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Nikolas D. Johnson

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## ERRONEOUSLY CONFERRED ELIGIBILITY UNDER THE FAMILY AND MEDICAL LEAVE ACT

NIKOLAS D. JOHNSON\*

### I. INTRODUCTION

The workplace has changed dramatically in the last several decades. Among the changes are more women in the workforce,<sup>1</sup> an increasing number of employees who are classified as single parents,<sup>2</sup> an overall aging of the country's workforce,<sup>3</sup> and the continuing responsibility for women in the workplace to be the family's primary caretaker.<sup>4</sup> Often these changes force employees to place their family obligation ahead of job responsibilities.<sup>5</sup> Meeting these family responsibilities often leads an employee to miss more work than permitted by an employer's absenteeism policy. This may lead to an employer taking action against an employee for absenteeism, and could ultimately result in termination.<sup>6</sup>

Responding to this growing problem, Congress passed and President Clinton signed into law the Family and Medical Leave Act.<sup>7</sup> The Family and Medical Leave Act (FMLA) permits an eligible employee to take a leave of absence to address family health care issues<sup>8</sup> and/or certain family events<sup>9</sup> and thereby balance workplace demands with

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\* B.S., Florida A&M University, 1987; M.A., University of Cincinnati, 1993; J.D. Candidate, Salmon P. Chase College of Law, Northern Kentucky University, 2004. Employee Relations Department, Ford Motor Company. Mr. Johnson would like to extend thanks to the following people: his wife Robin Johnson; his daughter Brittany; his parents, Dr. Charles & Gladys Johnson; Professor Richard Bales; Professor Adam Todd; Professor Jennifer Martin; Robert E. Brooks; Richard Nichols, Jr.; Hayward Damon, Jr.; Bryan Russell; Lydia Johnson; Charles & Chlorice Davis; Cindy & Curtis Davis; Lewis Mitchell; Elvia Price; Andre Johnson; Luska Johnson; Jeff Vanway, Esq.; Robert Corker, Esq.; and Blandina Jabbari.

1. Richard Bales & Sarah Nefzger, *Employer Notice Requirements Under the Family and Medical Leave Act*, 67 MO. L. REV. 883 (2002) [hereinafter Bales & Nefzger].

2. Family and Medical Leave Act ("FMLA"), 29 U.S.C.A. §§ 2601-2654 (2003) (original version at 107 Stat. 6 (1993)).

3. Bales & Nefzger, *supra* note 1, at 883.

4. 29 U.S.C. § 2601(a)(5) (2003).

5. *Id.* § 2601(a)(3).

6. *Id.* § 2601(a)(4).

7. Robert J. Aalberts, *The Family and Medical Leave Act: Does It Make Unreasonable Demands On Employers?*, 80 MARQ. L. REV. 135 (Fall 1996).

8. 29 U.S.C. § 2601(b)(2).

9. *Id.*

family responsibilities.<sup>10</sup> The statute applies to employers conducting interstate commerce who have fifty or more employees<sup>11</sup> who are employed daily for a minimum of twenty weeks<sup>12</sup> in a calendar year and who work within seventy-five miles of the place of business.<sup>13</sup>

Because some employers are unfamiliar with administration and application of the FMLA, employees may be told or led to believe that they are eligible for leave under FMLA when they are not. Upon discovery of an error, employers often respond to such circumstances by revoking FMLA eligibility status from an otherwise ineligible employee. This raises the issue of whether an employer has the right to revoke FMLA eligibility from an employee for a requested FMLA leave of absence once the employer has conferred eligibility upon an ineligible employee.

This article argues that current Department of Labor regulations prohibiting employers from revoking conferred FMLA eligibility from statutorily ineligible employees, either due to error or non-compliance with eligibility notification deadlines, are in conflict with the plain language of the FMLA and therefore are unenforceable. Part II provides an overview of the FMLA, employer and employee eligibility requirements under the FMLA statute and Department of Labor Regulations, and the method for judicial review of regulations promulgated by an agency based on a specific statute such as the FMLA. Part III reviews significant U.S. Court of Appeals and U.S. District Court decisions concerning current Department of Labor regulations and an employer's ability to revoke FMLA eligibility from an ineligible employee. Part IV provides analysis on the issue. Part V proposes regulations that provide recourse for ineligible employees erroneously granted FMLA eligibility.

## II. BACKGROUND

### A. FMLA

#### 1. Overview

The Family and Medical Leave Act (FMLA) was signed into law by President Clinton on February 5, 1993,<sup>14</sup> two weeks into his presidency. The statute became effective six months later.<sup>15</sup> The statute permits an employee to balance job responsibilities with family

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10. 29 U.S.C. § 2601(b)(1).

11. Aalberts, *supra* note 7, at 136.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

needs.<sup>16</sup> The statute also provides employees with the opportunity to take a leave of absence from an employer to care for health conditions for themselves<sup>17</sup> and/or qualifying family members<sup>18</sup> and not be subject to adverse employment actions.<sup>19</sup> For a health condition to qualify for coverage under the FMLA it must be "serious."<sup>20</sup> The statute allows employees to take a leave of absence for family reasons<sup>21</sup> such as the birth<sup>22</sup> and/or adoption of a child.<sup>23</sup> Employees can commit up to twelve work weeks<sup>24</sup> - the equivalent of 480 hours, of leave of absence on either a continuous or intermittent basis based on circumstances<sup>25</sup> - towards an FMLA-qualifying health condition or event.

## 2. Employee Requirements and the FMLA

The FMLA imposes six requirements on an employee desiring to qualify for time off under the statute. First, an employee must have worked for her employer a total of twelve-hundred fifty (1250) hours<sup>26</sup> within the previous twelve months before the requested leave of absence period.<sup>27</sup> Second, the period covering a medically related leave of absence must relate to a "serious health condition."<sup>28</sup> A "serious health condition" is defined as a physical<sup>29</sup> or mental condition<sup>30</sup> that requires inpatient care at a health-care facility<sup>31</sup> or continuing treatment by a health care provider.<sup>32</sup> Third, an employee may be required to provide an employer with medical documentation concerning the requested leave.<sup>33</sup> Fourth, the employee can only request a leave of absence under the FMLA to care for herself<sup>34</sup> or for qualifying family members.<sup>35</sup> Qualifying family members include: (a) the employees' parents;<sup>36</sup> (b) the employee's spouse;<sup>37</sup> and (c) the em-

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16. Bales & Nefzger, *supra* note 1, at 886.

17. 29 U.S.C. § 2601(b)(2).

18. *Id.*

19. Bales & Nefzger, *supra* note 1, at 883.

20. Paula J. Dehan, *Has the FMLA Been Stretched Beyond Its Intended Scope?*, 29 N. KY. L. REV. 629 (2002) [hereinafter Dehan].

21. Bales & Nefzger, *supra* note 1, at 886.

22. 29 U.S.C. § 2601(b)(2).

23. Dehan, *supra* note 20, at 629.

24. 29 U.S.C. § 2612(a)(1).

25. *Id.* § 2612(b).

26. *Id.* § 2611(2)(A)(ii).

27. *Id.* § 2611(2)(A)(i).

28. Dehan, *supra* note 20, at 629.

29. 29 U.S.C. § 2611(11).

30. *Id.*

31. *Id.* § 2611(11)(A).

32. *Id.* § 2611(11)(B).

33. *Id.* § 2613(a).

34. 29 U.S.C. § 2601(b)(2) (2004).

