crime

normative stance, their
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the fact that some scholars
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Professor Ted Joyce of
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fessors John R. Lott Jr. of
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In any event, Donohue's
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■ EMPLOYMENT LAW

Family leave lives on

By Debra S. Katz and Avi Kumin SPECIAL TO THE NATIONAL LAW JOURNAL

WHAT WILL BECOME of the Family and Medical Leave Act (FMLA)? That is the question on the minds of many since the Supreme Court's recent decision in *Ragsdale v. Wolverine Worldwide Inc.* Although significant, the case does not signal the beginning of the end of the FMLA and its implementing regulations.

The FMLA requires employers with 50 or more employees to provide an employee up to 12 weeks of unpaid leave per year if the employee has a serious medical condition, an immediate family member with a serious medical condition or a newborn or newly adopted child to care for. Although Congress passed the FMLA nearly a decade ago, the law had not come directly before the Supreme Court until *Ragsdale,* decided in March.

When Tracy Ragsdale, a factory employee, was diagnosed with Hodgkin's disease, she took seven months of unpaid leave under her employer's leave policy. Her employer, however, neglected to inform her that this period would count against the 12-week FMLA entitlement. Ragsdale sought an additional 12 weeks, failed to return to work promptly and was terminated.

In court, Ragsdale noted that, under Department of Labor (DOL) regulations, an employer must inform an employee beforehand if it intends to count leave against that employee's FMLA entitlement and the employer may not retroactively designate leave as FMLA-qualifying.

The Supreme Court held that the DOL had overstepped its authority in adopting the regulation. The FMLA entitles eligible employees to a total of 12 weeks of leave—not 12 weeks plus the time they've already received under another plan. The DOL regulation created an irrebuttable presumption that an employee has been prejudiced by an employer's failure to designate leave as FMLA leave, which ran contrary to the statute's requirement that a plaintiff suffer actual injury.

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An overreaction

The employment defense bar views *Ragsdale* as an invitation by the Supreme Court to declare open season on FMLA regulations disfavored by employers. This view is not only inaccurate, but misguided. *Ragsdale* will not create a significant change in interpretation of the FMLA and its regulations. The court did not strike down the regulation in question, but rather ruled that it was invalid as applied in that particular—and rather unusual—case.

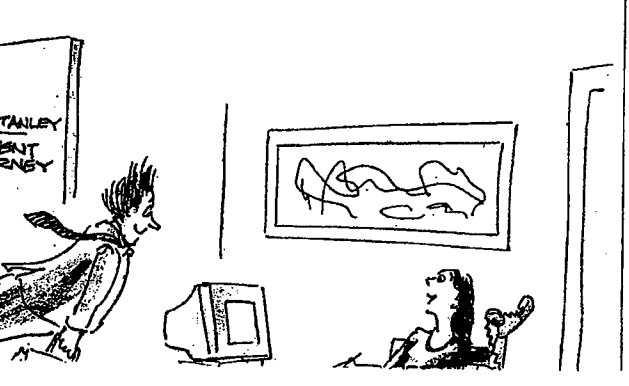
Indeed, the fact that the Supreme Court opted to decide such an unusual case may indicate that, as a whole, the regulatory scheme the DOL has adopted is working well. Rather than accept certiorari on a mainstream FMLA issue—such as the adequacy of employees' notice to their employers, restoration of employees to a job with equivalent pay or retaliation against employees who take FMLA leave—the Supreme Court left the lower courts' treatment of these issues intact.

The FMLA is not a significant burden on employers, as confirmed by a recent DOL report, *Balancing the Needs of Families and Employers: Family and Medical Leave Surveys.* The survey revealed that during a recent 18-month period, only 16.5% of covered employees had taken FMLA leave, and for most of those employees the length of the leave was 10 days or less. A majority of employers, despite some difficulties with notification and medical certification, found FMLA compliance relatively easy. Most employers reported that the FMLA had had no noticeable effect on their productivity, performance or growth.

The survey concluded that "[a] large majority of leave-takers said that taking leave had positive effects on their ability to care for family members," and their emotional well-being. The FMLA has proven its worth to employees while having a de minimus impact on employers. Rather than looking for ways to scale back application of the FMLA, employers and business groups should support reasonable expansion of the FMLA.

A Senate bill seeks to expand coverage of the FMLA to businesses with 25 or fewer employees. This would extend FMLA's family-supportive benefits to an additional 13 million employees. As experience has shown, businesses should not fear this expansion of the FMLA. NLJ

AND LAUGHTER



YOU BE THE JUDGE
Should lawyers be able