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FMLA Notice Requirements and the Chevron Test: Maintaining a Hard-Fought Balance

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FMLA Notice Requirements and the *Chevron* Test: Maintaining a Hard- Fought Balance

I.	INTRODUCTION	262
II.	THE FMLA SCHEME	264
	A. <i>The Purpose of the FMLA</i>	264
	B. <i>The Provisions of the FMLA</i>	265
	C. <i>Regulatory Provisions</i>	267
	D. <i>The Incongruity Between the FMLA and the Regulations: An Illustration</i>	270
III.	THE CIRCUIT SPLIT	272
	A. “Congress Was Clear”: Cases Invalidating 29 C.F.R. § 825.208(c)	272
	1. <i>McGregor v. AutoZone, Inc.</i> : The Eleventh Circuit	272
	2. <i>Ragsdale v. Wolverine Worldwide, Inc.</i> : The Eighth Circuit	274
	3. <i>Nolan v. Hypercom Manufacturing Resources</i> : The Policy Argument.....	277
	B. “Congress Left Gaps”: Cases Upholding 29 C.F.R. § 825.208(c)	278
	1. <i>Plant v. Morton International, Inc.</i> : The Sixth Circuit.....	278
	2. Lower Courts	280
IV.	RESOLUTION WITHOUT REGARD TO THE <i>CHEVRON</i> TEST.....	282
V.	ANOTHER FMLA NOTICE PROVISION IN JEOPARDY.....	290
VI.	<i>CHEVRON</i> ANALYSIS.....	291
	A. <i>The Constitutional Message of the Chevron Test</i>	292
	B. <i>The Chevron Test Today</i>	293
	C. <i>The Evolution of the FMLA</i>	297
	1. The Twelve-Week Entitlement Figure	298

	2.	Paid Leave Substitution	301
	3.	Notice Before FMLA Designation	302
VII.		EMPLOYEES' RIGHTS ARE PROTECTED WITHOUT THIS REGULATION.....	304
VIII.		CONCLUSION	308

I. INTRODUCTION

The Family and Medical Leave Act of 1993 ("FMLA" or "the Act"), an act that extends twelve weeks leave to employees for certain medical and family situations, seemed like a panacea for the everyday battles employees face in balancing work and family needs.¹ At last, the Act's supporters thought, an employee can take time off to care for a loved one, or have a child, and return to find his or her job intact. In the eight years since its enactment, however, the FMLA finds employees and employers alike disillusioned, uncertain about rights and obligations, and still fighting to balance work and family needs by being forced to follow the FMLA's complex procedures. Furthermore, the FMLA and accompanying regulations provide attorneys and judges with a great deal of confusion in reconciling seemingly conflicting provisions.

This Term, the Supreme Court will hear its first case ever under the FMLA and will hopefully give employers, employees, and lower courts needed guidance on interpreting the delicate balance between business and families that Congress sought to achieve.² Currently, several U.S. circuit courts disagree over the validity of a Department of Labor ("DOL") regulation promulgated to preserve employees' rights upon taking FMLA leave ("29 C.F.R. § 825.208(c)").³ The regulation requires that employers designate qualifying leave as "FMLA leave" at the beginning of the leave period.⁴ If an employer fails to notify employees of the FMLA designation, none of the absence preceding proper notice counts toward the employee's twelve-week entitlement under the FMLA.⁵ As a result,

1. 29 U.S.C. §§ 2601-2654 (1994).

2. See 29 U.S.C. § 2601 (1994) (listing purposes of the FMLA, including "balanc[ing] the demands of the workplace with the needs of families"); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 2548 (2001) (mem.).

3. Compare *Ragsdale*, 218 F.3d at 939 (holding 29 C.F.R. § 825.208(c) invalid) and *McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999) (holding same section invalid), with *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000) (upholding same section).

4. 29 C.F.R. § 825.208(a) (2000).

5. 29 C.F.R. § 825.208(c).

without proper notice regarding designation of leave as "FMLA leave," an employee could receive more than twelve weeks total leave.

All three circuit courts that have faced the issue, and numerous district courts, examined the agency interpretation under the well-established *Chevron* test.⁶ In the unanimous *Chevron* decision, the Supreme Court established a two-step test applicable to judicial review of agency interpretations of agency-administered regulations.⁷ As will be detailed later in this Note, the *Chevron* test provides courts with a vehicle to determine whether Congress has left a gap in a statutory scheme for an agency to fill with regulations, and whether the agency's subsequent regulations comport with congressional intent.⁸

