No. 00-6029

In The
Supreme Court of the United States

TRACY RAGSDALE, et al.,

Petitioners,

v.

WOLVERINE WORLDWIDE, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The Society for Human Resource Management ("SHRM") is the leading voice of the human resource profession. SHRM provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 165,000 professional and student members throughout the world. As the world's largest human resource management association, SHRM is a founding member of the North American Human Resource Management Association and a founding member and Secretariat of the World Federation of Personnel Management Associations.

As the leading association of the human resources profession, SHRM and its members are vitally concerned with the orderly development of the law concerning employee benefits, including paid and unpaid leave for medical, maternity, paternity and family care reasons. SHRM has long recognized its special responsibility to support and encourage compliance with the laws regulating employment and in the administration of efficient, workable human resource management systems.

In 1997, SHRM founded the National FMLA Technical Corrections Coalition. The Coalition is a diverse, broad-based, nonpartisan group of approximately 300 leading companies and associations. Members of the Coalition are fully committed to complying with both the spirit and the letter of the Family and Medical Leave Act ("FMLA") and strongly believe that employers should provide policies and programs to accommodate the individual work-life needs of their employees. At the same time, members

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[1]The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No persons or entities other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

of the Coalition believe that the FMLA should be fixed to protect those employees that Congress aimed to assist while streamlining administrative problems that have arisen.

With respect to this case, SHRM's interest is to support rules concerning leave entitlement and return to work that strike an appropriate and judicious balance between statutorily-mandated unpaid leave benefits and existing leave plans which in many cases provide pay, benefits and greater lengths of leave. Representatives and members of SHRM have appeared before Congress with respect to oversight and proposed changes of the FMLA and have submitted comments to the Department of Labor ("DOL") on proposed regulations implementing the FMLA.

INTRODUCTION

This case presents important questions concerning the validity of regulations adopted by the DOL pursuant to the Family and Medical Leave Act of 1993. Under the FMLA an employee is "entitled to a total of 12 workweeks" annually of unpaid FMLA leave. 29 U.S.C. §2612(a)(1). The DOL's regulations also provide, "An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave" annually. 29 C.F.R. §825.200(a). However, through the regulations at issue, the DOL has greatly expanded upon or acted contrary to this simple concept by providing for leaves beyond 12 weeks annually.

Congress recognized that certain employers were already providing paid leave for purposes for which FMLA leave was also required and sought to provide credit to such responsible employers. In such a case Congress provided, "an eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave or medical or sick leave of the employee for leave" provided under the FMLA. 29 U.S.C. §2612(d)(2)(B). Congress also provided "[i]f an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation." 29 U.S.C. §2612(d)(1).

This simple concept of accommodation of existing leave policies has been complicated by the DOL's confusing and conflicting regulations, including those at issue in this case, §825.208(c) and §825.700(a). In short, where employer-provided leave is available, the DOL has imposed upon employers notice and designation obligations, which if not observed, dramatically extend the leave time by a stacking penalty that applies across-the-board to add FMLA leave to existing employer-provided leave and extend the FMLA's job protections to the pre-designation weeks of leave as well as the post-designation 12 weeks of leave. Section 825.208(c) begins, "If the employer requires paid leave to be substituted for

unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later." If an employer has requisite knowledge to determine that company provided paid leave is for an FMLA reason and "fails to designate the leave as FMLA leave," the employer "may not designate leave as FMLA leave retroactively, and may designate" the leave as FMLA leave "only prospectively." According to 29 C.F.R. §825.208(c), "none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement." This stacking penalty for failure to designate is also set forth in §825.700(a) and addresses unpaid as well as paid employer-provided leave.

The Eighth and Eleventh Circuits, and several district courts, have found the additional leave stacking penalty contrary to the plain language of the statute and Congressional intent.

SUMMARY OF ARGUMENT

In enacting the FMLA, Congress created an entitlement of a total of 12 workweeks of unpaid job-protected leave annually for employees who meet specific eligibility criteria. Employees are advised of this right to a total of 12 weeks of unpaid leave by notice prepared by the DOL and posted by employers. Congress recognized that many employers also were voluntarily providing paid and unpaid leave for reasons set forth in the FMLA. In the case of employer-provided leave, Congress decided there was to be a total of 12 weeks, whether paid or unpaid. Petitioner argues that employees are entitled to leave under the employer's voluntary program and then up to 12 workweeks of job-protected FMLA leave unless the employer specifically notifies the employee that the two periods of unpaid leave are running concurrently. In the instant case, Petitioner claims entitlement to 42 weeks of leave in one year because Respondent failed to give her such notice.

