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Robert J. Aalberts

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# Employee Notice Requirements Under the Family and Medical Leave Act: Are They Manageable?

Robert J. Aalberts\*

Lorne H. Seidman\*\*

Almost two thirds of the labor force in the United States works for employers covered by the Family and Medical Leave Act (FMLA) of 1993.<sup>1</sup> Nearly fifty-five percent of U.S. workers also meet the FMLA's definition of "eligible" employee.<sup>2</sup> As one commentator, Jane Rigler, has

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\* Robert J. Aalberts is the Ernst Lied Professor of Legal Studies in the College of Business and Economics at the University of Nevada, Las Vegas. He earned his Juris Doctor at Loyola University, and an M.A. from the University of Missouri-Columbia. Professor Aalberts's research pursuits are in the areas of employment law and real estate law. He has published over 60 articles in law reviews and business journals, including the *Pepperdine Law Review*, *American Business Law Journal*, *Georgetown Journal of Legal Ethics*, *DePaul Law Review*, *Marquette Law Review*, *Louisiana Law Review*, *Southern Illinois University Law Journal*, *Labor Law Journal*, *Journal of Small Business Management*, *Employee Relations Law Journal*, *International Journal of Conflict Management*, *Benefits Law Journal*, and others. Professor Aalberts is currently the editor in chief of the *Real Estate Law Journal* and is a co-author of *LAW AND BUSINESS AND THE REGULATORY ENVIRONMENT* (4th ed. 1994).

\*\* Lorne H. Seidman is Professor of Legal Studies in the College of Business and Economics at the University of Nevada, Las Vegas. He received his Juris Doctor from Case Western Reserve University. Professor Seidman's research interests are in the areas of employment law, comparative law, and the history of law. His articles have appeared in numerous journals and law reviews, including the *Pepperdine Law Review*, *Marquette Law Review*, *Southwestern Law Review*, *Labor Law Journal*, *Southern Illinois University Law Journal*, *Cornell Hotel and Restaurant Administration Quarterly*, *Employee Relations Law Journal*, *International Journal of Conflict Management*, and the *Journal of Small Business Management*.

1. DEPARTMENT OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES xvi (1996) [hereinafter A WORKABLE BALANCE]; The Family and Medical Leave Act, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-2654 (1994 & Supp. 1996)).

2. A WORKABLE BALANCE, *supra* note 1, at xvi. See 29 C.F.R. § 825.110 (1996) for detailed coverage of what is an "eligible" employee.

noted, the FMLA “represents a fundamental change in the way American employers are required to acknowledge and accommodate employees and their families.”<sup>3</sup> Indeed, there is ample data to support Rigler’s conclusion.<sup>4</sup>

The “change” is a legislative response to what Congress perceived as a “demographic revolution” in the composition of the U.S. workplace and the increasing number of elderly Americans.<sup>5</sup> The Bureau of Labor of Statistics, for example, notes that the female labor force is expanding, and predicts that it will reach 66.1% of American workers by 2005.<sup>6</sup> Moreover, in 1993 the Families and Work Institute predicted that two thirds of women with preschool children and three quarters of women with children in school would be part of the job force by 1995.<sup>7</sup> “Equally dramatic” is the substantial number of single-parent households that have resulted from divorce, separation, and out-of-wedlock births.<sup>8</sup> Finally, due to advances in medical technology and health care, the elderly are the fastest-growing segment of the American population, and they frequently require the care of their working children.<sup>9</sup> For exam-

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3. Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 458 (1995) (discussing the rights, obligations, inconsistencies, and shortcomings of the FMLA).

4. Before the FMLA, employees generally received family and medical leave only if they had a voluntary or collective bargaining agreement which contained such a provision or if state laws required such leave. See A WORKABLE BALANCE, *supra* note 1, at xiii. However, only a quarter to a third of those policies offered by employers were comparable to the protections now given by the FMLA. *Id.* The remaining employer policies generally did not provide for the care of a seriously ill parent, child, spouse, or newborn, newly adopted, or foster child. *Id.* Moreover, when employers handled these cases on an ad hoc basis, the leaves were shorter than those of the FMLA, and benefits were not always maintained for the employee. *Id.* Also, prior to the passage of the FMLA, at least 35 states possessed some type of law requiring unpaid family or medical leave, but state laws varied greatly. See Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act’s History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 54-57 (1995) (discussing state laws regarding maternity leave). The FMLA does not supersede existing state or local laws providing family leave as long as the state or local laws provide greater rights than those offered by the Act. See 29 C.F.R. § 825.701(a).

5. S. REP. NO. 103-3, at 5-7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7-9 (discussing the demographic changes which warrant passage of the FMLA).

6. *Id.* at 5, *reprinted in* 1993 U.S.C.C.A.N. at 8.

7. *Id.* at 5-6, *reprinted in* 1993 U.S.C.C.A.N. at 8.

8. *Id.* at 6, *reprinted in* 1993 U.S.C.C.A.N. at 8 (“The Census Bureau reports that single parents accounted for 27 percent of all family groups with children under 18 years old in 1988, more than twice the 1970 proportion.”).

9. *Id.* at 6-7, *reprinted in* 1993 U.S.C.C.A.N. at 8-9 (“Currently 32 million Americans are aged 65 and over, comprising 12 percent of the population. Between 1980 and 1990, the number of people aged 75 or older grew by nearly one third.”).

ple, studies show that families or friends provide between sixty and eighty percent of the care provided to the elderly.<sup>10</sup>

These new demographics reveal a potential conflict in the workplace.<sup>11</sup> Workers must meet the reasonable demands of their employers as well as the demands of everyday life.<sup>12</sup> Given that in 1993 forty percent of all employees believed that they would require FMLA leave at some time in the next five years,<sup>13</sup> and given that current Department of Labor (DOL) regulations require employers "to responsively answer questions from employees concerning their rights and responsibilities under the FMLA," it becomes imperative that employers also understand their rights and responsibilities under the Act.<sup>14</sup>

This Article will, after reviewing the basic requirements of the FMLA, focus on the affirmative responsibility of employees to provide their employers with the notice required for FMLA leave.<sup>15</sup> As this Article will note, the concept of adequate notice, although required by current DOL regulations, has been defined by the federal courts.<sup>16</sup> The trend in

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10. A WORKABLE BALANCE, *supra* note 1, at 9-10.

11. The conflicts and misunderstandings between employers and employees are likely to be greater than most people realize. As of January 1997, the Department of Labor (DOL) had received more than 6300 complaints of FMLA violations. *Family Leave Details Now on Hotline*, DALLAS MORNING NEWS, Jan. 21, 1997, at 13D. In response to the volume of complaints, the DOL announced that as of January 21, 1997, it now has a toll-free number: 1-800-959-FMLA. *Id.* Callers will receive a brief explanation of the FMLA and learn how to get more in-depth information concerning the Act. *Id.*

12. The real-life conflicts and struggles between employers and employees over family leave have generated not only the interest of lawmakers, but of the popular press and even Hollywood. For example, in January 1997, CBS premiered the made-for-TV movie *A Child's Wish*, based on the true story of a family whose daughter became seriously ill. Her father later lost his job taking leave to care for her. That story is then contrasted with another family whose terminally ill daughter could be cared for because the FMLA had been enacted. The movie featured a cameo appearance by President Clinton speaking about the Act. *A Child's Wish* (CBS television broadcast, Jan. 21, 1997); see also *Clinton's TV Role Mimicked Real Life*, CHATTANOOGA TIMES, Jan. 22, 1997, at A11.

13. A WORKABLE BALANCE, *supra* note 1, at xix. The study also found that one fifth of all workers in the 1993 study had a need at that time for FMLA-covered leave. *Id.*

14. 29 C.F.R. § 825.301(d) (1996).