The Eighth and Eleventh Circuits have invalidated the regulation as contrary to the FMLA language and congressional intent to provide only twelve weeks of leave.⁹ The Sixth Circuit, however, has held that the FMLA statute does not speak to the issue of employer notice of FMLA designation, and therefore, the DOL regulation evinces a permissible and reasonable construction of the statute and is valid.¹⁰ The Supreme Court will resolve the conflict in the 2001-2002 Term by reviewing the Eighth Circuit's decision in *Ragsdale v. Wolverine Worldwide, Inc.*

This Note will first briefly sketch the statutory and administrative scheme that the FMLA creates and provide an illustrative example. Next, it will examine the reasoning behind the cases that make up this circuit split. While the flexible language of the *Chevron* test can support either result, this Note contends that the constitutional principles behind the *Chevron* test demand the invalidation of the section of the regulation that potentially allows more than twelve weeks of leave.¹¹ Finally, this Note will elaborate upon these constitutional principles and Congress's deliberate policy choices in enacting the FMLA, which in this case should not be changed or improved by the DOL's interpretation. This Note advocates invalidating the current version of 29 C.F.R. § 825.208(c) as

6. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

7. See *id.* at 842-43.

8. See *id.*

9. See 29 U.S.C. § 2612(a)(1) (1994) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave . . ." (emphasis added)); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000), *cert.granted*, 121 S.Ct. 2548 (2001) (mem.); *McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999).

10. See *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000).

11. See *infra* Part VI.A (detailing the constitutional principles of the *Chevron* test).

contrary to the FMLA because the regulation potentially allows employees more than twelve weeks of leave when Congress made a deliberate and controversial choice to allow *only* twelve weeks of leave.

II. THE FMLA SCHEME

A. *The Purpose of the FMLA*

The enactment of the FMLA represented a fundamental change in the way American employers were required to acknowledge and accommodate employees and their family needs.¹² As the number of working women, single-parent households, and aging relatives increased, American workers felt compelled to choose between their jobs and families.¹³ Congress found that the family unit suffered without parental participation in both early childbearing and the care of family members.¹⁴ Congress further acknowledged that the choice between work and family affected women more than men, and therefore, often encouraged gender discrimination.¹⁵ Given these findings, Congress created a statutory scheme to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."¹⁶ Furthermore—and significantly—Congress sought to accomplish this purpose in a manner that "accommodates the legitimate interests of employers."¹⁷

12. Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 458 (1995). Before the enactment of the FMLA, the United States was virtually the only industrialized country without a nationalized leave policy to require employers to provide some form of maternity or parental leave. *Id.* at 461. The legislative history of the statute indicated that the impetus for the FMLA was the dramatic shift in demographics of the working population, including the increase in number of women in the workforce and single-parent households, and the aging of the American population. *Id.* at 459-60.

13. *Id.*

14. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2601(a)(2) (1994); Rigler, *supra* note 12, at 460-61 (citing S. REP. NO. 103-3, at 6 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 8).

15. See § 2601(a)(2).

16. § 2601(b)(1); see also Cristina Duarte, *The Family & Medical Leave Act of 1993: Paying the Price for an Imperfect Solution*, 32 U. LOUISVILLE J. FAM. L. 833, 838-39 (1994) (noting that granting job-protected leave legitimates family concerns by creating an "ambiance of acceptance and respect for the workers" and preserves the employees' professional integrity); Rigler, *supra* note 12, at 469 ("The essence of the FMLA is the concept of job security . . .").

17. § 2601(b)(3).

B. The Provisions of the FMLA

This attempt to craft a balance between employer and employee needs resulted in a statutory scheme similar to that of other labor laws that establish minimum standards for employment, such as child labor laws, the minimum wage, and the Social Security Act.¹⁸ Essentially, the FMLA entitles “eligible employees”¹⁹ of “covered employers”²⁰ to a minimum of twelve weeks leave each year for one or more of the following situations: birth and care of a newborn; adoption or foster care of a child; care of a family member with a serious health condition; and an employee’s own serious health condition.²¹ The statute is notably vague regarding the definition of a “serious health condition,” leaving the DOL to fill in the gaps.²²

The FMLA requires employees to satisfy certain minimal notice and certification requirements regarding the reason for leave.²³ At the same time, the FMLA imposes notice requirements on the employer to ensure that employees are aware of their FMLA rights.²⁴ The statutory notice requirement for the employer includes only the display of a poster with certain excerpts from the FMLA to inform employees of their rights.²⁵ As will be discussed in the next

18. Rigler, *supra* note 12, at 461 (citing S. REP. NO. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 21).

19. An “eligible employee” has worked for the employer for twelve months and for at least 1,250 hours of service during the previous twelve-month period. 29 U.S.C. § 2611(2)(A) (1994).