The requirement in the regulations that employers stack FMLA and employer-provided leaves is not provided for in the statute and is contrary to it. If Congress had intended for employees to be entitled to more than 12 workweeks of leave annually, Congress would have enacted provisions to that effect, indicating the conditions when an employee qualifies for additional weeks of leave. Because Congress did not do so, the 12 workweek maximum must be applied by the courts. Indeed, the legislative history further demonstrates the stacking penalty is clearly improper as it penalizes responsible employers and discourages more expansive voluntary leave programs.

There may be cases where employees do not elect to substitute employer-provided paid leave for unpaid FMLA leave or inquire about the concurrent running of employer-provided leave and FMLA leave, yet the employer elects to substitute company leave for FMLA leave. As shown by the facts here, other

more reasonable notice provisions adequately ensure sufficient notice of the employer's election to substitute. If an employer fails to provide adequate notice and it works to the detriment of an employee, causing interference with the employee's exercise of her statutory rights, – not the case below – Congress has expressly provided a detailed and carefully crafted remedy. In such a case, the employee may seek to enforce any denied FMLA rights in court and seek the monetary and injunctive relief provided in 29 U.S.C. §2617(a).

ARGUMENT

I. The Penalty Provisions For Failing to Timely Designate Are Contrary to the Act and Not a Reasonable Construction of It.

In administering the FMLA, the Secretary of Labor is authorized to issue regulations "as are necessary to carry out" the provisions and purposes of the Act. 29 U.S.C. §2654. However, the FMLA as defined in the DOL's conflicting regulations is significantly different than the FMLA legislated by Congress. At issue in this case are the DOL's regulations which significantly expand and contradict the core component of the Act–an employee's entitlement to a *total* of 12 workweeks of FMLA leave per year.

In *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984), this Court set forth a two-step test for determining the validity of regulations such as the ones at issue in this matter. First, the Court must determine if Congress has "directly spoken to the precise question at issue." *Id*. at 842. If the Court "ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id*. at 843 n.9. In the event Congress has not directly spoken to the precise question and thus the statute is silent or ambiguous on the issue, the Court must determine if "the agency's answer is based on a permissible construction of the statute." *Id*. at 843. Constructions that are contrary to clear congressional intent must be rejected. *Id*. at 843 n.9.

Applying *Chevron's* test, the Eighth Circuit properly found the regulations providing for additional leave invalid. *See Ragsdale v. Wolverine Worldwide, Inc*., 218 F.3d 933, 937-938 (8th Cir. 2000). The Eleventh Circuit and several lower courts have also found the regulations invalid under the *Chevron* test or the principles articulated therein. *See, e.g., McGregor v. Autozone, Inc*., 180 F.3d 1305, 1308

(11th Cir. 1999)(concluding employer's failure to designate paid leave as FMLA leave did not entitle employee to 12 weeks of unpaid leave stacked on top of 13 weeks of paid leave because the regulations requiring such a result are invalid and unenforceable whether the Act is viewed as clear and the regulations clearly contrary to the Act or whether the Act is viewed as somewhat ambiguous and the regulations manifestly contrary to the Act); *Fulham v. HSBC Bank USA*, 2001 WL 1029051 *7 (S.D. N.Y., Sept. 6, 2001)(finding employer's failure to designate paid leave as FMLA leave did not entitle employee to 12 weeks of unpaid leave stacked on top of his 26 weeks of paid leave because regulations requiring such a result were contrary to the Act); *Twyman v. Dilks*, 2000 WL 1277917, *13-14 (E.D. Pa., Sept. 8, 2000)(invalidating regulations as "directly inconsistent" with the Act's express language and inconsistent with the purpose of the Act); *Howell v. Standard Motor Products, Inc*., 2001 WL 912387, *3 (N.D. Tex., Aug. 10, 2001)(finding employer's failure to designate unpaid leave as FMLA leave did not entitle employee to 12 additional weeks of unpaid FMLA leave and predicting Fifth Circuit would agree with Eighth and Eleventh Circuits on invalidity of penalty regulations); *Nolan v. Hypercom Mfg. Res.*, 2001 WL 378235 *7 (D. Ariz., March 26, 2001)(finding regulation invalid because it provides employees more leave than the substantive guarantees of the statute). This Court should similarly declare the regulations requiring more than 12 weeks of leave invalid as they are contrary to the Act and not a reasonable construction of it.