15. See generally *id.* §§ 825.302-304 (discussing employee notice requirements). See *infra* notes 55-70 and accompanying text for a discussion of employee notice requirements.

16. See *infra* notes 71-149 and accompanying text (discussing federal courts' interpretations of employee notice requirements).

recent decisions is a matter of capital importance to employers because proper or improper notice of FMLA leave establishes the employer's right to require medical certification<sup>17</sup> or to initiate disciplinary action.<sup>18</sup> In addition, awareness of the employee's FMLA notice requirement will permit employers to avoid the possible contention that the employer has elected to waive a right that the Act specifically grants.<sup>19</sup>

#### THE FMLA: HOW IT WORKS

The FMLA covers employers<sup>20</sup> who engage in interstate commerce and who employ fifty or more employees<sup>21</sup> for each working day during each of twenty or more calendar work weeks in the current or preceding calendar year.<sup>22</sup> Although the current regulations distinguish an independent contractor from an employee,<sup>23</sup> the concept of an "employee" under the FMLA is broader than the common law concept of master and servant.<sup>24</sup> Moreover, "[m]ere knowledge by an employer of

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17. 29 C.F.R. §§ 825.305-307 (discussing employee medical certification requirements).

18. *See id.* § 825.304 (discussing an employer's recourse against an employee who fails to give adequate notice as required under the FMLA).

19. *Id.* § 825.304(a) ("An employer may waive employee's FMLA notice obligations or the employer's own internal rules on leave notice requirements.").

20. 29 U.S.C. § 2611(4)(A) (1994). The definition of what constitutes an "employer" also encompasses any "public agency" as defined under the Fair Labor Standards Act of 1938. *Id.* § 2611(4)(A)(iii) (stating the definition "includes any 'public agency' as defined in section 203(x) of this title.") Accordingly, this definition would include the U.S. government, its agencies, states and their political subdivisions, the District of Columbia, and territories or possessions of the United States. *Id.*

21. The manner for determining if an employer employs the requisite number of employees to invoke FMLA coverage may be influenced by a recent U.S. Supreme Court case, *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660 (1996). In *Walters*, the Court unanimously ruled that courts must use the "payroll method," in which all workers recorded on an employer's weekly payroll must count toward the minimum jurisdictional amount required under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1994). *Id.* at 664. Prior to the ruling, some circuits, such as the 7th Circuit from which *Walters* was appealed, held that hourly or part-time workers could count as employees only on days in which they were physically present at work. *See E.E.O.C. v. Metropolitan Educ. Enter., Inc.*, 60 F.3d 1225 (7th Cir. 1995), *rev'd*, *Walters v. Metropolitan Educ. Enter., Inc.*, 117 S. Ct. 660 (1996). Indeed, the FMLA regulations appear to endorse this method. *See* 29 C.F.R. § 825.105(b) (1996) ("Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week.").

22. 29 U.S.C. § 2611(4)(A)(1).

23. *See* 29 C.F.R. § 825.105(a) ("In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who 'follows the usual path of an employee' and is dependent on the business in which he/she serves.").

24. *See id.*

work done for the employer by another is sufficient to create the employment relationship under the act."<sup>25</sup> In addition, employees on leave, paid or unpaid, and employees suspended for disciplinary or other reasons count as employees.<sup>26</sup>

An employee is eligible to take FMLA leave, assuming the notice requirement is met, once the employee has (1) been employed for at least twelve months (the months need not be consecutive);<sup>27</sup> (2) been employed for at least 1250 hours during the previous twelve-month period;<sup>28</sup> and (3) been employed at a work site where fifty or more employees are employed (by the same employer) within seventy-five miles<sup>29</sup> of the work site.<sup>30</sup>

The FMLA allows leave when an eligible employee of a covered employer meets the notice requirement. This leave may be taken because (1) it relates to the birth or care of the employee's newborn child;<sup>31</sup> (2) it is the result of the placement of a child with the employee for adoption or foster care;<sup>32</sup> (3) it concerns the care of an employee's child,

The definition of "employ" for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term "employ" as defined in the Act includes "to suffer or permit to work." The courts have indicated that, while "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law.

*Id.*

25. *Id.*

26. *Id.* § 825.105(c).

27. 29 U.S.C. § 2611(2)(A)(i) (1994).

28. *Id.* § 2611(2)(A)(ii).

29. *Id.* § 2611(2)(B)(ii).

30. 29 C.F.R. § 825, Final Rule, Apr. 6, 1995, p. 12 ("The regulations have been clarified by deleting the reference to 'radius,' a term not found in the statute. The 75-mile distance will be measured by surface miles using available transportation by the most direct route between worksites."). The FMLA considers separate buildings a work site if "they are in reasonable geographic proximity," and for employees with no fixed work site (e.g., truck drivers), a work site is their "home base." *Id.*

31. 29 U.S.C. § 2612(a)(1)(A) (1994); see 29 C.F.R. § 825.112(c) (allowing leave to commence prior to the birth of the child for such activities as prenatal care or for women unable to work because of their pregnancy).

32. 29 U.S.C. § 2612(a)(1)(B); see 29 C.F.R. § 825.112(b) (granting leave for the adoption of a child, including such reasons as attending counseling sessions, appearing in court, and consulting with a lawyer).

spouse or parent having a serious health condition,<sup>33</sup> or (4) it is the result of the employee's serious health condition where the employee is unable to perform the requirements of his or her job.<sup>34</sup>

When leave is taken pursuant to the FMLA, it entitles the employee to reinstatement to his or her former position or an equivalent position with the same benefits and terms of employment.<sup>35</sup> Failure to abide by these provisions can subject an employer<sup>36</sup> to compensatory damag-

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33. 29 U.S.C. § 2612(a)(1)(C); see 29 C.F.R. § 825.113(a) (1996) (defining "spouse" as a husband or wife under state law including common law, if applicable). "Parent" can mean biological parents as well as anyone "in loco parentis" for the employee when the employee was a child. *Id.* § 825.113(b). A "son" or "daughter" can be the biological, adopted, foster or stepchild, legal ward, or child of a person "in loco parentis," and can be over eighteen if the child cannot care for himself or herself or is disabled under the Americans with Disabilities Act (ADA). *Id.* § 825.113(c).

34. 29 U.S.C. § 2612(a)(1)(D). See 29 C.F.R. § 825.114(a)(1-2) (1996) for a discussion of what constitutes a "serious medical condition" under the FMLA. See generally Robert J. Aalberts & Lorne H. Seidman, *The Family and Medical Leave Act: Does It Make Unreasonable Demands on Employers?*, 80 MARQ. L. REV. 135 (1996) (discussing how the courts have interpreted "serious medical condition" under the FMLA).

35. 29 U.S.C. § 2614(a)(1) (1994); see 29 C.F.R. § 825.214(a) (1996) (discussing the employee's rights after returning from FMLA leave).