20. The FMLA only covers employers who employ fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year. § 2611(4)(A). Requiring more than fifty employees serves to extend coverage only to employers engaged in interstate commerce. Rigler, *supra* note 12, at 463. The Seventh Circuit, however, has held that language contained in an employee handbook can create the right to FMLA leave for workers of employers with less than the required number of employees. *See Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132, 1137 (7th Cir. 2001).

21. 29 U.S.C. § 2612(a)(1) (1994). The employee may take the twelve-week leave on an intermittent or reduced leave schedule in cases of the employee’s own serious health condition or taking care of a family member’s serious health condition. § 2612(b)(1).

22. § 2611(11) (“The term ‘serious health condition’ means an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.”).

23. § 2612(e); 29 U.S.C. § 2614(c)(3) (1994). If leave is foreseeable, the FMLA requires employers to notify employers of the need within thirty days before the date of leave, and to make a reasonable effort to schedule the treatment so as not to disrupt to operations of the employer. § 2612(e). Employers may require certification from a health care provider of the employee’s or relative’s serious health condition. § 2614(c)(3). Many criticize the statute’s stringent standard of “serious health condition,” noting that many pressing childhood or elderly needs that legitimately call employees away from their jobs do not constitute “serious health conditions.” *E.g.*, Duarte, *supra* note 16, at 852.

24. 29 U.S.C. § 2619(a) (1994).

25. *Id.*; *see also* 29 C.F.R. § 825.300(a) (2000) (“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

section, the DOL regulations impose further employer notice requirements, which give rise to the issue addressed in this Note.²⁶

The FMLA mandates only unpaid leave,²⁷ but encourages employers to adopt more generous policies than those mandated by the Act.²⁸ In many cases, the FMLA will converge with employers' own policies allowing paid leave, such as vacation days, sick days, and disability pay. The FMLA allows employers the option of requiring employees to substitute their paid leave for any part of the FMLA leave entitlement.²⁹ In other words, paid leave entitlements may run *concurrently* with FMLA leave. The FMLA does not require employers to expand leave policies beyond a total of twelve weeks.³⁰ The DOL regulations attempt to address the confusion and complexity an employer faces in tracking FMLA entitlements at the same time as tracking its own benefit program.³¹

At the end of the mandated leave, the FMLA imposes both an affirmative and a negative obligation on employers. As an affirmative duty, the employer must restore the employee to the same

and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. Employers may duplicate the text of the notice contained in Appendix C of this part, or copies of the required notice may be obtained from local offices of the Wage and Hour Division. The poster and the text must be large enough to be easily read and contain fully legible text."); 29 C.F.R. § 825 app. C (2000) (sample posting notice, including reasons for taking leave, employee notice requirements, unlawful acts by employers, and job protections).

26. See *infra* Part II.C.

27. § 2612(c). Only mandating *unpaid* leave often surfaces as one of the biggest criticisms of the current FMLA. See Duarte, *supra* note 16, at 848-52 (arguing that the FMLA only benefits women who are employed, who have abundant financial resources and who have generous insurance packages and that families "whose sheer survival depends on federally legislated assistance" therefore cannot take advantage of the FMLA's protections).

28. See 29 U.S.C. § 2653 (1994) ("Nothing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act . . ."). Employers do not, however, have to "provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave." § 2612(d)(2)(B). For example, "[i]f an employer's paid sick leave plan does not permit use of that leave to care for an ill family member, . . . the FMLA will not require that leave associated with the family member's care be paid." Rigler, *supra* note 12, at 478.

29. § 2612(d)(2). An employer does not have to provide this option. In the absence of this option, an employee may elect to substitute paid leave for unpaid FMLA leave. *Id.*

30. See 29 U.S.C. § 2652(a) (1994). In addition, more generous state family leave laws will also run concurrently with FMLA leave. Rigler, *supra* note 12, at 494-95. The FMLA preempts less generous state family leave laws. *Id.*

31. See 29 C.F.R. § 825.208(c)-(d) (2000) (requiring employers to notify employees when any leave qualifies as FMLA leave).

or an equivalent position upon returning to work.³² As a negative prohibition, employers may neither interfere with nor discriminate on the basis of any of the rights provided in the FMLA.³³ An employee or the Secretary of Labor may bring a civil suit for violation of any of these obligations.³⁴

Congress provided multiple remedies for a violation of the FMLA. The legislation provides legal remedies such as lost wages, salary, employment benefits, or other compensation.³⁵ The employer may also be liable for other economic losses sustained by the employee, such as out-of-pocket medical expenses.³⁶ Furthermore, employers who violate FMLA rights are liable to the employee for liquidated damages, equal to the sum of the two types of damages described above, plus interest.³⁷ Finally, employees may also receive equitable relief, including employment, reinstatement, or promotion, in addition to attorneys' fees and costs.³⁸

C. Regulatory Provisions

Section 2654 of the FMLA in the U.S. Code charges the Secretary of Labor with the duty of prescribing regulations "as are necessary to carry out" the provisions of the FMLA.³⁹ The regulations, which took effect in 1995, attempt to fill in gaps left by Congress and establish more detailed procedures for employees and employ-

32. 29 U.S.C. § 2614(a)(1) (1994). The employer must also maintain the employees' accrued benefits, including group health insurance plans. § 2614(a)(2), (c).

