant v. Morton International, Inc., 212 F.3d 929, 935 (6th Cir. 2000).

The notice regulations are a reasonable interpretation of the FMLA and promote its purposes. They are not intended to be a penalty or an entitlement by which employees can obtain leaves longer than 12 weeks. Contra McGregor v. Autozone, 180 F.3d 1305, 1308 (11th Cir. 1999); Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d

933, 939 (8th Cir. 2000). The notice regulations reflect a "reasonable accommodation of conflicting policies" and deserve to be upheld. Chan v. Loyola University Medical Center, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 10 (N.D. Ill. Nov. 23, 1999), quoting Chevron, 467 US. at 843-44.

ARGUMENT

The FMLA was enacted to assist employees in balancing the "conflicting demands of work and personal life." The Act recognizes that on occasion an employee will be "incapable of performing her work duties for medical reasons." Price v. City of Fort Wayne, 117 F.3d 1022, 1024 (7th Cir. 1997). The FMLA provides eligible individuals with assurance that an employee's job, or an equivalent one, will be waiting upon her return to work. Id. at 1023.

A. Chevron v. NRDC Provides the Framework This Court Uses to Determine Validity of the FMLA Notice Regulations.

The Secretary of Labor is specifically directed to "prescribe such regulations as are necessary to carry out" the directives of the FMLA. 29 U.S.C. § 2654. In construing regulations of the Secretary of Labor, this Court has stated that if "Congress has not 'directly spoken to the precise question at issue,' we must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'" Auer v. Robbins, 117 S. Ct. 905, 909 (1997) quoting Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Chevron sets the standards for reviewing a challenge to the validity of administrative regulations:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of

> Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted). This Court explained that an administrative agency is empowered and required to formulate policy and make rules to fill gaps left by the underlying statute. Id. at 843.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (footnotes omitted). Finally, this Court in Chevron emphasized again the deference to be accorded to regulations promulgated by an administrative agency:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has de-

> pended upon more than ordinary knowledge respecting the matters subjected to agency regulations. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Id. at 844-45 (citations, quotation marks and footnotes omitted).

B. Notice Regulations Fill Gaps in FMLA Scheme.

"Deference under Chevron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." FDA v. Brown and Williamson Tobacco, 529 U.S. 120, 158 (2000). The FMLA contains gaps because it "is silent as to the notice an employer must give to an employee before designating his paid leave as FMLA leave in the FMLA statutory scheme." Plant v. Morton International, Inc., 212 F.3d 929, 935 (6th Cir. 2000). The Sixth Circuit also rejected the argument that the notice regulations are inconsistent with the statute "because the FMLA was intended to set out minimum labor standards." Id. (emphasis in original).

Another court has held that there are gaps in the FMLA scheme:

> [T]here is no question that there are gaps in the FMLA. As noted above, the FMLA does not, in general, prescribe what type of notice regarding FMLA leave an employer must provide employees. The FMLA does not specify when the 12 weeks of FMLA leave begin or how FMLA leave is initiated. The FMLA provides that an employer or an employee may substitute paid leave for unpaid leave, but it does not specify how or when an employer or employee must inform the other that paid leave will be substituted for un-

paid leave.

Chan v. Loyola University Medical Center, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 7 (N.D. Ill. Nov. 23, 1999). Accord Ritchie v. Grand Casino of Mississippi, Inc., 49 F. Supp.2d 878, 880-81 (S.D. Miss. 1999).

This Court recently held that "in extraordinary cases" "there may be a reason" for the Courts to "hesitate before concluding that Congress has intended" that a statute's ambiguity "constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." FDA v. Brown and Williamson Tobacco, 529 U.S. at 159. This Court further explained that Congress is more likely to have answered the major questions and leave "interstitial" questions for the agency to answer. Id. (Congress did not authorize FDA to regulate tobacco). In contrast, the FMLA notice regulations are ordinary in nature and address the "interstitial" questions of when FMLA leave begins, how FMLA leave is initiated, and how or when an employee or an employer go about specifying whether paid leave will count as FMLA leave.