36. The term "employer" under the FMLA is similar to that of the Fair Labor Standards Act's definition. See *supra* note 20 and accompanying text. In respect to employer liability, there is a judicial trend toward finding no individual liability under Title VII of the Civil Rights Act, the ADA, and the ADEA. However, individual supervisors may be found liable under the FLSA if they are capable of exercising supervisory authority over an employee who later complains. Thus, because the definitions under the two Acts are similar, by analogy supervisors may likewise be found liable under the FMLA. See Paul J. Kennedy & Ronald I. Tisch, *When Supervisors Are Sued*, 42 HRMAGAZINE 124 (1997); see also Corey E. Fleming, *'Family Leave Act' Plaintiff Wins \$58,000 Jury Verdict*, LAW. WKLY. USA, Nov. 4, 1996, at 1 (discussing *Freemon v. Foley*, No. 95-C-209 (N.D. Ill. Sept. 26, 1996), in which there is no written opinion). But see *Frizzell v. Southwest Motor Freight, Inc.*, 906 F. Supp. 441 (E.D. Tenn. 1995) (holding that employees cannot sue individual supervisors under the FMLA). Employment agencies which are the primary employer and are responsible for required notices regarding FMLA leave might also be jointly liable with the client company under the FMLA. See Brent M. Giddens, *When Temporary Employees Bring Discrimination or Labor Suits Against Their Employment Agencies, the Client-Employers May Be Subject to Joint Liability*, NAT'L L. J., Jan. 13, 1997, at B6.

es<sup>37</sup> and equitable relief.<sup>38</sup> It is appropriate to state that "the essence of the FMLA is the concept of 'job security.'<sup>39</sup>

#### OVERVIEW OF THE FMLA NOTICE REQUIREMENTS

On February 5, 1993, President Clinton signed the FMLA into law,<sup>40</sup> with the Act taking effect for most covered workers on August 5, 1993.<sup>41</sup> At that time President Clinton gave his assessment of the Act: "American workers will no longer have to choose between the job they

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37. 29 U.S.C. § 2617(a)(1)(A)(i)(I) (1994) (discussing how "wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation" can be granted); *see also id.* § 2617(a)(1)(A)(i)(II) (granting "any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to twelve weeks of wages or salary for the employee"). Moreover, the damages can double if the employer did not act in good faith. In such a case, the statute provides "an additional amount as liquidated damages equal to the sum of the amount described in clause (i) [i.e., wages, benefits, etc.] and the interest" on those amounts can also be awarded. *See id.* § 2617(a)(1)(A)(iii). At least one federal district court has also ruled that a plaintiff, who the employer retaliated against for taking FMLA leave, can receive not only damages incurred from the time of his demotion to his termination by his employer, but also for damages suffered from the time of termination to the date of trial, and even damages incurred for benefits or compensation lost or denied *after the verdict*. *See Dawn E. Conner, 'Family Leave Act' Plaintiff Gets \$313,000 Jury Verdict*, LAW. WKLY. USA, Dec. 16, 1996, at 1, 12 (discussing *Cline v. Wal-Mart Stores, Inc.*, No. CA-0056-H (W.D. Va. 1996), a case in which no written opinion is available). The plaintiff's award can also double if the employer had not acted in good faith. *Id.* at 12. This is, at least to the authors' knowledge, the first case awarding damages for "front pay" as well as "back pay." *Id.*

38. 29 U.S.C. § 2617(a)(1)(B).

39. Rigler, *supra* note 3, at 469.

40. *Doing the Leave-Policy Shuffle*, U.S. NEWS & WORLD REP., Feb. 8, 1993, at 21. President Clinton frequently refers to the FMLA as a "hallmark of his administration." *See Hilary Stout, Clinton to Seek Wider Family-Leave Law*, WALL ST. J., June 25, 1996, at A2. Moreover, President Clinton seeks to expand the Act to include parent-teacher conferences, children's doctor's appointments, and taking elderly relatives to medical appointments or other professional services that may be related to their care. *See Corey E. Fleming, Will Congress Expand the 'Family Leave Act'?*, LAW. WKLY. USA, Nov. 18, 1996, at 18.

41. 29 C.F.R. § 825.102(a) (1996); *see also id.* § 825.700(c)(1) (discussing the effective date of FMLA when a collective bargaining agreement already exists).



need and the family they love."<sup>42</sup> One commentator concluded that the Act is an "appropriate step toward an enhanced quality of work life."<sup>43</sup>

However, in addition to providing employees and employers with a variety of specific rights and obligations, the FMLA raises certain difficult questions that are now being answered by our courts. Some of these issues, such as what constitutes a serious health problem and who qualifies as a son, daughter, and parent, have already received attention by this Article's authors<sup>44</sup> and others in both journals<sup>45</sup> and the popular press.<sup>46</sup> Still, the requirement that employees must provide employers with notice of the need for protected FMLA leave has received little attention and has resulted in costly litigation.<sup>47</sup>

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42. *Statement on Signing the Family Medical Leave Act of 1993*, 29 WEEKLY COMP. PRES. DOC. 144-45 (Feb. 8, 1993).

43. Rigler, *supra* note 3, at 505.

44. See Aalberts & Seidman, *supra* note 34, at 135.

45. See, e.g., Tim Barnett et al., *An Overview of the Family and Medical Leave Act of 1993*, 44 LAB. L.J. 429 (1993); Dana Brody, Note, *Current Developments in the Law: A Survey of Cases Addressing the Family and Medical Leave Act*, 5 B.U. PUB. INT. L.J. 367 (1996); Alice E. Conway, *A Guide to Practical Knowledge of the FMLA and Its Complex New Final Regulations*, 46 LAB. L.J. 515 (1995); Nancy R. Daspit, Comment, *The Family and Medical Leave Act of 1993: A Great Idea But a 'Rube Goldberg' Solution?*, 43 EMORY L.J. 1351 (1994); Andrew Devney, Note, *Current Developments in the Law: A Survey of Cases Addressing the Family and Medical Leave Act*, 5 B.U. PUB. INT. L.J. 361 (1996); Gerald L. Maatman, Jr. & Andrew J. Boling, *What You Should Know About the Family and Medical Leave Act*, 39 No. 5 PRAC. LAW. 21 (1993); Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047 (1994); Kevin G. Martin, *Employment Law*, 46 SYRACUSE L. REV. 499 (1995); Elizabeth Mitchell, Note, *Current Developments in the Law: A Survey of Cases Addressing the Family and Medical Leave Act*, 5 B.U. PUB. INT. L.J. 352 (1996); Amy Offenber, Note, *Current Developments in the Law: A Survey of Cases Addressing the Family and Medical Leave Act*, 5 B.U. PUB. INT. L.J. 379 (1996); Carol Daugherty Rasnic, *The United States' 1993 Family and Medical Leave Act: How Does It Compare with Work Leave in European Countries?*, 10 CONN. J. INT'L L. 105 (1994); Rigler, *supra* note 3; Cheryl R. Saban & Dena Sacco, *An FMLA Compliance Update: What Every Employer Should Know About the Final Rules*, 21 No. 1 EMPLOY. REL. L.J. 145 (1995); Garth L. Schneider, Note, *Current Developments in the Law: A Survey of Cases Addressing the Family and Medical Leave Act*, 5 B.U. PUB. INT. L.J. 371 (1996).

46. See, e.g., *Employer Errors Common in Family Leave Act*, INDIANAPOLIS BUS. J., Dec. 16, 1996, at 15; Jane E. Reddin, *Avoiding Employer Mistakes Under FMLA*, ARIZ. BUS. GAZETTE, Oct. 17, 1996, at 24; Sue Shellenbarger, *Family Leave Is Law, But Climate Is Poor For Actually Taking It*, WALL ST. J., Oct. 30, 1996, at B1; *Doing the Leave-Policy Shuffle*, *supra* note 40, at 21; Stout, *supra* note 40, at A2.

47. See, e.g., Timothy Stewart Bland, *The Required Content of Employees' Notice to Employers of the Need for Leave Under the FMLA*, 12 LAB. LAW. 235 (1996).

## EMPLOYER'S NOTICE REQUIREMENT

First, to demonstrate the contrast, it should be noted that although the FMLA compels the employer to inform employees of their right to take FMLA leave, no significant litigation has resulted from this requirement.<sup>48</sup> The reason is that current regulations specify how and where this must be done in "cookbook" detail.