35. *Id.*

36. 29 U.S.C. § 2612(C).

ployee's child.<sup>38</sup> The statute also provides that under certain circumstances a relationship that "in loco parentis"<sup>39</sup> between the employee and/or child<sup>40</sup> or parent<sup>41</sup> also are qualified family members. Fifth, an employee requesting a FMLA leave of absence must notify her employer of her intention to take a leave of absence on either a continuous or intermittent basis.<sup>42</sup> Sixth, an employee must notify her employer of an intention to have her absence covered by the FMLA.<sup>43</sup>

The timing of such notice depends upon when the employee becomes aware of the need for an FMLA-qualifying absence. If an employee becomes aware of a need to take an FMLA-qualifying leave more than thirty days prior to the commencement of the leave, the employee must provide the employer with at least thirty days advance notice of the leave's commencement date.<sup>44</sup> However, if the employee becomes aware of the need for the leave within thirty days of the leave's commencement, the employee must provide as much advance notice as is practicable.<sup>45</sup>

### 3. Employer Notice of Employee FMLA Eligibility

Congress delegated responsibility for creating FMLA regulations to the Department of Labor (DOL).<sup>46</sup> One of the regulations promulgated by the DOL addresses the effect of an employer's failure to satisfy employee notification deadlines for a requested leave of absence under the FMLA in terms of the minimum 1250 hours worked and length of service requirements.<sup>47</sup> Under regulation 29 C.F.R. 825.110(d), if an employer is informed of a FMLA leave request by an employee prior to the commencement date of a requested FMLA leave, the employer must notify the employee of his/her FMLA eligibility status for the requested leave prior to the leave's commencement date.<sup>48</sup> Alternatively, if the employee notifies the employer of a request for a FMLA leave less than two business days prior to the leave's commencement, the employer must notify the employee of the

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37. *Id.*

38. See *Id.*

39. See Barron's Law Dictionary 252 (4th ed. 1996), noting that "loco parentis" refers to a situation in which a person has put herself in the position of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary for legal adoption.

40. § 2611(12).

41. § 2611(7).

42. § 2612(e)

43. *Id.*

44. § 2612(e)(1).

45. § 2612(e)(2).

46. 5 U.S.C.S. § 6387 (2004) (original version in 107 Stat. 23 (1993)).

47. 29 C.F.R. 825.110(d) (1995).

48. *Id.*

FMLA eligibility status for the requested leave within two business days of receiving the employee's notice.<sup>49</sup>

An employer's failure to satisfy either of these employee notification deadlines imposed by 29 C.F.R. §825.110(d) results in the employee being automatically<sup>50</sup> and irrevocably<sup>51</sup> granted FMLA eligibility for the requested leave of absence.<sup>52</sup> However, several courts have spoken on the issue of whether this regulation, which provides for eligibility and irrevocability of FMLA eligibility for a requested leave of absence to an employee that is later deemed statutorily ineligible for FMLA certification, is congruent with the FMLA statute.

### B. *Judicial Standard of Review for Regulations*

The judicial standard of review used to determine the validity of an agency's regulation in regards to the statute from which the regulation was promulgated was outlined in *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>53</sup> Per the Clean Air Act of 1977,<sup>54</sup> the Environmental Protection Agency (EPA) promulgated regulations for the establishment of a permit program for the purpose of regulating "stationary sources" of air pollution.<sup>55</sup> These regulations allowed a state to create their own particular definition of "stationary sources," which in turn defined groupings for pollution emitting devices into a single classification known as a "bubble."<sup>56</sup> The District of Columbia Circuit Court of Appeals invalidated the regulations regarding "stationary sources" because it found the regulations to be contrary to the Clean Air Act.<sup>57</sup> The Supreme Court reversed the Court of Appeals and found that the definition for the term "source" was an allowable interpretation of the Clean Air Act.<sup>58</sup>

In reaching its decision, the court established a two-part test to be used for determining whether an agency's regulation is a valid or reasonable interpretation of the statute from which the regulation was promulgated.<sup>59</sup> This test is known by names such as the Chevron

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

54. 42 U.S.C.S. § 7401 (1977).

55. *See* 467 U.S. at 837.

56. *Id.*

57. *See id.* at 842.

58. *See id.* at 866.

59. *See id.* at 842.

Test,<sup>60</sup> the Chevron Two-Step,<sup>61</sup> or the Chevron Doctrine.<sup>62</sup> This first part of the test requires a court to determine whether Congress has expressly spoken to the issue that the regulation seeks to address.<sup>63</sup> If Congress has spoken to the issue then their express intent is controlling.<sup>64</sup> However, if a court determines that Congress has not spoken expressly to the issue the regulation seeks to address, then a court must move to the second part of the test. Under the second part, a court must determine whether the regulation is a reasonable interpretation of the statute at issue.<sup>65</sup> A regulation is a reasonable interpretation of a statute, and thereby a valid regulation, provided there is not a determination that the regulation is either arbitrary, capricious, or manifestly contrary to the statute for which the regulation is addressing.<sup>66</sup> The next section of this article reviews court how Federal Courts have addressed the issue of whether an employer can revoke erroneously conferred FMLA eligibility from a statutorily ineligible employee.

### III. SIGNIFICANT COURT DECISIONS

Neither the U.S. Court of Appeals nor the U.S. Supreme Court has addressed the issue of an employer's ability to revoke erroneously conferred FMLA eligibility from an otherwise statutorily ineligible employee. However, several federal courts have addressed this issue. The majority view is that employers can revoke erroneously conferred eligibility from ineligible employees. The minority view is that employers are precluded from revocation. This part of the article reviews both approaches.

#### A. *Majority Rule of Revocability of FMLA Eligibility*

##### 1. U.S. Court of Appeals Cases

###### a. Seventh Circuit

The Seventh Circuit Court of Appeals<sup>67</sup> was the first Federal appellate court to provide an opinion on the issue of revoking FMLA eligibility from an otherwise ineligible employee.<sup>68</sup> Jennifer Dormeyer requested from Comerica Bank an FMLA leave due to medical issues

60. See Michael Asimov et al., *State and Federal Administrative Law* 566 (2d ed., West 1998).

61. See *id.* at 565.

62. See Dehan, *supra* note 20, at 636.

63. 467 U.S. at 842.

64. *Id.* at 843.

65. *Id.*

66. *Id.* at 844.

67. *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579 (7th Cir. 2000).

68. *Id.* at 582.

with her pregnancy.<sup>69</sup> Comerica Bank failed to respond to her request.<sup>70</sup> At the leave's commencement date Dormeyer was an ineligible employee under the FMLA because she had not satisfied the minimum hours worked requirement.<sup>71</sup> Dormeyer claimed that Comerica Bank violated the FMLA by failing respond to her request for a FMLA leave prior to the leave commencement date, and that under 29 C.F.R. §825.110(d), she was then automatically made an eligible employee under the FMLA.<sup>72</sup> The District Court had dismissed Dormeyer's claim because it lacked the essential elements for a claim of a finding of a FMLA violation.<sup>73</sup>

In affirming the District Court's ruling,<sup>74</sup> the Court of Appeals noted that most of the U.S. District Courts that had addressed this issue determined that regulation 29 C.F.R. §825.110(d) was invalid.<sup>75</sup> Additionally, the Court of Appeals found that the Chevron Test did not need to be applied<sup>76</sup> in determining the validity of the regulation because the regulation itself had the effect of changing the FMLA statute.<sup>77</sup> The court also concluded that through this specific regulation the Department of Labor was outside its rulemaking scope of authority granted to it by Congress.<sup>78</sup> This court's rationale has been adopted by federal courts in Michigan in *Alexander v. Ford Motor Company*<sup>79</sup> and in Puerto Rico in *Caraballo v. Puerto Rico Telephone Inc.*<sup>80</sup>

The Seventh Circuit's decision is significant not only because it was the first federal appellate court to rule on the issue of revocability of granted FMLA eligibility from an otherwise ineligible employee,<sup>81</sup> but also because the court's dicta endorsed the possibility of an employer being estopped from revoking from an ineligible employee already granted FMLA eligibility.<sup>82</sup> The court stated that an employer could

69. *Id.* at 581.