33. 29 U.S.C. § 2615(a)-(b) (1994).

34. See 29 U.S.C. § 2617(a)(2) (1994) (authorizing a private right of action); § 2617(b)(2) (authorizing action by Secretary). The courts recognize two kinds of claims under the FMLA. *E.g.*, *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1352 (11th Cir. 2000). "Interference claims" arise when employers burden or completely deny substantive statutory rights to which their employees are entitled. *Id.* (citing § 2615(a)(1)). "Retaliation claims" arise when employers discharge employees for exercising their statutory right to leave. *Id.* (citing § 2615(a)(2)); see also Michael Murphy, Note, *The Federal Courts' Struggle with Burden Allocation for Reinstatement Claims Under the Family & Medical Leave Act: Breakdown of the Rigid Dual Framework*, 50 CATH. U. L. REV. 1081, 1084-85 (2001) (detailing the confusion in the courts over the proper analytical framework for reinstatement claims, which involve both an interference component and an element of retaliation). While plaintiffs often assert both claims at once, the problems described in this Note will occur in interference claims since the plaintiffs allege that proper notification is a substantive right provided to them by the FMLA.

35. § 2617(a)(1)(A)(i)(I); Megan E. Blomquist, Note & Comment, *A Shield, Not a Sword: Involuntary Leave Under the Family and Medical Leave Act*, 76 WASH. L. REV. 509, 517 (2001) (describing damage provisions).

36. § 2617(a)(1)(A)(i)(II).

37. § 2617(a)(1)(A)(iii). To overcome the presumption of liquidated damages, the employer must prove that it acted in good faith and with reasonable grounds for believing it was not in violation of the FMLA. *Id.*

38. § 2617(a)(1)(B),(3).

39. 29 U.S.C. § 2654 (1994).

ers to effectuate FMLA requirements.⁴⁰ For example, the DOL regulations establish a six-part test for defining a "serious health condition,"⁴¹ a noticeably vague definition in the statute.

Most significant for purposes of this Note, the DOL regulations elaborate upon employer and employee notice requirements.⁴² In effect, the regulatory scheme places most of the burden for understanding and discharging FMLA obligations upon the employer. While the issue may seem trivial at first, a mistake in notification has major ramifications for both parties, and significantly penalizes the party bearing the burden of understanding the FMLA. As this Note will argue, Congress, not the DOL, should make the policy decision of where to place the heavier burden of notification.

To illustrate how a heavier burden is placed on the employer, the FMLA requires employees taking foreseeable leave to provide thirty days notice to the employer,⁴³ but the regulations allow employees to notify employers of a need for unforeseeable leave "as soon as practicable."⁴⁴ The employee, or a spokesperson,⁴⁵ need not even mention the FMLA by name, but only needs to state that leave is needed.⁴⁶ The burden then shifts to the employer to obtain any additional information needed to determine the applicability of the FMLA.⁴⁷ The employee must comply with any information requests as quickly and comprehensively as practicable, "taking into consideration the exigencies of the situation."⁴⁸

Without proper notice from the employee, the employer can delay the requested leave.⁴⁹ In reality, the broad "as soon as practicable" language will almost never allow an employer to deny (quali-

40. See 29 C.F.R. § 825.100.00 (2000) (describing, in question and answer format, detailed procedures to comply with the broad statutory scheme).

41. 29 C.F.R. § 825.114 (2000). The FMLA itself provides a vague explanation as to what constitutes a serious health condition. See 29 U.S.C. § 2612(a)(1)(C)-(D) (1994). Under the regulations, however, a serious health condition is either inpatient care or continuing treatment by a health care provider. 29 C.F.R. § 825.114. The regulations provide a combination of factors that define "continuing treatment." See *id.*

42. 29 C.F.R. § 825.300.312 (2000).

43. 29 U.S.C. § 2612(e)(1)-(2) (1994).

44. 29 C.F.R. § 825.303(a) (2000).

45. Notice may be given by the employee's spokesperson, such as a spouse or adult family member, if the employee is unable to do so personally. 29 C.F.R. § 825.303(b).

46. 29 C.F.R. § 825.303(a); see also Timothy Stewart Bland, *The Required Content of Employees' Notice to Employers of the Need for Leave Under the FMLA*, 12 LAB. LAW. 235, 246 (1996) (advising employers to be "flexible and generous" when evaluating employee leave requests since employers face considerable uncertainty in determining whether to make further inquiry).