The FMLA mandates that employers post information explaining the Act where employees work.<sup>49</sup> Employers must post this information "prominently where it can be readily seen" and in print "large enough to be easily read."<sup>50</sup> Further, if a significant number of employees are not literate in English, then employers must post the information in a language in which they are literate.<sup>51</sup>

The FMLA outlines specific directions on how and when to provide more personal notice concerning the employees' rights and obligations. If the employer provides written guidance to employees, in a handbook, for example, then employers must likewise include the information concerning the employees' rights and obligations.<sup>52</sup> If employers do not use such publications, then every employee must receive written guidance in some other form, detailing their rights and obligations, and the DOL will provide an "FMLA Fact Sheet" for distribution to employees.<sup>53</sup>

Thus, it can be safely stated that if employers take the time necessary to read two provisions<sup>54</sup> of the current regulations, then they can de-

48. For example, most of the reported cases have been concerned with such issues as what constitutes a "serious health condition," and what is sufficient notice by the employee to the employer in order to receive FMLA protections. See Aalberts & Seidman, *supra* note 34, at 138.

49. 29 C.F.R. § 825.300(a) (1996).

Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any "eligible" employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division.

*Id.*

50. *Id.* ("The notice must be posted prominently where it can be readily seen by employees and applicants for employment.")

51. *Id.* § 825.300(c) ("Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the notice in a language in the which the employees are literate.")

52. *Id.* § 825.301(a)(1).

53. *Id.* § 825.301(a)(2).

54. *Id.* §§ 825.300-.301 (comprising the employers' regulatory notice requirements

termine if their procedures comply with the FMLA's notice requirement. Unfortunately, gauging the *sufficiency* of the *employees'* notice requirement is not so easily accomplished. In fact, gaining this ability requires much more than merely reading regulations or contacting the DOL.

#### EMPLOYEES' NOTICE REQUIREMENT

Of course, there are regulations that address the employees' notice requirement, and these regulations do provide some useful information. One regulation concerns a situation in which the employees' need for FMLA leave is foreseeable, and a second provides guidance when the need for FMLA leave is not foreseeable.<sup>55</sup>

On several points, the regulations take parallel positions. Assuming the employer has properly met its notice requirement, the employee must provide the employer with notice of the need for FMLA leave.<sup>56</sup> In both situations, the notice given to the employer can be verbal or by other reasonable means.<sup>57</sup> Also, in both situations, there are at least guidelines regarding the timeliness of notice by the employee. In the case of the need for unforeseen leave, the FMLA requires notice "within no more than one or two working days," or "as soon as practicable under the facts and circumstances" of a particular situation.<sup>58</sup> When the need for FMLA leave is foreseeable, the FMLA expects thirty days' advance notice if practical. If advance notice is not practical (e.g., due to a medical emergency), then notice must be given "as soon as practicable."<sup>59</sup> In either case, the employee does not need to expressly assert rights under the FMLA or even mention the Act.<sup>60</sup> The employee need only express the need for FMLA leave, thus qualifying for the leave. The

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under the FMLA).

55. See 29 C.F.R. §§ 825.302-303; see *infra* notes 56-66 and accompanying text.

56. See generally 29 C.F.R. §§ 825.302-303 (discussing employee requirements for FMLA-qualifying leave).

57. *Id.* § 825.302(c) ("An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave and the anticipated timing and duration of the leave."); see also *id.* § 825.303(b) (discussing employee notice requirements when FMLA leave is not foreseeable and stating that an employee's notice should be given "to the employer either in person or by telephone, telegraph, facsimile (fax) machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally.").

58. *Id.* § 825.303(a).

59. *Id.* § 825.302(a).

60. *Id.* § 825.302(c) ("The employee need not . . . even mention the FMLA [for foreseeable leave], but may only state that leave is needed for an expected birth or adoption, for example."); *id.* § 825.303(b) ("The employee need not expressly assert rights under the FMLA or even mention the FMLA [for unforeseeable FMLA leave], but may only state that leave is needed.").

burden then shifts to the employer to gather additional information<sup>61</sup> and medical certification.<sup>62</sup>

The FMLA barely addresses the content of the employees' notice to the employer.<sup>63</sup> In the event the FMLA leave is foreseeable, the employees' notice must make the employer aware of the employee's needs.<sup>64</sup> It is reasonable to believe similar language would have been included in the regulations governing unforeseeable leave had Congress drafted the regulations more concisely. But while the FMLA specifies the employer's notice to employees in great detail,<sup>65</sup> managers must look to the courts in an effort to determine when the content of the notice they receive demands protected FMLA leave.<sup>66</sup> Unfortunately, the reasoning of federal judges on this issue, unguided by adequate regulations, has not sailed by a fixed star.

Because the current regulations (effective April 6, 1995) parallel the preceding regulations regarding the adequacy of the employees' notice requirement, cases prior to April 6, 1995, provide useful guidance in an attempt to track the trend of judicial reasoning.<sup>67</sup> This parallel analysis

61. *Id.* § 825.302(c) ("The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and should obtain the necessary details of the leave to be taken.")

62. *Id.* ("In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave."); *see also id.* § 825.305 (regarding the employee's requirement to furnish medical certification if requested by the employer).

63. The legislative history accompanying the FMLA also fails to address employee notice requirements with any specificity. *See* S. REP. NO. 103-3, at 25 (1993), *reprinted in* 1993 U.S.C.C.A.N. at 27 (providing that "[e]mployees who face emergency medical conditions or unforeseen changes will not be precluded from taking leave if they are unable to give 30 days' advance notice."); *see also* H.R. REP. NO. 103-8, pt. 1, at 38 (1993) (providing that "30 day advance notice is not required in cases of medical emergency or other unforeseen events").

64. 29 C.F.R. § 825.302(c) ("An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave. . . .").

65. *See supra* notes 48-54 and accompanying text.

66. *See supra* notes 55-64 and accompanying text.

67. The differences between the interim regulations and the final regulations are minor. Congress detected and resolved one minor difference between the two sets of regulations that involved the employee notice requirement in the interim regulations. Under the interim regulations, foreseeable FMLA leave did not require the employee to "express certain rights under the FMLA or even mention the FMLA." *See* Manuel v. Westlake Polymers Corp., 66 F.3d 758, 761 (5th Cir. 1995) (citing 29 C.F.R.

must be done because, as noted above, over the next five years an estimated forty percent of all employees will attempt to assert their need for FMLA leave.<sup>68</sup>

No single case provides a clear beacon. Knowledge of what courts will, and equally important, will not require an employee to provide when giving adequate notice emerges from a review of existing case law. Judges themselves acknowledge the difficulty with this area. "The precise requirements . . . are unclear under the applicable regulations," one court has noted.<sup>69</sup> Another court has declined "to announce any categorical rules" for notice by an employee, stating its content "will depend on the facts and circumstances of each case."<sup>70</sup> Still, when considered as a whole, the existing body of case law does provide illumination.

### EARLY DECISIONS

Early federal court decisions demonstrated an inclination on the part of judges to balance the specificity of detailed information employers are required to give employees under the FMLA against the high degree of specific information employees were required to provide their employers in order to gain the benefit of protected FMLA leave.<sup>71</sup> Two cases demonstrate this approach.

The first example is *Manuel v. Westlake Polymers Corp.*, decided in November 1994.<sup>72</sup> This is the frequently referenced "ingrown toenail" case,<sup>73</sup> although contrary to popular press commentary, the decision was assessing the adequacy of notice provided by Ms. Manuel to her employer, not the seriousness of a health condition.<sup>74</sup> Ms. Manuel had

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§ 825.302(b) (1996)). However, the interim regulations did not mention this with regard to unforeseeable leave. *Manuel* noted this discrepancy and considered it an inadvertent omission by the regulators. *Id.* at 763 ("[R]equiring employees unable to foresee their need for leave to expressly invoke the FMLA's protection would significantly burden the employees. Employees often cannot foresee their need for medical or family leave."). The final regulations adopted the *Manuel* court's position regarding foreseeable leave. See 29 C.F.R. § 825.303(b); *supra* note 60.