The Act expressly provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . ." 29 U.S.C. §2612(a)(1). This provision is not ambiguous. This provision is obviously not silent as to the total number of workweeks of leave an employee is entitled to under the Act. This maximum allowance is restated again when permission is granted to an employer to

substitute paid leave under its benefit plans for all or a portion of the mandated total of 12 weeks annually. In such a case, in the same section, Congress declared that "[i]f an employer provides paid leave for fewer than 12 weeks, the additional weeks of leave necessary to attain the 12 workweeks of leave . . . may be provided without compensation." 29 U.S.C. §2612(d)(1)(emphasis added). Under the express and unambiguous language of the Act, an employer is required only to provide up to a total of 12 weeks of leave per year. The 12 week total expressly includes both paid leave and unpaid leave. Thus, the Act does not require the employer to stack unpaid FMLA leave on top of employer-provided paid or unpaid leave.

Notwithstanding the express and unambiguous language of the Act, §§825.208(c) and 825.700(a) improperly convert the unpaid leave up to a "total of 12 workweeks" annually into an entitlement to 12 additional weeks unless the employer specifically notifies the employee within two business days that he or she is taking FMLA leave. This designation, under the regulation, applies "only prospectively as of the date of notification . . . ." §825.208(c). Thus, under the DOL's regulations, an employer may be "forced" to provide many more than 12 weeks of leave per year should the employer fail to provide certain notice. *Ragsdale*, 218 F.3d at 938. Indeed, if the regulations were applied as urged by Petitioner, she would have received a total of 42 weeks of leave in a single year.

This "disproportionate penalty" for failing to designate, *Ragsdale*, 218 F.3d at 938, which requires an employer to provide more than 12 weeks of leave annually, is entirely a creation of the DOL and contradicts the clear and unambiguous language in the Act. Those supporting the validity of the stacking penalty under the *Chevron* test do so by first attempting to validate and justify the designation and notice provisions and then bootstrapping the stacking penalty onto those requirements. Indeed, after arguing for the validity of the designation and notice provisions, the Solicitor General characterizes the stacking of leave

as no penalty at all, but merely the "consequence" of an employer's failure to designate.[2] In analyzing the *Chevron* test, the Solicitor focuses on Congress' silence as to the timing of the employer's "paid leave" election under §2612(d)(1) but ignores the clear language of the statute that manifestly is not silent as to the propriety of the stacking penalty or "consequence" for failing to timely designate and the statute's carefully crafted remedy for an interference with FMLA rights. *See* 29 U.S.C. §§2612(a)(1) and 2617.

While some "consequence" may be appropriate for an employer's failure to designate paid leave as FMLA leave in the case of detrimental reliance, as we discuss below, Congress provided for and carefully detailed the remedial relief available. *See* 29 U.S.C. §2617(a)(1)(A)(i),(ii) and (iii) and §2617(a)(1)(B). The "consequence" or penalty selected by the DOL and imposed by §825.208(c) and 825.700(a) dramatically contradicts the clear language of the Act, ignores the remedy provided by Congress, and greatly expands upon the Act's leave entitlement. Thus, the stacking penalty or "consequence" is invalid and must be stricken.

Not only are the regulations expressly contrary to the Act, they are also not a reasonable construction of it. As the Eleventh Circuit stated, "The regulations not only add requirements and grant entitlements beyond those of the statute but they also are inconsistent with the stated purpose of the statute." *McGregor*, 180 F.3d at 1308. An express purpose of the Act is "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers." 29 U.S.C. §2601(b)(3). Indeed, as noted by the Eighth Circuit below, "[t]he provisions of

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[2] The Sixth Circuit employed a similar bootstrapping analysis to validate the stacking penalty. *See Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935-36 (6th Cir. 2000) (finding the statute silent as to the notice an employer must give to employees before designating leave and then assuming without further analysis that the provision forbidding retroactive designation is therefore also valid).

the FMLA are noticeably bereft of any purpose to interfere with employer leave policies which grant greater leave rights than the FMLA or to require more generous leave plans than the minimum twelve weeks of unpaid leave mandated by the FMLA." *Ragsdale*, 218 F.3d at 937.

Because of the two-day time period for designating FMLA leave and the resulting stacking for failure to designate, a claimant is almost always assured of having longer than "the total of 12 workweeks" mandated by Congress.[3] Requiring this quick designation and denying retroactive application runs counter to the Act's express purpose of accommodating the legitimate interests of employers and encouraging employers to adopt more generous leave plans. There is probably no better illustration of the lack of congruency between the purpose of the Act and the practical result of the DOL's regulations than the outcome sought by Petitioner in this case, i.e. 12 weeks of unpaid FMLA leave stacked on top of 30 weeks of unpaid leave provided by Respondent.