47. 29 C.F.R. § 825.303(b).

48. *Id.*

49. 29 C.F.R. § 825.304(b) (2000).

fyng) leave in exigent circumstances.⁵⁰ This language seems to recognize that, in emergency situations, providing the proper information to an employer may not be the first priority for an employee. Therefore, the regulation once again places more of a burden on the employer to discharge FMLA rights because the employer must wait for the employee to clarify his situation before determining whether the FMLA applies at all.

The DOL regulations, however, impose significant notice requirements on employers in addition to the posting requirement contained in the text of the FMLA.⁵¹ For example, employers must include FMLA information in employee handbooks.⁵² Furthermore, employers must provide written notice detailing specific expectations and obligations each time an employee requests leave.⁵³ This written notice must include information concerning issues such as medical certification requirements, substitution of paid leave, employee responsibility for health benefit premium payments, and the employee's right to restoration to the same or an equivalent job upon return from leave.⁵⁴

A related regulation, 29 C.F.R. § 825.110(d), requires employers to inform employees whether they meet the eligibility test for FMLA protection.⁵⁵ If the employer fails to advise the employee whether he or she is eligible for FMLA leave prior to the date the requested leave is to commence, the employee will be deemed eligible.⁵⁶ In this case, the employer may not deny the leave, even though the employee may not even be legally entitled to FMLA protection.⁵⁷

50. For example, in *McNeela v. United Air Lines, Inc.*, the court held the notice regulation was satisfied when an employer *knew* that an employee had sustained a work-related accident with a serious neck injury. No. 98 C 1433, 1999 WL 377831, at *5 (N.D. Ill. May 10, 1999). Even though the employee repeatedly refused to return the employer's phone calls, the court ruled that refusal to provide more information did not affect any ruling on the notice requirement. *See id.* at *6. The court, instead, instructed employers to require a medical certification to resolve problems of uncommunicative employees and gain more information on the seriousness of the employee's condition. *See id.*

51. 29 U.S.C. § 2619(a) (1994).

52. 29 C.F.R. § 825.301(a)(1) (2000).

53. 29 C.F.R. § 825.301(b)(1).

54. *Id.*

55. 29 C.F.R. § 825.110(d) (2000). An "eligible employee" is an employee of a covered employer who has been employed by the employer for at least twelve months and has worked at least 1250 hours of service during the twelve-month period immediately preceding the commencement of the leave. 29 C.F.R. § 825.110(a)(1)-(2). The employer must confirm whether or not the employee has worked the requisite twelve months and 1250 hours. 29 C.F.R. § 825.110(d).

56. *Id.*

57. *Id.*

The regulation at issue in this Note, 29 C.F.R. § 825.208(c), utilizes a similar approach to that used in 29 C.F.R. § 825.110(d). Section 825.208(c) requires employers to notify employees when leave will count against the employee's annual FMLA leave entitlement, thus "designating" the leave as FMLA leave.⁵⁸ Problems under this regulation arise when employers begin substituting paid leave for FMLA leave, allowing the employer's more generous leave programs to run concurrently with their FMLA obligations.⁵⁹ In such cases, it may be unclear whether the employer-provided leave also counts as FMLA leave. To solve the problem, 29 C.F.R. § 825.208(c) mandates that employer designation of paid leave as FMLA leave must occur before the leave commences, unless the employer does not have sufficient information to make the FMLA designation.⁶⁰ Significantly, if the employer does not notify the employee that paid leave also counts as FMLA leave, the absence preceding the notice to the employee of the designation *does not count* toward the employee's twelve-week FMLA leave entitlement.⁶¹

D. The Incongruity Between the FMLA and the Regulations: An Illustration

The following hypothetical situation helps clarify the abstract rules of the DOL regulations. Suppose Jane works for Acme Inc., a company that provides employees with two weeks of paid vacation time and one week of paid sick days. Jane has accrued all three weeks of this paid leave time. As the FMLA permits,⁶² Acme requires that employees substitute accrued vacation and sick days for unpaid FMLA leave.

When Jane decides to take maternity leave, she properly notifies Acme within thirty days of her intended leave. Acme must then notify Jane, in writing, that her accrued three weeks paid leave will run concurrently with her twelve weeks unpaid FMLA leave.⁶³ Jane will then receive twelve total weeks of leave, as man-

58. See 29 C.F.R. § 825.208(c) (2000).

59. Requiring substitution, as mentioned above, is merely an option for employers. If an employer does not require substitution, the employee may also elect to substitute paid leave for unpaid leave. 29 U.S.C. § 2612(d)(2) (1994).