68. See *supra* note 13 and accompanying text.

69. *McGinnis v. Wonder Chem. Co.*, No. 95-4384, 1995 U.S. Dist. LEXIS 18909, at \*11 (E.D. Pa. Dec. 21, 1995).

70. *Manuel*, 66 F.3d at 764.

71. See *supra* notes 48-54 and accompanying text.

72. *Manuel v. Westlake Polymers Corp.*, No. 94-0691, 1994 U.S. Dist. LEXIS 20996 (W.D. La. Nov. 30, 1994), *rev'd*, 66 F.3d 758 (5th Cir. 1995).

73. See, e.g., Susan A. Bocamazo, 'Absent' Workers Are Now Swing Under Federal Law," LAW. WKLY. USA, May 6, 1996, at 1, 16 (discussing *Manuel* in some detail under the heading "Ingrown Toenail").

74. *Manuel*, 1994 U.S. Dist. LEXIS 20996, at \*7 ("The dispute in this case centers around notice.").

been hired by Westlake in July 1986, and, beginning in 1987, missed a substantial number of workdays in each of the following years.<sup>75</sup> In 1992, Westlake established a "no fault" absence control policy under which every absence was counted regardless of the reason.<sup>76</sup> Excessive absences led to a four-step disciplinary process, ending in termination.<sup>77</sup> Ms. Manuel accumulated sufficient absences to reach the end of the process and was terminated in February 1994.<sup>78</sup> She would not, however, have been legally terminated if a number of her absences were protected by the FMLA.<sup>79</sup> This was the nature of the lawsuit that Ms. Manuel promptly filed.<sup>80</sup>

While the court did not assess the seriousness of the health problems alleged by Ms. Manuel, it did note that complications and some hardships followed the medical procedure to remove an ingrown toenail.<sup>81</sup> The court also noted that Ms. Manuel contacted her supervisor the first workday after she had received medical treatment "and informed him of her inability to return to work."<sup>82</sup> "It is undisputed," the court stated, that the "plaintiff notified her supervisor of the need to miss work . . . due to her infected toe" and that two days later she informed her employer that "she would not be able to go into [sic] work since her toe was badly swollen, and she was on crutches."<sup>83</sup> However, Ms. Manuel failed to "request or otherwise intimate to Westlake Polymers that she was taking FMLA leave."<sup>84</sup>

In the absence of current DOL regulations that expressly state an employee need not "expressly assert rights under the FMLA" (*Manuel* was decided under interim regulations),<sup>85</sup> the district court concluded that "it is not inconvenient nor unduly burdensome to require an employee in some manner to refer, or attempt to refer, to the Act."<sup>86</sup>

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75. *Id.* at \*2.

76. *Id.*

77. *Id.* at \*3-4.

78. *Id.* at \*4.

79. *Id.* at \*5.

80. *Id.*

81. *Id.* at \*7 ("[S]he would not be able to go into [sic] work since her toe was badly swollen, and she was on crutches.").

82. *Id.* at \*3.

83. *Id.* at \*7.

84. *Id.* at \*7-8.

85. See *supra* note 67 and accompanying text.

86. *Manuel*, 1994 U.S. Dist. LEXIS 20996, at \*10.

In reaching its decision, the district court made two observations it considered relevant at the time. First, the seriousness of the plaintiff's health condition was not patently obvious.<sup>87</sup> Second, because Westlake had met its notice requirement by posting pertinent provisions of the FMLA on a bulletin board frequented by employees,<sup>88</sup> Ms. Manuel was held to have actual notice of her obligations, even though she was in fact unaware of the Act.<sup>89</sup>

Although the district court decision in *Manuel* did not survive an appeal, and the DOL's current regulations directly counter *Manuel*, the case serves to demonstrate that, at an early point in time some courts were prepared to demand the specificity from employees that DOL regulations demand from employers.

Demanding this balance also appears in another early case, *Reich v. Midwest Plastic Engineering*, decided in July 1995.<sup>90</sup> Although *Midwest Plastic* began a shift from the rigid reasoning of *Manuel* by refusing to require the employee to "refer, or attempt to refer"<sup>91</sup> to the FMLA, it clearly continued to demand substantial specificity in the employee's notice requirements.<sup>92</sup>

The FMLA provides that the Secretary of Labor may bring an action on behalf of an "affected employee."<sup>93</sup> In *Midwest Plastic*, Mr. Reich believed that Ms. Van Dosen, a Midwest Plastic employee, met this requirement.

As in *Manuel*, the seriousness of Ms. Van Dosen's health condition was not at issue. Her illness (chicken pox) was a serious health condition within the meaning of the Act.<sup>94</sup> Indeed, the sole issue was whether Ms. Van Dosen adequately provided notice to her employer under the FMLA requirements.<sup>95</sup>

On the morning of November 15, 1993, Ms. Van Dosen left a message with her employer stating she believed she had contracted chicken pox (her two daughters also had chicken pox), that she had been to an

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87. *Id.* at \*7.

88. *Id.* at \*11-12; see *supra* notes 48-54 and accompanying text (discussing employers' notice requirements under the FMLA).

89. *Manuel*, 1994 U.S. Dist. LEXIS 20996, at \*11.

90. No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 12130 (W.D. Mich. July 22, 1995). See generally *Schneider*, *supra* note 45, at 371-75 (discussing the *Midwest Plastic* case in detail).

91. *Midwest Plastic*, 1995 U.S. Dist. LEXIS 12130, at \*11.

92. See *id.*; see *supra* note 86 and accompanying text.

93. 29 U.S.C. § 2617(a)(1) (1994). "The Secretary may bring an action in any court of competent jurisdiction to recover the damages described in subsection (a)(1)(A) of this section." *Id.* § 2617(b)(2).

94. *Midwest Plastic*, 1995 U.S. Dist. LEXIS 12130, at \*7.

95. *Id.*

emergency room the preceding day, and that she would be going to her doctor that day.<sup>96</sup> Her doctor confirmed her illness, and on the next day Ms. Van Dosen called a shift foreman and provided this information.<sup>97</sup> Ms. Van Dosen was eventually hospitalized on the night of November 17.<sup>98</sup> She did not inform her employer of her hospitalization, and the court did not accept her contention that a friend of hers had provided this information.<sup>99</sup> It was not disputed that Ms. Van Dosen did not call her employer on November 19, but did go to the bank on that same date to make a car payment.<sup>100</sup> Ms. Van Dosen again saw a doctor on November 22 and was excused from work until December 1.<sup>101</sup> Following a four-day Thanksgiving vacation Ms. Van Dosen prepared to present her employer with a "doctor's slip," but her employer terminated her before she could present the slip.<sup>102</sup> She very promptly claimed her employer had violated the FMLA.<sup>103</sup>

The *Midwest Plastic* court declined to follow the *Manuel* requirement that the employee specifically invoke FMLA leave. The court stated that "at a minimum" the employee must give sufficient detail of the condition to make it evident that the FMLA protects the requested leave.<sup>104</sup> The court concluded that Ms. Van Dosen did not meet this test.<sup>105</sup>

The court preceded this conclusion by illustrating its reasoning with a hypothetical. The court used an example of two employees involved in separate car accidents on the same day.<sup>106</sup> The first employee is injured and hospitalized; the second employee is not injured and goes fishing.<sup>107</sup> The next workday each employee calls their employer and reports they will not be at work that day because they were involved in a car accident the preceding day.<sup>108</sup> Even though the first employee

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96. *Id.* at \*2-3.

