

## **CHANGES TO STATE AND FEDERAL LEAVE LAWS**

**By Karen Sutherland**

In 2003, Washington State expanded employees' ability to use various forms of leave to care for family members. The law gives employees a choice of what leave to use in order to care for their children, including a biological, adopted, foster, stepchild, legal ward, or a child of a person standing *in loco parentis* (acting as a parent) who is under 18, or over 18 and incapable of self-care because of a mental or physical disability. The law also permits an employee to use leave to care for a spouse, parent (including biological parents and persons who acted as parents when the employee was a child such as step-parents), parent-in-law, or grandparent.

An employee is not limited to using accrued sick leave for family leave purposes, but may also use vacation or personal holidays if such other paid time is part of the employer's policy or collective bargaining agreement. An employee may not take advance leave until it has been earned, and any employee taking leave under the foregoing circumstances must comply with the terms of any collective bargaining agreement, if applicable, or other employer policy applicable to the leave.

Similar to the federal Family Medical Leave Act (FMLA) the state leave law provides that an employer shall not discharge, threaten to discharge, demote, suspend, discipline, or otherwise discriminate against an employee where the employee has exercised or attempted to exercise their rights under the law.

The interpretation of the "FMLA" has largely been left to the Department of Labor ("DOL"), which has issued extensive regulations covering the statute. One of those regulations requires that employers provide notice to employees that the leave they are taking is considered FMLA leave, and is therefore being counted against the employee's entitlement to up to 12 weeks of leave in a 12-month period for family purposes such as serious health conditions, child birth, maternity, and personal illness. Under the regulation, if the employer fails to give notice, then the leave is not considered FMLA leave, no matter how long it lasts.

The United States Supreme Court addressed this notification requirement in *Ragsdale v. Wolverine*, where it held that an employer that failed to provide notice of FMLA entitlement to an employee did not have to provide more than 12 weeks leave to that employee. In *Ragsdale*, an employee with cancer took a 30-week leave for treatment. The employer never informed the employee that the 30 weeks would count against her 12-week FMLA entitlement. The employer denied the employee's request for additional leave beyond 30 weeks and terminated her when she did not return to work.

Relying on the DOL regulation, the employee sued for reinstatement, 12 more weeks of leave, and back pay. The Supreme Court denied her claim and struck down the DOL regulation as incompatible with the FMLA. According to the Court, given that the employee stated she would have taken 30 weeks leave even if she had known it would count towards her FMLA leave, the regulation wrongly removed the employee's burden of having to prove an FMLA violation. In other words, the penalty on the employer (having to provide another 12 weeks of leave) was

unconnected to any actual harm that the employee might have suffered from the employer's failure to notify. The Court viewed this as incompatible with the FMLA's remedial nature.

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*This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at [ksutherland@fair-workplace.com](mailto:ksutherland@fair-workplace.com)*