70. *Id.*

71. *Id.*

72. *Id.* at 582.

73. No. 96-C4805, 1997 U.S. Dist. Lexis 10260 at 11, (N.D. Ill. Jul 15, 1997), *aff'd*, 223 F.3d 579.

74. 223 F.3d at 585.

75. 223 F.3d at 582.

76. *Id.*

77. *Id.*

78. *Id.*

79. 204 F.R.D. 314 (E.D. Mich. 2001). (District Court held that an employer's failure to timely inform an employee of FMLA ineligibility did not preclude employer from using employee's ineligibility as a pretext for FMLA eligibility revocation.)

80. 178 F. Supp. 2d 60 (D.P.R. 2001). (District Court held that by promulgating 29 C.F.R. §825.110(d) the Department of Labor overreached its authority because the regulation, contrary to Congressional intent, expanded the class of FMLA eligible employees.)

81. *Id.*

82. 223 F.3d at 582.



be estopped from revoking the otherwise ineligible employee's FMLA eligibility if: (a) an employer through its silence concerning eligibility misleads an employee concerning his/her FMLA eligibility status;<sup>83</sup> (b) an employee reasonably relied on an employer's silence as an affirmation of FMLA eligibility;<sup>84</sup> and (c) the employee was harmed by the employer's silence concerning communication of FMLA eligibility.<sup>85</sup>

#### b. Eleventh Circuit

The Eleventh Circuit Court of Appeals considered an employer's right to revoke an already granted FMLA eligibility to an otherwise ineligible employee in *Brungart v. Bellsouth Telecommunications Inc.*<sup>86</sup> Robin Brungart began employment with Bellsouth in February 1991.<sup>87</sup> On December 1, 1994, she began an unpaid leave of absence that lasted until September 1996.<sup>88</sup> On December 2, 1996, Brungart requested a leave of absence under the FMLA due to her mother's heart surgery.<sup>89</sup> Responding to her request, Bellsouth sent Brungart a letter dated January 16, 1997<sup>90</sup> stating her request for FMLA coverage for the December 2 leave of absence had been denied because, as of the leave commencement date Brungart had not satisfied the FMLA's minimum work hours requirement.<sup>91</sup> Brungart never disputed that she failed to satisfy the FMLA's "hours worked requirement" in relation to her December 1996 leave request.<sup>92</sup>

In May or June 1997, Brungart requested and was granted FMLA eligibility for a leave scheduled to commence on July 10, 1997.<sup>93</sup> On July 9, 1997, Bellsouth terminated Brungart for failing to meet performance standards.<sup>94</sup> Brungart subsequently sued Bellsouth claiming FMLA violations.<sup>95</sup> One count of Brungart's suit alleged she had become a FMLA eligible employee<sup>96</sup> and Bellsouth's denial of FMLA eligibility pertaining to her December 1996 leave of absence violated the FMLA because Bellsouth had failed, per 29 C.F.R. §825.110(d), to

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83. *Id.*

84. *Id.*

85. *Id.*

86. 231 F.3d 791 (11th Cir. 2000).

87. *Id.* at 793.

88. *Id.*

89. *Id.*

90. *Id.* at 794.

91. *Id.*

92. *Id.* at 796.

93. *Id.* at 794.

94. *Id.*

95. *Id.*

96. *Id.* at 795.

notify her of ineligibility for FMLA within the required two business days.<sup>97</sup> The District Court granted summary judgment to Bellsouth.<sup>98</sup>

The Court of Appeals affirmed the District Court.<sup>99</sup> In affirming the lower court, the Court of Appeals found the findings of the Seventh Circuit Court of Appeals in *Dormeyer* persuasive.<sup>100</sup> However, unlike the court in *Dormeyer*, the court of appeals concluded that the Chevron Test was applicable in determining the validity of the regulation.<sup>101</sup> Applying the Chevron Test the court, like every other court except for one,<sup>102</sup> found that per Step One of the test that Congress had expressly spoken to the issue of defining an eligible employee under the FMLA,<sup>103</sup> thereby making the current regulation invalid by way of Congress' express intent.<sup>104</sup>

This court also stated that its decision in this case should be seen as a reaffirmation of its position on this issue<sup>105</sup> as held in *McGregor v. Autozone Inc.*<sup>106</sup> In *McGregor*, the court invalidated Department of Labor Regulation 29 C.F.R. §825.208(c)<sup>107</sup> because it had the effect of extending the period of FMLA leave available to an eligible employee beyond Congress' express statutory intent of a maximum of twelve work weeks.<sup>108</sup> The rulings of the Seventh and Eleventh Circuit Court of Appeals have also been incorporated into an eighth circuit opinion in *Evanoff v. Minneapolis Public Schools*.<sup>109</sup>

### c. Second Circuit

The Second Circuit Court of Appeals provided its opinion regarding revocation of an already granted FMLA eligibility from an ineligi-

97. *Id.*

98. *Id.* at 793.

99. *Id.* at 800.

100. *Id.* at 796.

101. *Id.*

102. *See* 173 F. Supp. 2d at 540.

103. *See* 231 F.3d at 797.

104. *See Id.*

105. *See Id.*

106. *See* 180 F.3d 1305 (11th Cir. 1999).

107. *See* 29 C.F.R. §825.208(c) (1994). (This regulation states that when a FMLA eligible employee gives notice of his or her intent to take a paid leave of absence, for which an employer has determined is for a FMLA-related reason, if an employer fails to notify an employee prior to commencement of the leave that the leave will be counted against an employee's maximum twelve weeks leave entitlement, such a leave could not be charged retroactively against an employee's twelve week entitlement.)

108. *See* 231 F.3d at 797.

109. *See Evanoff v. Minneapolis Public Schools*, 11 Fed. Appx. 670 (8th Cir. 2001). (Federal Appeals Court upheld District Court decision to reject statutorily FMLA-ineligible employee's claim of FMLA eligibility due to employer's failure to comply 29 C.F.R. §825.110(d). The Appeals Court concurred with the District Court that the regulation showed a misuse of Department of Labor regulatory authority and contradicted express Congressional intent on the issue of the classification of a FMLA eligible employee.)

ble employee in *Woodford v. Community Action of Greene County Inc.*<sup>110</sup> Iva Woodford was employed by Community Action of Greene County (CAGC) for approximately twelve years.<sup>111</sup> On November 18, 1997, she requested a leave of absence under the FMLA<sup>112</sup> due to stress, anxiety, and depression. The leave was scheduled to commence on November 17.<sup>113</sup> Within the twelve months preceding Woodford's commencement of this leave she had only worked 816.5 hours.<sup>114</sup> On November 19, 1997, CAGC provided Woodford with written notification that she was an eligible employee under the FMLA for her requested leave.<sup>115</sup> During this leave of absence, CAGC hired another person to perform Woodford's duties.<sup>116</sup> On January 15, 1998, while she was still on leave, CAGC informed Woodford that she would not be reinstated.<sup>117</sup> Woodford subsequently filed suit against CAGC claiming FMLA violations.<sup>118</sup>

The District Court granted summary judgment in favor of CAGC<sup>119</sup> because Woodford failed to satisfy the FMLA hours worked requirement prior to the leave's commencement.<sup>120</sup> On appeal, Woodford argued that CAGC was precluded from challenging Woodford's status as an FMLA eligible employee for her November 1997 leave because CAGC, per 29 CFR §825.110(d), having already granted eligibility status to Woodford could not subsequently revoke eligibility.<sup>121</sup> In affirming the lower court's findings,<sup>122</sup> the Court of Appeals followed the reasoning of the Seventh and Eleventh Circuit Courts of Appeals<sup>123</sup> in concluding that the regulation attempts to change the FMLA by giving eligibility status to those employees that are ineligible under the statute.<sup>124</sup> The court also agreed with the Seventh and Eleventh Circuits findings that in creating the FMLA Congress expressly addressed the subject of employee eligibility requirements.<sup>125</sup>

The court's findings in *Woodford* are significant for several reasons. First, the court agrees with the Seventh and Eleventh Circuits in their

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110. See 268 F.3d 51 (2nd Cir. 2001).