C. Notice Regulations Are Reasonable Interpretation of FMLA Scheme.

The notice regulations are a reasonable interpretation of the FMLA statutory scheme because they reflect "Congress's concern with providing ample notice to employees of their rights under the statute." Plant v. Morton International, Inc., 212 F.3d 929, 935 (6th Cir. 2000). The notice regulations cannot be viewed as inconsistent with legislative intent merely because they generate "the possibility that employees could end up receiving more than twelve weeks of leave." Id. at 935-36.

1. Procedures Specified by Notice Regulations

The FMLA regulations require an employee to notify the employer of the need for leave. 29 C.F.R. §§ 825.302 and 825.303. The employee need not mention the Act by name, but must state a qualifying reason for the leave. Id. The employer must then decide if the employee is eligible for FMLA leave. If the employer decides that

the employee is eligible for FMLA leave, then the employer must notify the employee that the leave is FMLA leave and will count toward the employee's 12-week entitlement. 29 C.F.R. § 825.208(b)(1).

The regulations require the employer to designate the leave as FMLA leave within 2 business days of obtaining sufficient information that the reason for the leave is covered by the FMLA. Id. The form of the notice is very flexible. Notice can be provided orally or in writing. 29 C.F.R. § 825.208(b)(2). But if the notice is oral, it must be confirmed in writing shortly thereafter. Id.

"The written notice may be in any form, including a notation on the employee's pay stub." Id. If an employer does not notify an employee that leave is designated as FMLA leave, then the leave is not counted toward the employee's entitlement. 29 C.F.R. §§ 825.208(c) and 825.700(a). In addition, an employer is required to notify the employee whether the employer will require paid FMLA leave to be substituted for unpaid leave. 29 C.F.R. §§ 825.208(c) and 825.301(b)(1)(iii). If an employer cannot initially determine whether leave is covered by the FMLA, an employer is only then allowed to designate leave retroactively. 29 C.F.R. § 208(d) and (e).

Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 938 (8th Cir. 2000) and McGregor v. Autozone, 180 F.3d 1305, 1308 (11th Cir. 1999) both stress that in some circumstances the regulations result in employers providing more than 12 weeks of leave. But the regulations only impose a "modest burden" on an employer in order to avoid this situation. Chan v. Loyola University Medical Center, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 9 (N.D. Ill. Nov. 23, 1999). This situation can occur only when (a) the employer has enough information to determine that the leave is for a reason covered by the FMLA and (b) the employer fails to notify the employee that the leave is FMLA leave. Id.

2. Benefits of Notice Regulations

The regulations are reasonable because they have the "salutary effect of ensuring that employees are made

aware of their rights under the FMLA." Id. When employees are informed whether leave is FMLA leave and whether it counts toward the 12 week entitlement, "they will better be able to plan and manage their allotment of leave." Id. The notice regulations also help to avoid misunderstandings between employers and employees, especially where the employee erroneously believes her position is protected and fails to return to work during the entitlement period, but might have been able to return to work sooner, even if this would be difficult. Id.

The construction of the FMLA, as set forth in Ragsdale and McGregor, that Congress only wanted to provide 12 weeks of leave is plausible. But it is "not the only reasonable interpretation of the Act. Another interpretation, that of the Department of Labor, recognized gaps in the FMLA." Id. at 10.

> The Department concluded that it was important that employees be informed of their rights under the FMLA and determined that employers should bear some modest burden of informing employees about certain aspects of FMLA leave as to which the statute gives the employer choices. Among other things, the regulations impose on employers an obligation to notify employees that a leave is FMLA leave and that, if the employer so elects, paid leave must be used for FMLA. The regulations reflect a concern for accommodating employers by, among other things, allowing flexibility as to the form of the notice and permitting retroactive designation of leave as FMLA leave in some circumstances.

Id.

The burden on the employer is modest indeed. Notification can be accomplished through any type of writing, even a notation on a pay stub. 29 C.F.R. § 825.208(a), (b)(1) and (b)(2). The Department of Labor also provides an optional prototype notice which states in part:

> This is to inform you that: (check appropriate boxes, explain where indicated)
>
> 1.You are [ ] eligible [ ] not eligible for leave un-

der the FMLA.

2. The requested leave [ ] will [ ] will not be counted against your annual FMLA leave entitlement.

Appendix to FMLA Regulations. 29 C.F.R. §§ 825.100 et seq.