As stated by the Eighth Circuit, the obvious purpose of counting paid leave – as expressly contemplated by Congress – as part of the employee's 12 weeks is to ensure that neither an employee nor an employer will be disadvantaged by the existence of the FMLA. *Ragsdale*, 218 F.3d at 938. The statutory provision, as the Eighth Circuit further noted, protects the employer when an employee requests FMLA leave by not requiring the employer to provide paid leave on top of the 12 weeks of FMLA leave. *Id*. Moreover, this substitution provision further illustrates Congress' intent to not require employers to stack FMLA leave on top of the employer-provided leave. However, the DOL improperly seized upon

[3]As one plaintiff argued, ". . . the regulation carries an implicit penalty awarding an employee an additional day of FMLA leave for each day the employer is late in making the designation (hence the 37 days of additional leave claimed by Daley)." *Daley v. Wellpoint Health Networks, Inc., et al.*, 146 F.Supp.2d 92, 99 (D. Mass. 2001).

the designation provision as the thin reed on which to impose a wildly disproportionate penalty in those cases where the employer fails to notify the employee that employer leave, whether paid or unpaid, and FMLA leave run concurrently. Thus, the regulations are inconsistent with and manifestly contrary to the Act and its stated purposes. They should be declared invalid under *Chevron*.

II. The Disproportionate, Stacking Penalty Which Requires an Employer to Provide Both Company Designed Leave and FMLA Leave Is Contrary to Congressional Intent and Is Not Necessary to Implement the Act.

A. Imposing a disproportionate stacking of leave penalty on employers who already provide paid or unpaid medical, family and maternity leave is contrary to Congressional intent.

Not only is the stacking penalty contrary to express statutory language carefully crafted after much study and debate by Congress, the stacking of FMLA leave onto employer-provided leave is contrary to Congressional intent. The legislative history abundantly demonstrates that (a) Congress wanted to applaud, rather than penalize employers who voluntarily provide leave for FMLA purposes; (b) Congress was persuaded that on balance the 12-week allotment was appropriate given the need to adjust work schedules or hire temporary replacements and thus provided for substitution of company paid leave for FMLA unpaid leave as an option; and (c) Congress wanted to encourage – not discourage or penalize – employers to adopt more generous leave policies than provided by the FMLA. The stacking penalty is contrary to each of these Congressional purposes.

Congress, in 1993, determined that some private employers were not providing sufficient leave of absence from work for medical, maternity or parental assistance reasons, thus in some cases, forcing employees to choose between families and work or to lose their jobs due to an inability to work because of health conditions. Cited studies found that only 37% of workers in private business were covered by

"maternity" leave and only 18% were covered by unpaid "paternity" leave. Other studies found that 30% to 40% of businesses did not offer job guaranteed sick leave. S. Rep. No. 103-3, at 15 (1993), *reprinted in* 1993 U.S.C.C.A.N., Vol. 2 at 17 ("Senate Report"). This Senate Report concluded:

> These studies, taken together, indicate that while many employers are providing family and medical leaves to their employees, a significant percentage of employers of all sizes have yet to adopt such policies.

Id. President Clinton, in his signing statement, *id*. at 54-55, observed that "although many enlightened companies have recognized the benefits to be realized from a system providing for family and medical leave, not all do . . . . We must extend the success of those forward-looking workplaces where high performance teamwork has already begun to take root and where family and medical leave already is accepted."

Second, as noted above, employers who provided paid leave under existing benefit plans were permitted by Congress in 29 U.S.C. §2612(d)(1) and (2) to take credit for those existing leave provisions. But the maximum of 12 weeks remained in place: "When an employer has required or an employee has elected to substitute for unpaid leave appropriate paid leave of less than 12 weeks duration, the employer need only provide an additional period of unpaid leave so that the total of paid and unpaid leave provided equals 12 weeks." Senate Report at 29 (emphasis added); HR Rep. No. 102-135, at 41 (1991)(same).

The 12-week maximum and minimum was carefully selected after years of study and debate. For a number of years, mandated leave had been the subject of considerable debate. In 1991, proposed identical FMLA legislation was not passed but the House Report (HR Rep. No. 102-135) reflected extensive debate concerning the appropriate amount of leave. Also, it was concluded that employers were

to be accommodated, particularly those who furnished leave under their existing voluntary plans. The House Report provided:

> The amount of time available for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a twelve week minimum represents a middle ground between the family needs of workers and an employer's business needs. Employers are, of course, free to and are encouraged to provide longer leaves.