111. See *id.* at 52.

112. See *id.*

113. See *id.* at 53.

114. See *id.* at 52.

115. See *id.* at 53.

116. See *id.*

117. See *id.*

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.* at 58.

123. See *id.* at 55.

124. See *id.*

125. See *id.*

invalidation of 29 C.F.R. §825.110(d). The *Woodford* court also: (a) agreed with Seventh Circuit that an employer could be estopped from revoking granted FMLA eligibility from an otherwise ineligible employee<sup>126</sup> when the criteria outlined in *Dormeyer* is satisfied;<sup>127</sup> and (b) amplified the call for another regulation by concurring with the Seventh Circuit on the belief that the Department of Labor should consider through its rulemaking procedure adopting a new regulation. The court stated that the regulation should address circumstances when an ineligible employee under the FMLA takes action in reliance on an employer's implicit or express notice to the employee of FMLA eligibility.<sup>128</sup>

# 1. U.S. District Court Cases

## a. *Wolke v. Dreadnought Marine*

In *Wolke v. Dreadnought Marine Inc.*, U.S. District Court in Virginia spoke to the issue of an employer's failure to meet Department of Labor regulatory notification deadlines and the employer's ability to revoke expressly or implicitly granted FMLA eligibility for a leave of absence requested by an employee who failed to meet FMLA statutory requirements related to hours worked prior to the commencement of the requested leave.<sup>129</sup> Kevin Wolke had been hired by Dreadnought in September 1994.<sup>130</sup> Upon being hired he was covered by Dreadnought's health insurance plan.<sup>131</sup> In April 1995, Wolke was injured in a non-work related accident that left him unable to work.<sup>132</sup> In July 1995, Dreadnought cancelled Wolke's insurance thereby leaving him to resolve any unpaid medical bills.<sup>133</sup> However, Dreadnought later reinstated Wolke's insurance coverage for the purpose of permitting Dreadnought's insurer to pay Wolke's medical bills.<sup>134</sup> Wolke subsequently filed suit against Dreadnought claiming that he was entitled to the protections of the FMLA and that canceling his insurance violated 29 U.S.C § 2614(c)(1)<sup>135</sup> of the FMLA.<sup>136</sup>

126. See *id* at 57.

127. See *id*.

128. See *id*.

129. See 954 F. Supp. 1133 (E.D. Va. 1997).

130. See *id* at 1133.

131. See *id*.

132. See *id*.

133. See *id*. at 1134.

134. See *id*.

135. See 29 U.S.C. §2614(c)(1) (2003). (This section of the FMLA statute states that, except in circumstances when a FMLA eligible employee fails to return to work after an expired FMLA leave or fails to return to work for a reason other than the continuation, recurrence of, or start of a serious health condition, an employer must retain the employee's group health plan coverage for the duration of the eligible leave at the same level as provided to the eligible employee during his/her period of employment.)

In its answer, Dreadnought stated that Wolke was precluded from claiming a FMLA violation because he was an ineligible employee under the FMLA.<sup>137</sup> Both parties stipulated that Wolke had not been employed by Dreadnought for the required twelve months prior to the commencement of his medical leave.<sup>138</sup> In support of his claim, Wolke claimed Dreadnought's failure to inform him that he was an ineligible employee within two business days after being notified of a requested medical leave<sup>139</sup> automatically made him an eligible employee under the FMLA for this specific requested leave.<sup>140</sup>

The District Court granted summary judgment in favor of Dreadnought.<sup>141</sup> The court held that 29 C.F.R. 825.110(d) was an invalid regulation.<sup>142</sup> In finding the regulation invalid, the court referred to the Chevron Test.<sup>143</sup> Starting with step one of the test, the court found that Congress had specifically spoken on employee eligibility requirements under the FMLA in terms of the required minimum hours an employee must work<sup>144</sup> as well as the time period in which the required hours must be worked.<sup>145</sup> The court added that the regulation was contrary to Congress' intent because it had the effect of transforming those employees that Congress specifically mandated as ineligible for FMLA coverage into eligible employees.<sup>146</sup> The court's decision and rationale in *Dreadnaught* have formed the basis for conclusions that 29 C.F.R. §825.110(d) is invalid in U.S. District Courts in Oregon,<sup>147</sup> in Maryland,<sup>148</sup> and in Texas.<sup>149</sup>

#### b. *McQuain v. Ebner Furnaces*

Employers in Ohio who embraced the majority view and sought to have the FMLA eligibility revocation preclusion clause of 29 C.F.R. §825.110(d) declared invalid with respect to an employer's FMLA eligibility notification requirements cited *McQuain v. Ebner Furnaces*<sup>150</sup> as support for their position. Keith McQuain began employment with

136. *Wolke*, 954 F. Supp. at 1133.

137. *Id.* at 1134.

138. *Id.*

139. 29 C.F.R. 825.110(d) (1995).

140. 954 F. Supp. at 1135.

141. *Id.* at 1138.

142. *Id.* at 1137.

143. *Id.* at 1135.

144. *Id.* at 1135-36.

145. *Id.* at 1136.

146. *Id.*

147. *See Stewart v. INTEM Inc.*, 2000 U.S. Dist. Lexis 12980 at 14.

148. *See Seaman v. Downtown Partnership of Baltimore, Inc.*, 991 F. Supp. 751, 754 (D. Md. 1998).

149. *See Fisher v. State Farm Insurance Co.*, 999 F. Supp. 866, 870 (E.D. Tex. 1998).

150. 55 F. Supp. 2d 763 (N.D. Ohio 1999).

Ebner Furnances on July 2, 1989.<sup>151</sup> On August 3, 1993, McQuain was involved in a work-related accident<sup>152</sup> that resulted in several subsequent periods of medical leaves.<sup>153</sup> One of these leaves commenced on November 8, 1996.<sup>154</sup> At the commencement of this leave McQuain had not worked 1250 hours in the previous 12 months.<sup>155</sup> On September 5, 1997, while still on the November medical leave, Ebner Furnances informed McQuain that retroactive to September 1, 1997<sup>156</sup> his current medical leave would qualify as a FMLA leave of absence.<sup>157</sup> As McQuain's medical leave continued, Ebner received medical information dated October 6, 1997<sup>158</sup> which stated due to medical condition, McQuain would be given permanent medical restrictions.<sup>159</sup> Based on the recently received medical information, Ebner determined that there were no positions available that would meet McQuain's medical restrictions.<sup>160</sup> Following the determination, Ebner informed McQuain that he was being terminated effective November 30, 1997.<sup>161</sup>

McQuain then filed suit against Ebner.<sup>162</sup> McQuain claimed that his termination was improper. He asserted that Ebner was estopped from denying him continuing FMLA eligibility for his November 1996 leave because Ebner, per 29 C.F.R. §825.110(d), failed to notify McQuain that he was an ineligible employee within two business days from the commencement of his November 8 leave.<sup>163</sup> Ebner Furnances countered that McQuain was an ineligible employee under the FMLA.<sup>164</sup>

The District Court ruled in favor of Ebner Furnances.<sup>165</sup> The court concluded that McQuain was an ineligible employee under the FMLA<sup>166</sup> and that 29 C.F.R. §825.110(d) was invalid.<sup>167</sup> In reaching its decision that McQuain was an ineligible employee under the FMLA, the court applied the Chevron Test to the regulation and determined from step one that Congress clearly stated that a condition

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151. *Id.* at 766.