60. 29 C.F.R. § 825.208(c). For instance, the employer may not have sufficient information to designate leave as FMLA leave when the employee has failed to comply with the employee's notice requirements due to exigent circumstances.

61. *Id.*

62. § 2612(d)(2)(B).

63. 29 C.F.R. § 825.208(c).

dated by the statute, but three of those weeks will be paid as employer-provided leave.

Suppose, however, that Acme fails to notify Jane properly that her paid leave runs concurrently with unpaid FMLA leave until the twelfth week of her leave. Jane may be under the impression that she not only receives her accrued paid leave, but also another twelve weeks of unpaid leave mandated by the FMLA, for a total of fifteen weeks leave. She might not know that she was expected to return to work after twelve weeks in order to retain her FMLA right to reinstatement. Under the current regulations, those twelve weeks preceding proper notice would not count toward Jane's FMLA entitlement;⁶⁴ only a proper notification triggers the running of the twelve-week clock. Thus, under 29 C.F.R. § 825.208(c), Acme must then allow Jane an additional twelve weeks of leave, for a total of twenty-four weeks.⁶⁵ After twenty-four weeks, Acme must restore Jane to her original, or an equivalent, position.⁶⁶

This incongruity has disturbed some courts, which have accurately noted that the FMLA intended to provide only twelve weeks of leave per year.⁶⁷ The question thus becomes one of statutory construction and administrative law to determine whether Congress could have possibly intended the interpretation espoused by the DOL.⁶⁸

64. *Id.*

65. *Id.*

66. 29 U.S.C. § 2614(a)(1) (1994) (providing a right to restoration).

67. *E.g.*, *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000) ("Entirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to additional leave under the FMLA when the employer's leave plan already provides for twelve weeks of FMLA qualifying leave."), *cert. granted*, 121 S. Ct. 2548 (2001) (mem.); *Cox v. AutoZone, Inc.*, 990 F. Supp. 1369, 1373 (M.D. Ala. 1998) ("Plaintiff is, in effect, converting FMLA from a statute which provides a minimum, a baseline, of federally-mandated unpaid leave, into a statute which mandates an additional [twelve] weeks of leave for all employees This is inconsistent with the text and the guarantees of the statute.").

68. *Ragsdale*, 218 F.3d at 936 ("In all cases, although the level of deference afforded an agency interpretation may appear high, the court remains the final authority in matters of statutory interpretation and 'must reject administrative constructions which are contrary to clear congressional intent.'").

III. THE CIRCUIT SPLIT

A. "Congress Was Clear": Cases Invalidating 29 C.F.R. § 825.208(c)⁶⁹1. *McGregor v. AutoZone, Inc.*: The Eleventh Circuit

The Eleventh Circuit was the first circuit court to address the validity of 29 C.F.R. § 825.208(c). The Middle District of Alabama had already expressed judicial scorn for the effects of this regulation in holding it invalid, and in 1998, the Eleventh Circuit strongly affirmed that holding.⁷⁰

In *McGregor v. AutoZone, Inc.*, plaintiff Alicia Cox,⁷¹ worked as a manager in the defendant's AutoZone store for over three years.⁷² Cox commenced maternity leave under AutoZone's disability pay plan, which provided managers with full salary for thirteen weeks of disability.⁷³ Cox alleged that AutoZone never informed her that this paid leave would run concurrently with her FMLA-mandated leave.⁷⁴ Cox did not return to work until after fifteen weeks of maternity leave.⁷⁵ Upon her return, AutoZone demoted her for exceeding both her employer-provided the twelve weeks of FMLA-protected leave.⁷⁶ Cox claimed that her employer-provided leave should run consecutively with her FMLA leave due to im-

69. Agreeing with the reasoning of *McGregor* and *Ragsdale*, detailed below, many district courts have followed suit in invalidating 29 C.F.R. § 825.208(c). See, e.g., *Fulham v. HSBC Bank USA*, No. 99 Civ. 11054 (JGK), 2001 U.S. Dist. LEXIS 13570 (S.D.N.Y. Sept. 6, 2001); *Howell v. Standard Motor Prods., Inc.*, No. 4:99-CV-987-E, 2001 U.S. Dist. LEXIS 12332, at *9-10 (N.D. Tex. Aug. 10, 2001); *Daley v. WellPoint Health Networks, Inc.*, No. Civ.A. 99-CV-11464RGS, 2001 WL 539463, at *5 (D. Mass. May 14, 2001); *Twyman v. Dilks*, No. 99-4378, 2000 U.S. Dist. LEXIS 12942, at *33 (E.D. Penn. Sept. 6, 2000); *Schloer v. Lucent Tech. Inc.*, No. 99-3392, 2000 U.S. Dist. LEXIS 10146, at *2 (D. Md. Jan. 21, 2000); *Neal v. Children's Habilitation Ctr.*, No. 97 C 7711, 1999 U.S. Dist. LEXIS 14762, at *6 (N.D. Ill. Sept. 10, 1999).