Even the Eighth Circuit's Ragsdale opinion recognizes that under certain circumstances an employee who does not receive notice that she is on FMLA leave will be prejudiced: "[N]otice could be necessary where the employee claims that the sole reason she exceeded her FMLA leave was due to the employer's failure to notify her that her leave was designated as FMLA leave and if she had been so notified, she would have returned to work at the end of the twelve weeks." 218 F.3d at 939-40. Also, in foreseeable leave situations, Ragsdale states that "an employer's failure to provide notice that the leave counts against the FMLA entitlement could interfere with the employee's ability to plan and use future FMLA leave." Id. at 940.

3. Employer Ignorance of Notice Regulations

This Court holds that the "principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation." United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563 (1971). This is an inflexible rule and " 'lies at the foundation of the administration of justice.' " The Duty of the Government to Make the Law Known, 51 Fordham L. Rev. 255 fn. 4 (1982), quoting 1 F. Wharton, Wharton's Criminal Law § 400, at 579-80 (1932) (footnotes omitted).

The common thread which Ragsdale, McGregor, Plant and Chan share is that the employer in each case apparently was ignorant of the requirements of the FMLA notice regulations during the period in which the employees were on leave. But given the widespread publicity about the FMLA since its enactment in 1993, no employer who is subject to its terms (by virtue of employing 50 or more employees within a 75 mile radius, 29 U.S.C. § 2611(2)(B)) could convincingly claim igno-

rance of the existence of the Act itself. Consequently, it is reasonable to expect that employers subject to the FMLA will take whatever steps are necessary to comply with the Act and its regulations.

4. Notice Regulations Provide Clear Guidance

Another reason that the notice regulations are a reasonable interpretation of the FMLA scheme is that they provide clear guidance to employers and employees. Absent this guidance, not only would employees be less informed about their FMLA rights, litigation would likely increase over the issues of "when the 12 weeks of FMLA leave begin or how FMLA leave is initiated." See Chan v. Loyola University Medical Center, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 7 (N.D. Ill. Nov. 23, 1999). Also, increased litigation is likely because the "FMLA provides that an employer or an employee may substitute paid leave for unpaid leave, but it does not specify how or when an employer or employee must inform the other that paid leave will be substituted for unpaid leave." See id.

In contrast, upholding the notice regulations will eliminate the threat of additional litigation over these issues and likely decrease FMLA litigation even more over time. Reversal of the court of appeals below will confirm that employers and employees have a duty to abide by the notice regulations. A reversal by this Court will likely alert employers covered under the Act—who are still ignorant of the notice regulations—that they must take steps to comply with them. See generally Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) and Burlington Industries v. Ellerth, 524 U.S. 742, 744 (1998) (holding in these cases provides incentive to employer to exercise reasonable care and adopt policies "to prevent and correct promptly any sexually harassing behavior").

D. Notice Regulations are a "Reasonable Accommodation of Conflicting Policies."

Given that there are gaps in the FMLA scheme, the notice regulations reflect a "reasonable accommodation

of conflicting policies" and deserve to be upheld. Chan v. Loyola University Medical Center, 6 Wage & Hour Cas. 2d (BNA) 328, 1999 WL 1080372, slip op. at 10 (N.D. Ill. Nov. 23, 1999), quoting Chevron, 467 US. at 843-44. Ragsdale emphasizes that the FMLA was intended to "accommodate the legitimate interests of employers." 218 F.3d at 939, citing 29 U.S.C.§ 2601(b)(3). Nevertheless, "the stated purposes of the FMLA to 'balance the demands of the workplace with the needs of families' and 'entitle employees to take reasonable leave for medical reasons' implicitly require that employees be made aware of their rights and responsibilities under the FMLA." Chan v. Loyola University Medical Center, 6 Wage & Hour Cas.2d (BNA) 328, 1999 WL 1080372, slip op. at 10 (N.D. Ill. Nov. 23, 1999) (emphasis added).

For these reasons, Amici urge the Court to reverse the decision below and uphold the notice regulations of the Secretary of Labor.

CONCLUSION

For the foregoing reasons, Amici respectfully urge that the judgment below be reversed and the case remanded with the direction that the Secretary of Labor's FMLA notice regulations are valid and must be applied by the District Court.

Respectfully submitted,

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