152. *Id.*

153. *Id.* at 767.

154. *Id.* at 768.

155. *Id.* at 773.

156. *Id.* at 768.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 769.

163. *Id.* at 773.

164. *Id.*

165. *Id.* at 776.

166. *Id.*

167. *Id.* at 775.

precedent to an employee's FMLA eligibility is that the employee must have worked 1250 hours within the 12 months prior to the commencement of a leave.<sup>168</sup> Also, as in *Wolke*, the court concluded that the regulation expanded the class of employees eligible for coverage under the FMLA<sup>169</sup> and such expansion was contrary to the express intent of Congress,<sup>170</sup> thereby rendering the regulation invalid.<sup>171</sup>

### c. *Nordquist v. City Finance Company*

In *Nordquist v. City Finance Company* a U.S. District Court in Mississippi addressed the issue of an employer's ability to revoke the FMLA eligibility of an ineligible employee once the employer has expressly granted eligibility.<sup>172</sup> City Finance Company employed Deadria Nordquist.<sup>173</sup> In July 1999, she went on maternity leave.<sup>174</sup> At the commencement of her leave Nordquist was a FMLA ineligible employee<sup>175</sup> based on 29 USC §2611(4)(A)(i).<sup>176</sup> Although an ineligible employee, Nordquist requested FMLA coverage for her maternity leave<sup>177</sup> and soon received a letter from City Finance informing her that she was an eligible employee under the FMLA.<sup>178</sup> While on maternity leave, City Finance discovered several alleged improper lending acts made by Nordquist<sup>179</sup> and summarily terminated her.<sup>180</sup> Nordquist then sued City Finance claiming they had violated the FMLA by terminating her for exercising employer-granted FMLA rights that are provided to an eligible employee.<sup>181</sup>

The District Court granted summary judgment to City Finance.<sup>182</sup> The court based its summary judgment finding on the persuasive conclusions of an overwhelming number of courts<sup>183</sup> that had struck down 29 C.F.R. §825.110(d).<sup>184</sup> because it had the contrary Congressional

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168. *Id.*

169. *Id.* at 776.

170. *Id.* at 775.

171. *Id.*

172. 173 F. Supp. 2d 537 (N.D. Miss. 2001).

173. *Id.* at 538.

174. *Id.*

175. *Id.*

176. *Id.* See also 29 U.S.C. §2611(4)(A)(i) (2003) (FMLA is applicable to any employer or person conducting commerce or an activity affecting commerce who employs fifty or more employees for each working day during each of twenty or more calendar workweeks within the current or prior year.)

177. *Id.*

178. *Id.* at 539.

179. *Id.* at 538.

180. *Id.*

181. *Id.*

182. *Id.* at 541.

183. *Id.* at 540.

184. *Id.*

intent of effectively extending FMLA eligibility to an otherwise ineligible class of employees.<sup>185</sup> In addition, the court stated that the regulation created an invalid preclusion for employers seeking to revoke FMLA eligibility from an ineligible employee.<sup>186</sup> This case is significant because until this court's ruling, revocation of FMLA eligibility cases had dealt with an implicit granting of FMLA to ineligible employees due to failures to satisfy regulatory notification requirements. However, this court's ruling established that despite an employer's express granting of FMLA eligibility to an otherwise ineligible employee, if the employee was an ineligible employee under the FMLA at the commencement of a leave, the employer is not precluded from subsequently revoking the FMLA eligibility.

## B. *The Minority View of Judge James G. Carr*

### 1. *Miller v. Defiance Metal Products* – Minority View Rationale

Months after the *Wolke* decision, a U.S. District Court in Ohio weighed in on the issue of an employer's ability to revoke an ineligible employee's FMLA certification despite failing to satisfy FMLA notification deadlines in *Miller v. Defiance Metal Products Inc.*<sup>187</sup> A temporary agency assigned Lisa Miller to work at Defiance Metal Products beginning on December 4, 1994.<sup>188</sup> On July 24, 1995, Miller ended her employment with the temporary agency and began a full-time employment relationship with Defiance.<sup>189</sup> On January 30, 1996, Miller sought medical attention for back, shoulder, and neck pain.<sup>190</sup> On the same day, she submitted to her employer a form excusing her from work for medical reasons.<sup>191</sup> On February 14, 1996, Defiance sent Miller a letter informing her that it was their opinion that she was an ineligible employee under the FMLA for her medical leave.<sup>192</sup> Miller subsequently submitted additional medical excuse forms to Defiance stating that she would be off work until March 28, 1996.<sup>193</sup> On March 18, 1996, Defiance terminated Miller citing absenteeism.<sup>194</sup> Miller then filed suit against Defiance claiming that her termination was an FMLA violation.<sup>195</sup>

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185. *Id.*

186. *Id.*

187. *Miller v. Defiance Metal Products Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997).

188. *Id.* at 946.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*



U.S. District Court Judge James G. Carr ruled in favor of Miller.<sup>196</sup> In reaching his decision, Judge Carr determined Defiance's failure to satisfy 29 C.F.R. §825.110(d) employer to employee notification deadlines precluded them from revoking FMLA eligibility status from Miller on the basis of her hours worked within the preceding twelve months prior to the leave's commencement failed to meet statutory requirements.<sup>197</sup> In reaching this conclusion, Judge Carr reasoned the regulation could be interpreted as addressing two exclusive issues:<sup>198</sup> (a) an employee's required hours worked within the twelve months proceeding commencement of the leave per the FMLA;<sup>199</sup> and (b) employer to employee FMLA notice of in terms of satisfying eligibility requirements.<sup>200</sup> The court, in applying step one of the Chevron Test, found that in terms of an employee's eligibility the regulation simply reiterates the express intent of Congress via the statute creating the FMLA<sup>201</sup> and therefore the regulation was valid in regards to an employee's hours worked and length of service eligibility requirements.<sup>202</sup>

However, Judge Carr reached a different conclusion concerning notification requirements addressed by the regulation. Using step one of the Chevron Test, he found that the Congressional intent of the FMLA statute did not expressly address the issue of an employer's notification regarding an employee's FMLA eligibility.<sup>203</sup> Thus, in accordance with the Chevron Test, Judge Carr moved on to step two of the test.<sup>204</sup> Applying step two, he found the ineligibility notification deadline was not arbitrary, capricious, or contrary to the statute creating the FMLA.<sup>205</sup> Judge Carr noted that such a regulation was in line with the FMLA's purpose of balancing the demands of the workplace with the needs of an employee's family.<sup>206</sup> He added that an employer's failure to notify an employee of their ineligibility within the regulation's deadline would frustrate such a balancing act by the employee.<sup>207</sup>

Based on Judge Carr's application of the Chevron Test, the court found a regulation which grants FMLA eligibility to an otherwise inel-

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196. *Id.* at 949.

197. *Id.*

198. *Id.* at 948.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. 467 U.S. at 843.

205. 989 F. Supp. at 948.

206. *Id.*

207. *Id.*

igible employee when the employer fails to satisfy the employer regulatory notification deadlines in terms of minimum hours of work and length of service requirements to be a reasonable statutory interpretation of the FMLA statute and therefore a valid regulation.<sup>208</sup> This court's ruling was significant for several reasons. First, for the first time a court had gone beyond step one of the Chevron Test in determining whether 29 C.F.R. §825.110(d) was valid in light of statutory FMLA eligibility requirements.<sup>209</sup> Secondly, this case is the only known case that has been cited in favor of validating 29 C.F.R. §825.110(d) in relation to FMLA eligibility being granted to otherwise ineligible employees.<sup>210</sup> Third, this court's findings given a later finding in a similar case by Judge Carr, which will be discussed below.