70. See *Cox v. AutoZone, Inc.*, 990 F. Supp. 1369, 1371 (M.D. Ala. 1998), *aff'd*, *McGregor v. AutoZone, Inc.* 180 F.3d 1305, 1309 (11th Cir. 1999).

71. At the appellate court level, the trustee for Cox's bankruptcy, *McGregor*, was substituted as the real party in interest. *McGregor*, 180 F.3d at 1306 n.1.

72. See *Cox*, 990 F. Supp. at 1371.

73. *Id.* The employer's leave policy was thus more generous than that required by the FMLA.

74. *Id.* AutoZone contended that the employee handbook specified that leave taken with disability pay ran concurrently with FMLA leave. *Id.* The court never resolved this factual dispute, since it invalidated the notice provision.

75. *Id.*

76. *Id.*

proper notice under 29 C.F.R. § 825.208(c), and brought suit for lost wages and benefits, liquidated damages, and reinstatement.⁷⁷

In granting summary judgment for AutoZone, the district court emphasized that the FMLA no longer protected Cox because Cox had taken the full twelve weeks of leave authorized in the statute.⁷⁸ This same logic has been used in other cases reasoning that a plaintiff may not sue under the FMLA if the plaintiff had received the substantive rights (the twelve weeks leave) offered under the FMLA.⁷⁹ The *Cox* opinion did not rest on this reasoning, however; it held 29 C.F.R. § 825.208(c) invalid under the *Chevron* test.⁸⁰

In the unanimous *Chevron* decision, the Supreme Court established a two-step test applicable to judicial review of agency interpretations of agency-administered statutes.⁸¹ In reviewing a regulation, the court must first examine whether Congress has directly spoken to the precise question at issue.⁸² If the intent of Congress is clear, the inquiry ends and the court must give effect to the congressional intent.⁸³ If, however, the statute is silent or ambiguous with respect to the specific issue, the court must decide whether the agency's interpretation is based upon a reasonable construction of the statute.⁸⁴ If so, the court must defer to the agency interpretation and uphold the regulation.⁸⁵

The district court opinion seemed to suggest that this regulation failed step one of the *Chevron* test, reasoning that Congress had spoken directly to the precise question at issue.⁸⁶ By examining the legislative history of the FMLA, the district court found a "clear intent of Congress to protect only those workers who take twelve or

77. *Id.* at 1370-71.

78. *Id.* at 1373.

79. *E.g.*, *Kur v. Fox Valley Press, Inc.*, No. 96 C 3685, 1997 WL 89140, at *3-4 (N.D. Ill. Feb. 20, 1997) ("FMLA allows 12 weeks of leave. . . . We take judicial notice of the fact that Plaintiff's first leave period was 12 weeks in length. Therefore, [the plaintiff] did not have a FMLA right to the second leave period. Any harassment that resulted from her plans to take a second leave is not actionable under the FMLA.")

80. *Cox*, 990 F. Supp. at 1381; *McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999).

81. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* The *Chevron* test advocates strong deference to agency interpretations. *Id.* at 844. "If this choice [in policy] represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

86. *See Cox v. AutoZone, Inc.*, 990 F. Supp. 1369, 1376 (M.D. Ala. 1998) ("There is not enough ambiguity in FMLA to justify the regulations which the Secretary has written.")

fewer weeks of leave."⁸⁷ Therefore, as to the amount of leave, Congress did not leave a "gap" for the DOL to fill.⁸⁸ The district court also noted, however, that this regulation would fail the second step of *Chevron*, even if Congress had left an ambiguity, because the regulation is "manifestly contrary to the statute."⁸⁹

On appeal, the Eleventh Circuit began its inquiry by examining the statutory language and legislative history of the FMLA to discern congressional intent on this issue.⁹⁰ The court found that Congress intended to provide only a baseline of twelve weeks leave and that Congress nowhere suggested that the twelve-week entitlement might be extended.⁹¹ In fact, the court pointed out, where Congress wanted explicit notice provisions with significant consequences, Congress provided for them in the statutory language.⁹²

The Eleventh Circuit also found the regulation inconsistent with the purpose of the FMLA. The FMLA explicitly aims "to balance the demands of the workplace with the needs of families . . . in a manner that accommodates the legitimate interests of employers."⁹³ Section 825.208(c), the court reasoned, did not accommodate the employers' interests because the employer might provide all twelve weeks of FMLA leave and still find itself involved in litigation.⁹⁴ Furthermore, the court found that this regulation discouraged employers from adopting leave policies more generous than the FMLA minimum standards, which conflict with the FMLA provision expressly stating that the FMLA does not discourage more generous leave policies.⁹⁵

2. *Ragsdale v. Wolverine Worldwide, Inc.*: The Eighth Circuit

In 2000, one year after *McGregor*, the Eighth Circuit followed the Eleventh Circuit in declaring 29 C.F.R. § 825.208(c) inva-

87. *Id.* at 1380.