H.R. Rep. No. 102-135, at 37 (1991). Like the Act which was finally passed in 1993, the 1991 bill permitted the employer to substitute certain paid leaves for mandated unpaid leave. Accordingly, an employer may require the employee to take paid vacation or paid personal leave for any part of the leave required under the Act. *Id*. at 41. Congress only cautioned that an employer may not trade shorter periods of paid leave for the longer periods of unpaid leave prescribed by the Act. *Id*. at 42. The 1991 Report concluded: "Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the Act, on an unpaid basis." *Id*. (Emphasis added). Indeed, the DOL's final regulations provide: "An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12 month period for any one, or more, of the following reasons . . . ." §825.200(a) (emphasis added).

The stacking penalty in case of a failure to notify and designate runs contrary to this carefully designed approach to leave. The disproportionate stacking penalty exclusively penalizes those "enlightened" and "forward-looking" employers who voluntarily provided leave, particularly paid leave in substantial amounts, in addition to FMLA leave. Accordingly, since the disproportionate stacking penalty

in §825.208(c) and §825.700(a) falls exclusively on those employers already providing paid or unpaid leave, it is clearly contrary to Congressional intent.

Not only did Congress provide for a "total" of 12 weeks of leave because of scheduling difficulties which might otherwise arise and accommodate "enlightened" employers by allowing substitution of employer-provided leave for mandated leave, Congress expressly wanted to encourage employers to provide even greater benefits than those contemplated by the Act. 29 U.S.C. §2653 provides:

> Nothing in this Act or in any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with requirements under this Act or any amendment made by this Act.

The Society for Human Resource Management respectfully submits that nothing discourages employers more from adopting more generous leave policies than the conflicting and confusing regulations of the DOL and their arbitrary, disproportionate stacking penalty for a "failure to notify" when that failure does not adversely affect an employee's receipt of statutory rights, as shown by the facts here.

B. The disproportionate stacking of FMLA leave on employer-provided paid or unpaid leave is not necessary to effectuate the Act.

As noted, 29 U.S.C. §2654 authorizes the Secretary of Labor to develop regulations "as are necessary to carry out" the Act. The stacking penalty is not only contrary to the Act and legislative intent, it is not necessary to "carry out" the Act. This is particularly true in the case of unpaid leave which is at issue in this case.

The interim final regulations published on June 4, 1993 (58 Fed. Reg. 31794) focused only on the election by the employer to substitute paid leave for FMLA leave. The interim final version of §825.208(c) did not impose a stacking penalty in the event the employer failed, or was tardy, in designating that the

FMLA leave was to run concurrently with employer furnished paid leave. In addition, the interim final regulations, as do the final regulations, provided for a retroactive counting of leave as FMLA leave in the situation where an employer seeks to designate leave as FMLA leave after the leave has begun. *See* §825.208(d). Further, in the final regulations, employers may designate leave as FMLA leave retroactively even after the employee has returned to work in two situations: (1) where the employer did not learn the reason for the absence until the employee's return or (2) where the employer knew the reason for the leave but was not able to confirm that the leave qualifies under the FMLA (e.g., the requested medical certification had not been received by the employer). *See* §825.208(e). As the above provisions demonstrate, "retroactivity" is not contrary to the intent and purposes of the Act, and final §825.208(c)'s prohibition on retroactivity when substitution of paid leave occurs is not necessary to ensure that employees receive their FMLA benefits.

This stacking penalty in §825.208(c) and §825.700(a) cannot be justified by citing an alleged need to notify employees of their rights and obligations under the Act. Congress provided for notice in a number of instances. *See* 29 U.S.C. §2619 (requiring employers to post notices prepared or approved by the DOL summarizing the pertinent provisions of the law); 29 U.S.C. §2612(e)(1) (notice obligation of employees to employers); 29 U.S.C. §2614(b)(1)(A)-(B) (notice to key employees concerning lack of reinstatement rights). In addition, the DOL in the other regulations has imposed additional notice provisions on the employer. *See* §825.301(a)(1) (information concerning FMLA entitlements and employee obligations must be included in employee handbook or other document) and §825.301(a)(2) (providing written guidelines to employees concerning the employees' rights and obligations under the FMLA if an employer does not generally publish written policies, manuals and handbooks).