## 2. *Rocha v. Sauder Woodworking* – Judge Carr's Minority View Abandonment

In 2002 in *Rocha v. Sauder Woodworking Co.*,<sup>211</sup> Judge Carr addressed the same issue that he had previously addressed in the *Miller* case.<sup>212</sup> Heather Rocha began working for Sauder on November 1, 1999.<sup>213</sup> Beginning on March 7, 2001, she was unable to report for work due to illness.<sup>214</sup> It is undisputed by both parties that at the commencement of her medical leave Rocha had failed to meet the FMLA's hours worked eligibility requirements.<sup>215</sup> On several occasions between March 7 and March 21, Rocha supplied medical documentation related to her medical leave.<sup>216</sup> On March 21, Rocha met with Sauder's Human resources Manager Joe Dominique.<sup>217</sup> Mr. Dominique provided Rocha with a leave of absence form<sup>218</sup> and told her that by having a physician fill out the form and returning it to Sauder<sup>219</sup>, this would lead to a granting of eligibility for a FMLA medical leave of absence.<sup>220</sup> However, at this same meeting,<sup>221</sup> Mr. Dominique failed to inform Rocha that she was an ineligible employee under the FMLA for her requested leave because of a failure to sat-

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208. *Id.* at 949.

209. *Id.* at 948.

210. 173 F. Supp. 2d 537, 540 (N.D. Miss. 2001).

211. 221 F. Supp. 818 (N.D. Ohio 2002).

212. *Id.* at 819.

213. *Id.* at 818.

214. *Id.*

215. *Id.*

216. *Id.* at 819.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

isfy the statutory minimum hours worked requirement.<sup>222</sup> Rocha returned the leave of absence form on March 29.<sup>223</sup> On April 17, Rocha was terminated for absenteeism.<sup>224</sup>

In support of her claim, Rocha cited Judge Carr's decision in *Miller*, in which he validated 29 C.F.R. §825.110(d) by finding it to be a reasonable interpretation of the statute creating the FMLA.<sup>225</sup> Rocha argued that Sauder should have been prohibited from revoking her FMLA eligibility due to their failure to meet a regulatory notification deadline.<sup>226</sup> In his decision in this case, Judge Carr took the opportunity to state that *stare decisis*<sup>227</sup> does not mean that a court's decision must be followed for an infinite time period.<sup>228</sup> He ruled that employers could not be precluded from revoking or denying FMLA eligibility to an otherwise statutory ineligible employee due to an employer's failure to satisfy notification requirements outlined in 29 C.F.R. §815.110(d).<sup>229</sup> Judge Carr's rationale for overruling his decision in *Miller* was not based on his reinterpretation of the regulation via application of the Chevron Test. Instead it was the result of the fact that no other court had positively cited his findings in *Miller*<sup>230</sup> combined with a universal rejection for the basis of his findings in the *Miller* case.<sup>231</sup> Having reviewed how U.S. Courts of Appeals and federal District Courts have addressed this issue, the next section will provide an analysis of these court decisions.

#### IV. ANALYSIS

##### A. Court Decisions

In concluding that 29 C.F.R. §825.110(d) is an invalid regulation, the courts showed an enlightened and logical thought process in addressing the issue of an employer's ability to revoke erroneously conferred FMLA eligibility. Their rationale was based on the sound principles that the regulation contradicted Congressional intent and granted FMLA eligibility to employees that Congress sought to exclude from eligibility. The Second and Seventh Circuits, while agreeing that 29 C.F.R. § 825.110(d) is invalid, introduced the possibility

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222. *Id.*

223. *Id.*

224. *Id.* at 818.

225. *Id.* at 819.

226. *Id.*

227. See Barrons, *supra* note 39, at 483, noting that *stare decisis* refers to a situation where a court is, "slow to interfere with principles announced in a former decision and often uphold them even though they would decide otherwise were the question a new one."

228. 221 F.Supp at 820.

229. *Id.* at 820.

230. *Id.* at 819.

231. *Id.* at 820.

that an employer could be estopped from revoking eligibility granted to an otherwise ineligible employee. While there were two circuit courts that addressed the issue of estopping revocation of conferred FMLA eligibility, all of the courts addressing this issue failed to uniformly and adequately resolve an issue of substantial importance.

The unresolved issue is what protections, if any, should be afforded to an ineligible employee who has acted upon an employer's erroneous conferral of FMLA eligibility, particularly when there is universal judicial agreement that the employer has the right to revoke FMLA eligibility from an otherwise ineligible employee. The Department of Labor has not validly addressed employee rights when eligibility is conferred in error. In light of this and based on the current cases addressing an employer's eligibility revocation ability, it is incumbent upon the Department of Labor (DOL) to take action. The DOL should promulgate valid regulations that provide an estoppel defense to an employee erroneously notified, implicitly or expressly, that she is an eligible employee under the FMLA, but who later suffers revocation of eligibility due to a statutorily ineligible status.

#### *B. Rationale for Estoppel Defense*

Employees should be afforded an estoppel defense for revocation of conferred FMLA eligibility. The prerequisite for such a defense would be that eligibility was initially conferred due to either employer error or non-compliance with notification deadlines. There are two reasons for providing an estoppel defense. First, an estoppel defense would provide an equitable remedy for wrongly conferred eligibility. Second, an estoppel defense would require employers to improve their internal auditing processes related to eligibility compliance.

First, the estoppel defense would provide an equitable remedy to employees for wrongly conferred FMLA eligibility or eligibility notification non-compliance. The courts created a bright-line rule on eligibility revocation solely based on a determination that 29 C.F.R. §825.110(d) provided FMLA eligibility to statutorily ineligible employees. Some courts in their decisions were silent of the issue of estoppel. Courts addressing the issue indicated through their dicta that they were not creating a bright-line eligibility revocation rule, and did not intend to use the rule as an excuse for complete revocation of a leave of absence.

The courts related estoppel to an employer's right to estop a conferred leave of absence. If the courts were to conclude that an estoppel defense applied to a revocation of FMLA eligibility from otherwise ineligible employees, they would be contradicting express Congressional intent regarding eligibility under the FMLA statute.

All of the courts made it clear that regardless of the reason for wrongful FMLA-eligibility conference, the employer had an absolute right to revoke eligibility from an ineligible employee. However, the courts failed to provide any equitable resolution for employees who find themselves in situations where the employer either willfully, recklessly, or negligently conferred and then subsequently revoked FMLA eligibility due to an employee's statutorily ineligible status.

Providing employees who rely on the employer's conferral of FMLA eligibility, either through error or notification non-compliance, with an estoppel defense provides an adequate equitable remedy. The estoppel defense alluded to by the courts addressing the issue does not seek to confer FMLA eligibility upon statutorily ineligible employees. Instead, such a defense would preclude an employer from revoking a conferred, non-FMLA, leave of absence from an employee who reasonably relied on the employer's implicit or express conference of FMLA eligibility for the requested leave. Estoppel would give an employee subjected to eligibility revocation an option to request or continue a non-FMLA leave of absence, provided the leave complies with an employer's non-FMLA leave of absence policy. Employees subjected to eligibility revocation deserve such an option because the ineligible employee who takes or continues a leave of absence can, depending on an employer's leave of absence policy, effect the date on which he or she satisfies the FMLA statute's minimum hours worked requirement. An FMLA-ineligible employee who takes a leave of absence can delay his or her date of eligibility if the leave fails to count towards the FMLA's minimum hours worked requirement. By allowing the option to take or continue the leave despite FMLA eligibility revocation provides the employee some control as her date of FMLA eligibility.