97. *Id.* at \*3.

98. *Id.*

99. *Id.* at \*4 ("The Court found Mr. Long [the employer] the more credible witness and accepts as true his testimony regarding the substance of their November 19 conversation.").

100. *Id.*

101. *Id.*

102. *Id.* at \*5-6.

103. *Id.* at \*6.

104. *Id.* at \*9.

105. *Id.* at \*14.

106. *Id.* at \*10.

107. *Id.* at \*10-11.

108. *Id.* at \*11.



had a serious health condition and the second did not, "neither employee provided the employer with adequate notice of their need for FMLA-leave."<sup>109</sup>

According to the *Midwest Plastic* court, in order to provide adequate notice, the first employee should have stated that "he had been hospitalized as the result of the accident."<sup>110</sup> Applying this hypothetical to Ms. Van Dosen, the court noted that Ms. Van Dosen contacted her employer "on only three occasions," and in the course of these contacts never gave sufficiently detailed information "to make it evident to Midwest that her leave was as the result of a 'serious health condition.'"<sup>111</sup> She did not indicate her need for the continuing care of a health care provider, nor did she indicate that she had been hospitalized as a result of her having chicken pox.<sup>112</sup>

The court observed that notice must be given "as soon as practicable."<sup>113</sup> The court suggested that "[s]urely, if Ms. Van Dosen was able to go to the bank on the afternoon of November 19, she was 'practicably' able to" notify Midwest Plastic of her condition or at least give notice by that date.<sup>114</sup>

Although Ms. Van Dosen had a serious health condition, and even though the court held that she need not specifically invoke the FMLA, she had still failed to give adequate notice of protected leave.<sup>115</sup> The court, although not following the more stringent requirements set forth in *Manuel*, continued to support the concept that the courts should balance the specific notice requirements imposed on employers under the Act with the specific notice requirements imposed on employees by the courts.

#### TRANSITIONAL CASES

Within three weeks of the *Midwest Plastic* decision, a trend emerged in federal decisions that demonstrated a movement away from the more rigorous requirements expressed in *Manuel*<sup>116</sup> and *Midwest Plastic*.<sup>117</sup> This migration was first demonstrated in August 1995 in *Brannon v. Oshkosh B'Gosh, Inc.*<sup>118</sup>

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109. *Id.*

110. *Id.*

111. *Id.* at \*12.

112. *Id.*

113. *Id.* at \*13 (quoting 29 C.F.R. § 825.303(a) (1996)).

114. *Id.*

115. *See supra* notes 96-103 and accompanying text.

116. *See supra* notes 85-89 and accompanying text.

117. *See supra* notes 104-14 and accompanying text.

118. 897 F. Supp. 1028 (M.D. Tenn. 1995). *See generally* Offenber, *supra* note 45,

In *Brannon*, the court again examined an employer's elaborate absenteeism policy to determine whether leave taken by Ms. Brannon was protected under the FMLA.<sup>119</sup> The *Brannon* court considered two separate leaves taken by the plaintiff. If the FMLA protected either of these absences, Ms. Brannon's termination for violating the defendant's absence control policy would have violated the FMLA, and would be unlawful. Ms. Brannon took the first leave as a result of an upper respiratory infection.<sup>120</sup> This, however, did not satisfy the court as a serious health condition, and therefore the employer could compute the absence in the employer's absence control scheme.<sup>121</sup>

Ms. Brannon took the second absence to attend to her three-year-old daughter, Miranda, who also suffered from an upper respiratory infection and an infected throat.<sup>122</sup> The court first concluded "that Miranda had a 'serious health condition'" and "[i]f plaintiff satisfied the FMLA notice requirements, then her absence was protected under the FMLA."<sup>123</sup>

By August 1995, the federal case law had dispelled the notion that an employee must refer, or attempt to refer, to the FMLA as a source of his or her rights.<sup>124</sup> The clear cause and effect reasoning, exemplified by the auto accident hypothetical in *Midwest Plastic*, began to fade.<sup>125</sup>

Oshkosh received notice of Ms. Brannon's absences by way of a note from a physician, delivered by the plaintiff's husband, that said "Please excuse off work till 1-12-94," and two phone calls stating "Miranda was too sick for [Ms. Brannon] to come to work."<sup>126</sup> Noting that "[t]he Act itself is silent regarding the notice which an employee must provide to her employer"<sup>127</sup> and that the regulations provide that the employee "may only state the leave is needed," the court concluded that the employer had received adequate notice under the FMLA.<sup>128</sup> The court ob-

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at 379-83 (discussing the *Brannon* case in detail).

119. *Brannon*, 897 F. Supp. at 1030-31.

120. *Id.*

121. *Id.* at 1037.

122. *Id.* at 1032.

123. *Id.* at 1037.

124. *Id.* at 1038. "The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed." *Id.* (quoting 29 C.F.R. § 825.303(b) (1995)) (emphasis omitted).

125. See *supra* notes 106-12 and accompanying text.

126. *Brannon*, 897 F. Supp. at 1033.

127. *Id.* at 1037.

128. *Id.* at 1038 (citing 29 C.F.R. § 825.303(a) and (b) (1996) (concerning notice re-

served that while “an employee must tell her employer the reason she is absent,” the courts were not imposing the specific notice requirements on employees when *Brannon* was decided.<sup>129</sup>

*Hendry v. GTE North, Inc.*,<sup>130</sup> also decided by a district court in August 1995, and also refusing to impose specific notice requirements on employees, indicates that there are doubts regarding notice.<sup>131</sup> In *Hendry*, the plaintiff suffered migraine headaches, as her employer apparently knew.<sup>132</sup> Some days the headaches were so severe that Ms. Hendry could not work, but on other days they were less severe and, even with a headache, she could work.<sup>133</sup> GTE alleged that Ms. Hendry ultimately violated its absence control policy when she missed work after phoning her supervisor and “report[ing] herself ill with a migraine headache.”<sup>134</sup>

While the *Hendry* court stated that an employee must “provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave,”<sup>135</sup> it conceded “Hendry arguably complied with this requirement.”<sup>136</sup> After her phone call, the court noted, “the employer had a responsibility to inquire further” and “obtain the necessary details.”<sup>137</sup> The court asserted that once the employee had stated the problem, the department supervisor was expected to assess it, and possibly inform the employee of her FMLA benefits.<sup>138</sup>

This trend was continued in October 1995 when a federal court of appeals expressed its opinion<sup>139</sup> reversing the original *Manuel* decision.<sup>140</sup> Because the interim DOL regulations had been revised by this

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quirements for employees)).

129. See, e.g., *Manuel v. Westlake Polymers Corp.*, No. 94-0691, 1994 U.S. Dist. LEXIS 20996 (W.D. Dist. La. 1994) (preceding the final regulations issued in April 1995, requiring reference to FMLA), *rev'd*, 66 F.3d 758 (5th Cir. 1995). But see generally *supra* notes 85-89 and accompanying text (discussing the lower *Manuel* court's willingness to impose specificity from employers' requirements under the DOL regulations).

130. 896 F. Supp. 816 (N.D. Ind. 1995).

131. *Id.*

132. *Id.* at 819 (discussing the fact that Hendry was a long-time employee of GTE and suffered migraine headaches during the last three years of her employment).

133. *Id.* at 820.

134. *Id.* at 828.

135. *Id.* (quoting 29 C.F.R. § 825.302(c) (1996)).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995).