Indeed, the DOL, in explaining the regulations at issue, did not justify the stacking penalty as necessary to compel employers to provide information on the FMLA. Rather, the comments which accompanied the final regulation and which were published in the Federal Register on January 6, 1995 (60 Fed. Reg. 2180) reflect an entirely different focus on the part of the DOL. A review of the justification demonstrates it is contrary to the intent of Congress. At that time, the DOL, in referring to the final version of §825.208, which first contained the stacking penalty and prohibition on retroactive designation, stated:

> This section was intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted "after the fact" disputes. . . . Because of the possible "stacking" of unpaid FMLA leave entitlements in addition to an employer's pre-existing leave plan, it appears that some employers that wished to mitigate their exposure to extended leaves by employees have been motivated by the provisions in the Interim Final Rule to try to determine and count all possible FMLA-qualifying absences as FMLA leaves (by whatever means, including through overly-intrusive inquiries of employees when they request to use their accrued paid leave). . . . [Discussion of various comments deleted.] After careful consideration of the many comments and objections received on this section, the Department has revised the regulation along the following lines. . . . If the employer has the requisite knowledge to determine that a leave is for an FMLA reason at the time the employee either gives notice of the need for leave or it commences, and the employer does not notify the employee as required at that time that the leave is being designated as FMLA leave, the employer may not then designate the leave as FMLA leave retroactively; it may designate only prospectively, as of the date of notification to the employee of the designation. . . .

60 Fed. Reg. at 2207-2208.[4]

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[4] In their briefs below and before this Court, counsel for Petitioner and Amicus in support of Petitioner assert various rationale for imposing the stacking penalty. Such "post hoc rationalizations" by appellate counsel must be rejected. *See N.L.R.B. v. Metro. Life Ins. Co.*, 380 U.S. 438, 444 (1965) ("for reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review"), *citing Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("courts may not accept appellate counsel's post hoc rationalizations for agency action"). This seems particularly true where different sections of the same regulations point in different directions; some regulations providing for retroactivity while others prohibit retroactivity; some regulations impose a stacking penalty, others only prohibit an employer from taking

In short, in the regulations at issue, the DOL, and some commentators, were attempting to second guess the provision for substitution of paid leave for FMLA leave (and concurrent running of leave periods) which Congress expressly intended. Certainly, it is not contrary to Congressional intent or the purpose of the FMLA for employers to be concerned about "extended leaves by employees" over the "total" of 12 weeks contemplated by the FMLA.

Accordingly, the requirement that FMLA leave be stacked on top of employer-provided paid or unpaid leave is indeed a "disproportionate penalty" as the Eighth Circuit held, and is not necessary to carry out or implement the Act.

C. The Act and other regulations protect both employees and employers and provide an appropriate remedy to protect employee FMLA rights.

1. Unpaid Leave

Congress provided for a total of 12 weeks of leave, job protection upon return from such leave, and sufficient notice of those rights to employees. 29 U.S.C. §2619(a) requires an employer to post a notice to employees: "Each employer shall post and keep posted . . . a notice, to be prepared and approved by the Secretary, setting forth excerpts from, or summaries of, the pertinent provisions of this subchapter and information pertaining to the filing of a charge." Section 2619(b) provides the penalty for failure to post: "Any employer that willfully violates this section may be assessed a civil money penalty not to exceed $100 for each separate offense." The final regulations in Appendix C set forth the notice to employees which is entitled "Your Rights Under the Family and Medical Leave Act of 1993." This notice unequivocally advises employees of their FMLA leave rights:

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adverse action against an employee and denying their statutory rights by failing to provide notice.

> FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons.

The kinds of leave protected by the FMLA are then specified.

No further notice to employees is required with respect to their FMLA leave rights and unpaid leave. This notice sufficiently advises employees of their "total" of 12 weeks of unpaid leave annually and places a duty upon them to inquire further if there is any doubt concerning their leave entitlements or the duration of their leave. In *Nolan*, 2000 WL 378235 at * 7, the court, after an extensive analysis of the cases and the requirements of the FMLA, observed:

> The burden of communications does not rest on the employer alone. There is no reason why employees should not be required to understand the extent of their guaranteed leave. There is a clear basis in the statute for requiring employees to confer with employers about their anticipated absences. *See* 29 U.S.C. §2612(e). Employees have a duty to notify employers of foreseeable births or planned medical treatments. *Id*. Absent some extraordinary medical obstacle, not alleged here, there is no reason why employers and employees cannot at the time of notice or within a few days thereafter determine when available leave shall be exhausted. This contemplates responsibility by employees, if they are interested in securing their jobs, and by employers. But as the statute plainly reflects, employees are in a better position to anticipate the amount of time off they will need, and they are more motivated to insure that their job will be protected while they are away.[5]

Certainly the notice of "up to 12 weeks of unpaid" leave is clear on its face. No further notice is required in the case of unpaid leave, as Congress recognized by its silence.