An employer who had, based on the hours worked requirement or notification non-compliance, wrongfully conferred FMLA eligibility to an ineligible employee also conferred eligibility because the employer determined the reason precipitating the requested leave was a qualifying medical condition or family event per the statute. An employee estoppel defense would preclude an employer from denying a granted non-FMLA leave of absence to a requesting employee because the employer subsequently determines that FMLA eligibility was granted in error. It is quite likely that upon being erroneously granted FMLA eligibility, an employee makes arrangements associated with the granted leave. The arrangements made under non-FMLA or FMLA leave often take the same form. The arrangements could range from making and paying for transportation costs related to an FMLA-qualifying event such as an adoption, to scheduling to

participate in the after-care of a parent following the parent's surgery. An estoppel defense creates an equitable remedy for the ineligible employee who would have had the opportunity to make informed decisions concerning financial outlays or other issues associated with the reason for the leave request if she had been properly informed. The inequity lies in the fact that the wronged employee by no fault of his or her own was led to reasonably believe that an FMLA leave had been granted and is now faced with a non-FMLA leave request. An equitable remedy is provided by giving the employee the option to commence or continue the leave of absence under different terms.

The second reason why ineligible employees should have access to an estoppel defense is that such a defense will force employers to improve their internal audit controls regarding FMLA eligibility conference and notification compliance. The facts associated with most of the cases discussed in this article possessed one of two common denominators: (1) the employer failed to realize that the employee requesting the leave was a statutorily ineligible employee prior to implicit or express conference of FMLA eligibility for the leave; and (2) the employer failed to notify the requesting employee in a timely way that she was not a statutorily eligible employee. Both denominators are a direct result of an employer failing to either impose or improve upon internal processes designed to eliminate wrongful designation or notification non-compliance. An estoppel defense will place an employer in a position of having to impose or improve internal controls or to face financial consequences.

An employer estopped from denying or terminating a non-FMLA leave because of errors on its part is creating non-value added costs, which negatively affect the employer's profitability. The non-value costs can come in forms ranging from paying remaining employees additional and often not budgeted compensation such as overtime pay or compensatory time off, to hiring additional employees during the term of an employee's leave. Employers realize that the best way to attack any cost is to address the process that creates the cost. Unlike material costs and taxes that an employer often cannot control because they are not process-oriented, an employer has the ability to control costs associated with a successfully executed leave of absence estoppel defense. The employer can address its internal process to ensure that wrongfully conferred FMLA eligibility is not provided to otherwise ineligible employees.

### *C. Rationale Against an Estoppel Defense*

There are two reasons why an estoppel defense should not be adopted. First, such a defense would place an additional compliance

burden upon employers, and at the same time not provide employees an incentive to monitor their eligibility status. Second, given that the courts have already adopted a bright line rule on the issue of FMLA eligibility revocation from a statutorily ineligible employee, the estoppel defense places an additional and unnecessary responsibility on an employer's usually understaffed human resources department.

The first reason for not adopting an estoppel defense is that it shifts additional burdens of compliance on the employer and fails to promote employee accountability. Throughout the history of the FMLA, the burdens of statutory compliance have been placed exclusively on employers. Burdens imposed on employers include: (a) requiring them to inform employees of provisions of the FMLA via posting "rights notices;"<sup>232</sup> (b) requiring employers to ensure that its non-English speaking employees are informed of their FMLA rights;<sup>233</sup> and (c) and requiring retention of documentation related to an employee and FMLA-related regulations<sup>234</sup> for a period of at least three years.<sup>235</sup> The employee's sole responsibility in this aspect of the employer-employee relationship is to inform the employer of a request to take a leave of absence under the FMLA. By placing an additional administrative burden upon the employer based on the threat of estoppel, employers will argue that compliance continues as a strict one-way street that always favors the employee. The employer's rationale for this argument is that there is precedent for employment related statutes placing some level of burden for compliance on the employee. For example, the statute creating Worker's Compensation places a compliance burden on an employee from the standpoint that the employee must follow prescribed safety measures in order for fully avail herself of Worker's Compensation payments.

The second reason for not adopting an estoppel defense is that it places unnecessary and additional responsibility on understaffed human resource departments regarding an issue already addressed by the courts. In the era of running streamlined companies, some employers use Activity-Based Cost Management or ABCM<sup>236</sup> to manage costs. In using ABCM, employers place tasks and costs associated with the tasks into one of two categories, value-added or non value-added expenses.<sup>237</sup> In recent years human resource departments have often been placed in the non-value added expense category. Human

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232. 29 C.F.R. § 825.300(a) (1994).

233. 29 C.F.R. § 825.300(c).

234. 29 C.F.R. § 825.500(c)-(g).

235. 29 C.F.R. § 825.500(b).

236. Sidney J. Baxendale & Michael J. Spurlock, *Does Activity-Based Cost Management Have Any Relevance For Electricity*, FORTNIGHTLY, July 15, 1997, at 32.

237. *Id.* at 33.

resource departments in the non-value added expense category are often provided limited and/or decreasing budgets as well as an inadequate level of staffing for completing tasks assigned to the department. Employers will argue that an estoppel defense will force them to allocate additional expenses via more staffing and/or increased budgets to human resource departments which are already considered strictly negative costs. Employers will also argue that such spending is superfluous. Employers will claim the unanimity among the courts in stating that employers can revoke FMLA eligibility for a leave of absence from a statutorily ineligible employee extends to the non-FMLA leave. As a complement to this argument, employers will argue that once a leave is deemed non-FMLA due to employee ineligibility, the employer then reserves the right to grant or deny an employee a non-FMLA based on the guidelines of its non-FMLA leave of absence policy. The next section provides a proposal designed to resolve the issue of revocation of FMLA eligibility from an otherwise ineligible employee and subsequent employee recourse in a manner equitable to both an employee and employer.

## V. PROPOSAL

In those jurisdictions that have addressed the issue of revocation of an ineligible employee's FMLA eligibility, courts have acknowledged that it is the employer's responsibility to be accurate in terms of notification and the timing of notification to an employee that the employee is ineligible under the FMLA. Some courts have even stated that an employee might have estoppel grounds based on the employer's notification/confirmation errors and/or failures. However, no court has been willing to categorically state that an ill-advised employee has an absolute right to recourse. Since employees lack the absolute right to recourse, the Department of Labor should promulgate regulations addressing employee recourse.

The regulatory changes to 29 C.F.R. §825.110(d) that I propose would create more of a level field in cases of employer FMLA eligibility notification non-compliance and erroneous FMLA eligibility conference. The proposed changes consist of: (1) providing erroneously FMLA-conferred employees a minimal period of unpaid leave to address issues precipitating a leave request; (2) requiring employers to notify ineligible employees of their estimated date of FMLA eligibility post-eligibility revocation; and (3) requiring agency adjudication on FMLA eligibility notification and/or erroneous confirmation disputes prior to judicial review. Following is draft language related to proposed regulatory changes.



2004] *ERRONEOUSLY CONFERRED FMLA ELIGIBILITY* 111

A. *Proposed Regulations*

1. Proposed Regulation A

*Erroneously Granted FMLA Leave Prior to Leave Commencement/  
Written Notice of FMLA Ineligibility*

If an ineligible employee, per this proposed regulation, makes a request for a leave of absence under the FMLA and the requested leave is granted in error by an employer prior to the commencement of the employee's requested leave, an employer must within five business days following the date of the request or granting of FMLA eligibility, whichever is later, provide the ineligible employee with written notice of his/her ineligibility for FMLA leave.