140. *Manuel v. Westlake Polymers Corp.*, No. 94-0691, 1994 U.S. Dist. LEXIS 20996 (W.D. La. Nov. 30, 1994), *rev'd*, 66 F.3d 758 (5th Cir. 1995). “The district court held that Manuel did not satisfy the notice requirements of the Family and Medical Leave Act of 1993, because she did not expressly invoke the statute's protection when she

time, eliminating an employee's need to invoke the FMLA, the appellate court reviewed *Manuel* pursuant to the interim regulations.<sup>141</sup> The case, however, is instructive.

The court of appeals soundly reversed the district court's decision in *Manuel*.<sup>142</sup> While the appellate court perpetuated some confusion by referring to the FMLA's "generous provisions" and refusing to "announce any categorical rules for the content of the notice by an employee," it clearly concluded that an employee need not specifically refer to the Act.<sup>143</sup> Employees are "ill-equipped to identify the statutory source of their rights,"<sup>144</sup> the court of appeals noted, stating "[t]hese are workers, not lawyers."<sup>145</sup> The appellate court concluded that Congress "did not intend employees like June Manuel to become conversant with the legal intricacies" of the FMLA.<sup>146</sup>

Early cases construing the employees' notice obligation may have demanded more detail than necessary. Yet, by late 1995, courts no longer balanced the specific notice obligations imposed on employers with clear-cut obligations imposed on employees.<sup>147</sup> While the initial *Manuel* decision spoke of "sufficient notice to apprise an employer of an employee's need to use FMLA-qualifying leave,"<sup>148</sup> the court of appeals noted that Congress did not intend to impose "an onerous requirement on employees."<sup>149</sup> These two conclusions are, of course, not inconsistent. Yet, there has been a shift in judicial expectations favoring the employee.

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notified her employer of her need for leave. We reverse and remand." *Manuel*, 66 F.3d at 759 (citation omitted).

141. *Manuel*, 66 F.3d at 761 n.2 (noting that "the interim regulations govern this dispute since Westlake's decision to suspend Manuel in December 1993 occurred prior to the release of the final regulations.").

142. *Id.* at 764.

143. *Id.* at 763.

144. *Id.*

145. *Id.*

146. *Id.* at 764.

147. See *supra* notes 116-46 and accompanying text.

148. *Manuel v. Westlake Polymers Corp.*, No. 94-0691, 1994 U.S. Dist LEXIS 20996, at \*10 (W.D. La. Nov. 30, 1994), *rev'd*, 66 F.3d 758 (5th Cir. 1995).

149. *Manuel*, 66 F.3d at 763.

## AN EMERGING CONCEPT

As noted previously, in reversing the lower court's decision in *Manuel*, the appellate court expressly exclaimed, "These are workers, not lawyers."<sup>150</sup> The court was correct: June Manuel operated a machine for Westlake Polymers.<sup>151</sup> From the other relevant cases it can be determined that Debra Hendry was a service clerk,<sup>152</sup> Penny Brannon worked in a production sewing job at Oshkosh,<sup>153</sup> and Lori Van Dosen reported to a "shift foreman."<sup>154</sup> But was the appellate court merely stating a fact, or should courts construe this case as suggesting an emerging concept?

*Johnson v. Primerica*, decided in January 1996, is instructive.<sup>155</sup> Although *Johnson* cites *Manuel*,<sup>156</sup> the *Johnson* decision articulated a new factor to assess the adequacy of an employee's notice under the FMLA: the sophistication of the employee.<sup>157</sup>

In *Johnson*, the plaintiff possessed a bachelor's degree, reported directly to a vice president at Smith Barney, and held the position of "group leader."<sup>158</sup> In that capacity, Mr. Johnson supervised four employees operating the company's principal inventory control system.<sup>159</sup>

In October 1993, Mr. Johnson missed three consecutive days of work without contacting his office.<sup>160</sup> When confronted by his supervisor, Mr. Johnson indicated he had not reported to work because "he was handling personal matters" and needed additional leave "to help his family start up a family business."<sup>161</sup> Mr. Johnson was told to put this request in writing.<sup>162</sup> In his written request for additional leave, Mr. Johnson asked for "the 'month of November off without pay . . . to [attend to] a matter . . . of significant financial importance to [his] immediate and extended family."<sup>163</sup> Smith Barney denied this re-

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150. *Id.*

151. *Manuel*, 1994 U.S. Dist. LEXIS 20996, at \*2.

152. *Hendry v. GTE North, Inc.*, 896 F. Supp. 816, 819 (N.D. Ind. 1995).

153. *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1030 (N.D. Tenn. 1995).

154. *Reich v. Midwest Plastic Eng'g*, No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 12130, at \*2 (W.D. Mich. July 22, 1995).

155. No. 94 Civ. 4869, 1996 U.S. Dist. LEXIS 869 (S.D.N.Y. Jan. 29, 1996).

156. *See id.* at \*19 (discussing how the employee does not need to invoke the FMLA by name, but must give sufficient information that the leave qualifies as FMLA leave).

157. *Id.* at \*19-20.

158. *Id.* at \*2-3.

159. *Id.* at \*3.

160. *Id.*

161. *Id.* at \*3-4 (quoting Transcript at 49).

162. *Id.* at \*4.

163. *Id.* (quoting Transcript at 19) (alterations in original).

quest.<sup>164</sup> Mr. Johnson missed several additional days of work in early November, stating that on each day, his absence was the result of a "back problem."<sup>165</sup> When Mr. Johnson was absent on an additional day and failed to call his office with an explanation,<sup>166</sup> Smith Barney fired him, a result he had been warned of ten days earlier.<sup>167</sup>

Mr. Johnson took no immediate action, but weeks later appeared at Smith Barney's Human Resources Department "to ask the location to which his former department had been moved."<sup>168</sup> Once it became apparent that Mr. Johnson would not be reemployed, he claimed the FMLA protected his absences.<sup>169</sup> Mr. Johnson then alleged that he had been required to attend to his son, who suffered from asthma.<sup>170</sup>

First, the court asserted that the evidence presented by Mr. Johnson concerning the child's health condition was insufficient to invoke FMLA protection.<sup>171</sup> Next, the court stated that "[e]ven if the court were to find that a serious health condition existed, Johnson ha[d] failed to show that his words or actions gave Smith Barney notice of such illness."<sup>172</sup>

Mr. Johnson argued that his written request for leave was "inelegantly drafted" and should be discounted because it was "generally known" that his son suffered from asthma and that he had "intimated" to his supervisor that his son was ill.<sup>173</sup>

Mr. Johnson's arguments failed. Noting that an employer "is not required to be clairvoyant,"<sup>174</sup> the court proceeded to distinguish *Johnson* from *Brannon*<sup>175</sup> and *Manuel*<sup>176</sup> because Mr. Johnson's written

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164. *Id.*

165. *Id.* at \*5-6.

166. *Id.* at \*6.

167. *Id.* Johnson testified "that he did not recall receiving the written warning." *Id.* at \*5.

168. *Id.* at \*6.

169. *Id.*

170. *Id.* at \*6-7.

171. *Id.* at \*13-14.

172. *Id.* at \*14.

173. *Id.* at \*16-17.

174. *Id.* ("Nothing in the FMLA, or the governing regulations, however, suggests that an employer's duty to inquire may be triggered solely by the employer's knowledge of prior medical events.")

175. *Id.* at \*17-18.