2. Employer-Provided Paid Leave Substitution

In the case of employer-provided paid leave and the "substitution" (or "concurrent running") which Congress specifically addressed, the burden remains with the employee, for the reasons cited above, to

[5]The DOL's regulations provide for resolution of disputes or questions "through discussions between the employee and the employer." §825.208(b)(1).

inquire concerning the impact of paid leave policies. As Congress recognized, the employee may elect to use paid leave, if available. The mandated notice reflects this as well: "At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave." Clearly, the employee is on notice and must inquire about substitution of leave and the impact this has on the "total" of 12 weeks.

In many instances, in the paid leave situations, in fact there is no need for an "election" or designation by the employer at the time leave is requested, as contemplated and required by §825.208(c). First, as noted, there is the situation where the employee elects to substitute accrued paid vacation, personal or medical/sick leave in order to receive the wages during the absence. Second, given the notice prepared by the DOL and posted, the employee will – or should – at least inquire in such cases as to paid leave and FMLA leave rights. In any event, it is difficult to believe an employee will not ask a rather straightforward simple question at or near the start of leave: when does my leave end and when must I be back at work to preserve my job?

The real issue with respect to "substitution" or "designation" occurs with respect to paid vacation or paid personal leaves which also may be substituted at either the employee's or the employer's option for any qualifying FMLA unpaid leave. §825.207(e). If neither the employee nor the employer elects to substitute paid leave for unpaid leave under the above conditions and circumstances, the employee will receive an unpaid leave and will remain entitled to all the paid vacation or personal paid leave which is earned or accrued under the terms of the employer's plan. Thus, the narrow circumstances under which an employer designation or substitution is required suggests again the disproportionate nature of the penalty imposed by the DOL by the burdensome notice provisions placed upon the employer in §825.208(c).

Even in those instances of paid leave substitution where confusion may arise (e.g., paid vacation time or paid personal leaves), specific designation "within two business days" of notice of the qualifying nature of the leave should not be required if the employer through distribution of written materials, handbooks or benefit description advised the employee of the employer's practice to require substitution in those cases. *See* §825.301(a)(1) and (2). Even where such information has not been provided prior to the leave request, there is no cause shown for the prohibition on "retroactive" designation which is permissible in other situations under the regulations.[6]

3. Congress Provided a Detailed, Carefully Crafted Remedy.

Although not the case below, if the employer has not provided such information concerning substitution of paid leaves, or fails to designate and the employee loses statutory rights in reliance thereon, the employee has recourse for failure to notify in the case of detrimental reliance and loss of statutory rights. As the Eighth Circuit recognized, there can be cases where an employee relies upon statements made by the employer or relies upon the silence resulting from the employer's failure to make the substitution election. However, the "disproportionate" stacking is not the answer. Rather, the statute provides a detailed remedy if the employee has been damaged by the denial of 12 weeks of unpaid leave or reinstatement at the end of the 12 week period. *See* 29 U.S.C. §2615(a)(1) and 2617(a). The enforcement provisions in 29 U.S.C. §2617 and its detailed, carefully tailored exclusive damage and relief scheme expressly provide the remedy for the "interference with rights" described in §2615(a). Indeed, as

[6]To the extent that §825.301(b)(1) requires specific notice of this designation, it is contrary to the purposes of the Act particularly if previously provided by the employer in another form and by the DOL's approved poster.

the Eighth Circuit observed, failure to give proper notice – where required in certain situations – "may function to interfere with or to deny an employee's substantive FMLA rights." 218 F.3d at 939. But Congress, while conferring a right in such cases, also provided a comprehensive and carefully crafted remedy which the DOL simply ignores and substitutes a disproportionate one.[7]

Thus, any failure of the employer to provide sufficient notice to the employees concerning their rights to paid leave should be dealt with under 29 U.S.C. §2617 and pursuant to traditional concepts of law. *See Covey v. Methodist Hosp. of Dyersburg, Inc.*, 56 F.Supp.2d 965, 968 (W.D. Tenn. 1999) ("In order to succeed on a failure to inform claim, the plaintiff must show (1) that the defendant failed to correctly inform her of her FMLA rights; and (2) that failure caused her to forfeit protections provided by the Act."); *Jeremy v. Northwest Ohio Dev. Ctr.*, 33 F.Supp.2d 635, 639 (N.D. Ohio 1999), *aff'd*, 210