2. Proposed Regulation A-1

*Failure to Provide Written Ineligibility Notice/Employer FMLA Revocation Rights and Employee Rights Post-Revocation*

An employer's failure to provide written notification of ineligibility within the aforementioned five business days: (a) will not preclude an employer from revoking FMLA eligibility from an ineligible employee prior to commencement of the requested leave of absence (b) will result in, at the discretion of the FMLA ineligible employee, the employee being presented with the opportunity for up to three business days unpaid leave for the purpose of addressing issues which precipitated the leave of absence request.

3. Proposed Regulation A-2

*Employer Systematic Failure to Provide Written Ineligibility  
Notice/Penalties*

A systematic pattern of failure by an employer to make the required employee notification of FMLA ineligibility as deemed by the Department of Labor shall be punishable by fines as outlined by the Department of Labor and/or revocation of an employer's Federal Contractor Status.

4. Proposed Regulation B

*Erroneously Granted FMLA Leave Following Leave Commencement/  
Written Ineligibility Notice*

If an ineligible employee, per this proposed regulation, makes a request for a leave of absence under the FMLA and the requested leave is granted in error by an employer and the employee's leave has already commenced, an employer must within five business days following the date of granting FMLA eligibility or discovery of an employee's FMLA ineligibility status, whichever is later, provide the ineligible employee written notice of his/her FMLA ineligibility.

5. Proposed Regulation B-1

*Employer FMLA Revocation From Ineligible Employees/Ineligible Employee Rights Post-Revocation*

The employer upon providing written notice of FMLA ineligibility may terminate the commenced leave and require the ineligible employee to return to work within three business days following notification of FMLA ineligibility. The employee may allocate the aforementioned three business days as paid or unpaid leave.

6. Proposed Regulation B-2

*Employer's Systematic Failure To Provide Employee Ineligibility Written Notice/Penalties*

A systematic pattern of failure by an employer to make the required employee written notification of FMLA ineligibility as deemed by the Department of Labor shall be punishable by fines as outlined by the Department of Labor and/or revocation of an employer's Federal Contractor Status.

7. Proposed Regulation C

*Requirement of Employers to Provide FMLA Ineligible Employees with Written Estimate of FMLA Eligibility Date*

Within ten business days of providing an employee the required written notice of his/her ineligibility for FMLA for a requested leave of absence, an employer must provide an ineligible employee in written form an estimated date in which the employee shall become an eligible employee per 29 U.S.C. §2601. A systematic pattern of failure by an employer to satisfy the aforementioned notification requirement as deemed by the Department of Labor shall be punishable by fines as outlined by the Department of Labor.

8. Proposed Regulation D

*Requirement of Agency Adjudication Prior to Judicial Review*

Any issues of dispute related to the satisfaction of the above-proposed regulations shall be first adjudicated by the Department of Labor prior to the commencement of judicial review.

B. *Positive Aspects of Proposed Regulations*

There are several positives associated with the outlined proposed regulations. First, a critical positive aspect of the proposal is that none of the proposed regulations have the effect of expanding the class of FMLA statutorily eligible employees. Therefore, the proposed regulations should not run the risk of judicial invalidation under the Chevron Test. Alternatively, if the regulations were subjected to Chevron

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Test analysis, a court is more likely to see the regulations as reasonable interpretations of the statute creating the FMLA. Second, the proposed regulations do not preclude an employer who erroneously granted FMLA eligibility to an otherwise ineligible employee or failed to comply with notification deadlines from revoking eligibility. Third, by requiring employers to provide a written estimated timetable as to when the then ineligible employee will become an FMLA eligible employee post-revocation of eligibility, the proposed regulations impose upon an employer a duty to reduce the probability of an employee ending up in repeated circumstances such as those which led the to litigation discussed in this paper. The proposed regulations should eliminate circumstances in which an employee is constantly unaware of when he or she will become an FMLA-eligible employee. Fourth, the proposed regulations create an exhaustion of remedies standard that will likely reduce judicial review of individual employee/employer disputes on this issue.

### C. *Criticisms of Proposed Regulations*

While the proposed regulations have several positive attributes, employers will point to several negative aspects. First, the regulations can be seen as placing an additional and unfair burden on an employer's human resources. Employers will argue that they are being punished by having to guarantee time off to employees because an employer either failed to meet notification deadlines or erroneously conferred FMLA eligibility to an employee who is clearly ineligible. Employers will argue further that being forced to guarantee time off to employees under the proposed regulations will create additional and unnecessary costs. Employers will claim that these costs will arise because they will have to retain what they consider superfluous employees to offset an employee's non-FMLA absence. Second, employers will assert that the regulations will create more FMLA litigation, particularly with respect to the definition of what constitutes a "systematic pattern of failure" by an employer pertaining to meeting employee notification deadlines. Third, employers will claim that requiring an employer who revokes an otherwise ineligible employee's FMLA eligibility to both provide the ineligible employee with a written estimate of a FMLA eligibility date and an official written notification of FMLA eligibility creates "non-value added" costs to an employer's overall "cost of doing business."

## VI. CONCLUSION

While attempting to comply with the FMLA in terms of providing coverage to statutory eligible employees, employers that have errone-

ously granted FMLA eligibility to statutorily ineligible employees or failed to comply with regulatory notification deadlines for a leave of absence have later revoked FMLA eligibility for such leaves. To date, federal courts on each level that have addressed an employer's ability to revoke eligibility despite the employer's failure to comply with 29 C.F.R. §825.110(d) have reached several conclusions. First, employers are not precluded from revoking erroneously conferred FMLA eligibility. Second, an employer's failure to meet an employee FMLA eligibility notification deadline will not automatically preclude revocation of FMLA eligibility from an ineligible employee. Third, 29 C.F.R. §825.110(d), in its current form, is an invalid regulation in terms of employee notification deadlines because it is contrary to Congress' express intent on the issue of employee eligibility requirements. Fourth, the regulation is invalid because it creates a new class of FMLA eligible employees out of an employee classification that Congress expressly stated was to be excluded from FMLA eligibility.

By invalidating 29 C.F.R. §825.110(d), the courts have in essence provided a uniform bright-line rule on the subject of an employee's FMLA ineligibility and the employer's ability to revoke erroneously conferred eligibility from ineligible employees. While the courts have seemingly resolved this issue for employers, the same cannot be said in terms of this issue and its effect on the ineligible employee. Courts have left unresolved the issue of recourse for employees that have acted on erroneously conferred FMLA eligibility for a specific leave of absence. Two federal appellate courts have found that an estoppel principle may be an avenue of employee recourse, but these courts decline to state that an effected employee has an absolute right to recourse. Other federal courts have simply not provided any semblance of uniform guidance on the issue of employee recourse.

This article argues that the Department of Labor can provide the needed guidance on this unresolved issue. Such guidance would be through the promulgation of new regulations that do not result in conferring FMLA eligibility on employees that are statutorily ineligible. These regulations would address issues concerning granting a non-FMLA leave for a specific requested leave of absence, written estimates of the date on which an ineligible employee is scheduled to reach FMLA eligibility status, and the provision of written confirmation of the date on which an employee becomes an eligible employee under the FMLA.

The proposed regulations would maintain the judicially created rights of the employer in terms of revoking eligibility from FMLA ineligible employees. In addition, the proposed regulations would establish absolute rights for FMLA-ineligible employees that have ei-

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ther: (a) taken action in anticipation of a leave due to an employer failure to meet employee notification deadlines; or (b) commenced what they thought to be a FMLA-qualifying leave. Adoption of the proposed regulations would establish an equilibrium between the employer who seeks the right to revoke or deny FMLA eligibility from otherwise statutorily ineligible employees and the employee who seeks to work in an employment atmosphere where he or she can balance family and job responsibilities.