Johnson's reliance on *Brannon v. Oshkosh B'Gosh, Inc.* [citations omitted] is misplaced. While *Brannon* acknowledges the employer's obligations under the

request belied his claim for qualified FMLA leave.<sup>177</sup> Keeping *Brannon* and *Manuel* in mind, the court stated that Mr. Johnson could not “shield himself behind inexperience or naivete.”<sup>178</sup> The court called attention to the fact that Mr. Johnson was an articulate individual and was inclined to reveal personal matters, and therefore it was “not credible that Johnson would fail to articulate a real medical reason when drafting a leave request that was allegedly based on medical exigency.”<sup>179</sup>

#### CONCLUSION

Current DOL regulations leave no doubt that employers must inform employees of their “entitlement” to FMLA leave.<sup>180</sup> These regulations not only impose upon employers the obligation to provide written information to employees, they direct employers to “responsively answer questions from employees” concerning their rights and obligations under the Act.<sup>181</sup>

Obviously, employers must have a sound working knowledge of the FMLA. While the notice requirements set forth in the current regulations do not require employer analysis, an employer must understand them.

An employment lawyer has noted that these regulations are a “nightmare”<sup>182</sup> and “exactly the kind of thing that Newt Gingrich has been criticizing as government nitpicking.”<sup>183</sup> Yet former Labor Secretary Robert Reich has told Congress that it is “pretty easy” to comply with the Act.<sup>184</sup> Which assessment is correct? The answer: Neither as-

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FMLA to make subsequent inquires when an employee gives notice of leave needed to care for an ill child, Johnson overlooks the fact that the employer’s duty to conduct further inquiry into a leave request is first triggered when an employee gives sufficient notice of a medical need for the requested leave.

*Id.*

176. *Id.* at \*19 (“Similarly, in *Manuel v. Westlake Polymers Corp.*, . . . the employer was aware that the plaintiff was absent for medical reasons.”).

177. *Id.*

178. *Id.*

179. *Id.* at \*19-20.

180. 29 U.S.C. § 2612(a)(1) (1994).

181. 29 C.F.R. § 825.301(d) (1996).

182. James L. Dam, *New ‘Family Leave’ Regs Make Employers Scramble*, LAW. WKLY. USA, Jan. 30, 1995, at 12 (quoting Robert Duston, employment lawyer from Washington, D.C.).

183. *Id.* (quoting Chicago employment lawyer Gerald Skoning).

184. Bocamazo, *supra* note 73, at 16.

assessment is correct, certainly not when the time arrives to implement the Act's notice requirements.

First, consider the notice that employers must give employees of their rights and obligations. While the regulations describe what is required in significant detail, the "government nitpicking" argument<sup>185</sup> is countered by the commentator who observed that the Act "generally provides clear direction as to employers' obligations."<sup>186</sup> Although an employer may not find these directions "pretty easy," still they are not a "nightmare."<sup>187</sup>

Second, and perhaps more importantly, consider the notice employees must give employers of the need for protected FMLA leave. Here again, administration of the Act could not be construed as pretty easy, but with adequate information and proper training, the result need not be a nightmare. Thus, there are two factors to consider: the adequacy of information received and the proper training of appropriate personnel.

In *Manuel*, the plaintiff gave notice to her supervisor,<sup>188</sup> in *Midwest Plastic*, notice was given to a shift foreman;<sup>189</sup> in both *Brannon*<sup>190</sup> and *Hendry*,<sup>191</sup> notice was given to a supervisor; and in the *Johnson* case, notice was given to Mr. Johnson's supervisor, a vice president.<sup>192</sup> In each case the person receiving notice was the appropriate person to receive notice. Comments leading to the current DOL regulations make clear that "[t]he employee is required to provide notice of need to take FMLA leave to the same person(s) within the company the employee ordinarily contacts to request other forms of leave."<sup>193</sup> Management must, therefore, train all supervisors who receive leave requests. It

185. See Dam, *supra* note 182, at 12.

186. Lawrence B. Fine et al., *Family, Medical Leave Legislation: Ensuring Corporate Compliance*, NAT'L L.J., Mar. 8, 1993, at S9.

187. See *supra* notes 180-81 and accompanying text.

188. *Manuel v. Westlake Polymers Corp.*, No. 94-0691, 1994 U.S. Dist. LEXIS 20996, at \*3 (W.D. La. Nov. 30, 1994), *rev'd*, 66 F.3d 758 (5th Cir. 1995).

189. *Reich v. Midwest Plastic Eng'g*, No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 12130, at \*2-3 (W.D. Mich. July 22, 1995).

190. *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1031 (M.D. Tenn. 1995).

191. *Hendry v. GTE North, Inc.*, 896 F. Supp. 816, 819 (N.D. Ind. 1995).

192. *Johnson v. Primerica*, No. 94 Civ. 4869, 1996 U.S. Dist. LEXIS 869, at \*3 (S.D.N.Y. Jan. 29, 1996).

193. THE FAMILY AND MEDICAL LEAVE ACT OF 1993, 60 Fed. Reg. 2180, 2220 (1995) (to be codified at 29 C.F.R. pt. 825) (answering comments concerning to whom notice should be given).



follows that management should limit the number of supervisors authorized to perform this function, and train them in depth. This limitation would be an advisable step considering the adequacy of the information the FMLA requires an employee to provide.

Consider what case law has shown. Early cases demonstrated an inclination to demand that an employee provide specific information, either invoking the FMLA<sup>194</sup> or at least expressing a cause and effect relationship between the serious health conditions and an absence from work.<sup>195</sup> Clearly, later case law and current DOL regulations eliminate the need to refer specifically to the FMLA.<sup>196</sup>

Thus, while there has been clarification as to what steps employees are not required to take (e.g., cite the FMLA, provide written notice, or notify some top official of the company),<sup>197</sup> employers must still glean from judicial construction of the Act what steps employees must take. To date, no jurisdiction has suggested any specific language or content required in the notice, but it has been suggested that the content of the employee's notice "will depend upon the facts and circumstances of each individual case."<sup>198</sup>

Accounting for the fact that most employees "are workers, not lawyers," employers must now be trained to assess the information they receive.<sup>199</sup> On the other hand, the *Johnson* case indicates that the burden placed on employees is linked to the employee's ability to provide information.<sup>200</sup> Mr. Johnson held a college degree, was not "disinclined to reveal personal matters," nor was he an "inarticulate individual."<sup>201</sup> Most employees claiming FMLA leave probably will not fit Mr. Johnson's profile. There are people, however, who do not openly reveal the condition of their health or the health of family members due to the personal and perhaps even embarrassing nature of such conditions. Supervisors authorized to receive leave requests must now learn to cope with an employee's desire for privacy, and realize when the employer's obligation to "inquire further" has been triggered.

As a final note, *Manuel* foretold *Johnson* by referring to the sophistication of employees.<sup>202</sup> *Johnson*, in turn, noted that the plaintiff had

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194. See *Manuel v. Westlake Polymers Corp.*, No. 94-0691, 1994 U.S. Dist. LEXIS 20996, at \*10 (W.D. La. Nov. 30, 1994), *rev'd*, 66 F.3d 758 (5th Cir. 1995).

195. See *Brannon*, 897 F. Supp. at 1037.

196. See *supra* notes 116-49 and accompanying text.

197. See *supra* notes 135-49 and accompanying text.

198. *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995).

199. *Id.* at 763.

200. *Johnson v. Primerica*, No. 94 Civ. 4869, 1996 U.S. Dist. LEXIS 869, at \*14-20 (S.D.N.Y. Jan. 29, 1996).

201. *Id.*

202. See *supra* notes 139-50 and accompanying text.

failed to show that his words or actions gave notice of the alleged illness.<sup>203</sup> While no other case suggests that an employee may communicate information by his actions, there is an adage that says actions speak louder than words. On this point, the current regulations are unclear with regard to both.<sup>204</sup>

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203. *Johnson*, 1996 U.S. Dist LEXIS 869, at \*16.

204. *See generally* 29 C.F.R. §§ 825.302-.303 (1996) (discussing employee notice requirements under the FMLA).