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[7] The Solicitor attempts to draw a parallel between the definition of FMLA "prohibited" acts in 29 U.S.C. §2615(a)(1) ("it shall be unlawful for any employer to interfere with, restrain or deny . . . any right provided under this subchapter") and a similar definition of unfair labor practice in the National Labor Relations Act, 29 U.S.C. §158(a)(1) (it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise" of their Section 7 rights). While the NLRB may have wide discretion in interpreting and applying that phrase to employer conduct or misconduct, it does so in the context of adjudicating unfair labor practices under 29 U.S.C. §160(a)-(c). Under FMLA that task was left to the courts by 29 U.S.C. §2617. Next, the NLRB has not attempted to define what constitutes "interference with" or "restrain" or "coercion" by regulations. And even where the NLRB enters certain remedial orders pursuant to and following unfair labor practice adjudications, its powers can only be exercised consistent with the statute. *See, e.g., H.K. Porter Co., Inc. v. N.L.R.B.*, 397 U.S. 99, 108-109 (1970) (Board exceeded powers conferred by statute in ordering employer to implement a particular form of collective bargaining agreement: "The Board's remedial powers under §10 of the Act are broad, but they are limited to carrying out the policies of the Act itself."); *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 307-311 (1965) (Board erred in concluding lock out in response to whipsaw strike constituted illegal interference, restraint or coercion under the Act, 380 U.S. at 318, because ". . . the role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act and the functions of the section relied upon. . ." and constitutes an improper "assumption by an agency of major policy decisions properly made by Congress.").

F.3d 372 (6th Cir. 2000)("Assuming that defendant did not provide adequate notice, plaintiff still fails to allege that this resulted in either forfeiture of FMLA protections or adverse consequences"); *Lacoparra v. Pergament Home Ctrs., Inc.*, 982 F.Supp. 213, 220-22 (S.D. N.Y. 1997) (employee alleges that employer provided insufficient notice of her rights and responsibilities under the FMLA as required by 29 C.F.R. §825.301(a)(1) but court found no benefits under the FMLA were denied); *see also, Blankenship v. Buchanan Gen. Hosp.*, 999 F.Supp. 832 (W.D. Va. 1998) (discussing adequacy of notice in handbook and equitable estoppel claim).

Respondent's failure to designate in this case did not cause Petitioner to forfeit any protections under the FMLA. Petitioner's series of hypothetical examples of "options" allegedly lost due to lack of information are not supported factually, rely on inaccurate interpretations of the Act and regulations, ignore the notice Petitioner did receive from Respondent and demonstrate the practical difficulty–if not impossibility-- facing employers as a result of the DOL's schemes. Even if Respondent had notified Petitioner on the first day of her leave that her FMLA leave and employer-provided leave ran concurrently, she could not have returned to work at the end of 12 weeks and would not have had any federally-protected job rights during the remaining weeks of her leave.

CONCLUSION

Petitioner received her unpaid leave entitlement of 12 weeks under the FMLA. There is simply no question about this. An additional grant of 30 weeks as a result of the disproportionate stacking penalty would clearly be contrary to Congressional intent. No election or designation was even contemplated by Congress in the case of unpaid leaves.

The stacking penalty imposed on employers when they fail to designate existing medical, sick, maternity or parental care paid leave – or even unpaid leave – as FMLA leave is not necessary to implement the Act. Indeed, it is contrary to the Act and to legislative intent. Congress clearly intended that employer-provided paid leaves – if the employee or employer elected – could run concurrently with FMLA leave and FMLA leave would not be stacked on top of employer-provided leave. Congress wished to encourage – not penalize – employers who provided greater leave than the FMLA.

No categorical disproportionate penalty should attach to an employer's failure to exercise its substitution option in a specific manner. The paid leave substitution option can be communicated in many ways – even by information distributed in advance or in handbooks, in plan booklets or other written literature. Where no information has been posted or previously provided, the "designation" of the paid leave as FMLA leave at some point may be required. However, retroactive designation does not run counter to the statute, as other regulations amply demonstrate.

If an interference with FMLA rights actually occurs, an employee may seek to utilize the Act's detailed, carefully crafted remedy. Utilizing the statutory remedy and traditional concepts of law, lower courts have struck a balance between employer rights expressly preserved by Congress and any loss of employee rights of "up to a total of twelve workweeks"of leave and reinstatement. This Court should follow suit. The DOL's disproportionate, categorical stacking penalty is contrary to the Act and Congressional intent and is not required to carry out the Act.

Respectfully submitted,

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October 2001