88. *Id.* at 1381.

89. *Id.* at 1380-81.

90. *McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999).

91. *See id.*

92. *Id.* For example, the FMLA allows employers to deny restoration to "highly compensated employees," but only when the employer properly notifies an employee of the intent to deny restoration on that basis. *See id.* (quoting 29 U.S.C. § 2614(b) (1994)).

93. *Id.* (quoting 29 U.S.C. § 2601(b)(3) (1994)).

94. *Id.*

95. *See id.* (citing 29 U.S.C. § 2653 (1994) ("Nothing in this Act . . . shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act . . .")).

lid.⁹⁶ In *Ragsdale v. Wolverine Worldwide, Inc.*, plaintiff Tracy Ragsdale had requested and received seven months leave under the leave policy of Wolverine, her employer.⁹⁷ Wolverine never notified Ragsdale that this leave counted against her FMLA entitlement, and she remained away from work beyond the seven months.⁹⁸ She was subsequently terminated for exceeding her leave.⁹⁹ Ragsdale protested by requesting twelve weeks FMLA leave because she could not yet return to work.¹⁰⁰ Wolverine denied the request and Ragsdale brought suit alleging improper notice under the DOL regulations.¹⁰¹ The *Ragsdale* court agreed with the reasoning set forth in *McGregor*, holding that the DOL regulations improperly converted the FMLA's minimum of twelve weeks leave into a mandate of notice and interfered with Wolverine's more generous leave policies.¹⁰²

The *Ragsdale* court provided additional reasoning beyond that of *McGregor* that may explain why certain courts disapprove of this DOL regulation. Both courts criticized the DOL's distortion of § 2612(d)(2)(B) of the FMLA under the U.S. Code, which provides that the employee may choose, or the employer may require, the substitution of paid leave for the FMLA entitlement.¹⁰³ The *Ragsdale* court, like the Eleventh Circuit in *McGregor*, viewed this section as an explicit balance between employer and employee rights.¹⁰⁴ This section enables employees to take advantage of paid employer-provided leave while protecting the employer from having to extend more leave than permitted in its policy.¹⁰⁵

Where the *Ragsdale* court elaborated, however, was in its recognition that the balance achieved by § 2612(d)(2)(B) of the FMLA under the U.S. Code does not always require a notice provision, contrary to the DOL's interpretation.¹⁰⁶ In some cases, reasoned the court, an employer's failure to give notice would interfere

96. See *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 940 (8th Cir. 2000), cert. granted, 121 S. Ct. 2548 (2001) (mem.). This court invalidated 29 C.F.R. § 825.700(a), which merely repeats the notice provision in 29 C.F.R. § 825.208(c). *Id.*

97. *Id.* at 935.

98. *Id.*

99. *Id.*

100. See *id.* Presumably, Ragsdale could not return to work because she had not recovered sufficiently from her cancer treatments. See *id.*

101. See *id.*

102. See *id.* at 937-38.

103. See *id.* at 938; *Cox v. AutoZone, Inc.*, 990 F. Supp. 1369, 1374 (M.D. Ala. 1998).

104. See *Ragsdale*, 218 F.3d at 938.

105. *Id.*

106. *Id.*

with or deny an employee's substantive FMLA rights.¹⁰⁷ For example, if the employer failed to give proper notice, and the employee would have returned to work at the end of twelve weeks if properly notified, there would be an interference with the employee's rights.¹⁰⁸ As another example, improper notice in cases of anticipated leave would interfere with an employee's ability to plan and use future FMLA leave.¹⁰⁹ In such cases, the employee could sue the employer for lack of notice under the FMLA.¹¹⁰

The *Ragsdale* case, the court concluded, did not qualify as one in which improper notice interfered with Ragsdale's substantive FMLA rights.¹¹¹ Ragsdale admitted that even if she had known that she had exhausted her FMLA leave, she was not well enough to have returned to work at the end of her seven-month leave.¹¹² Therefore, the court held, allowing Ragsdale to recover against Wolverine for a "technical violation" would be "an egregious elevation of form over substance" because proper notice would not have provided the employee with any more protection under these specific facts.¹¹³ Even if Wolverine had provided proper notice of FMLA designation, Ragsdale could not have changed her behavior, could not have returned to work, and therefore, still would have lost her job.¹¹⁴ The court ruled that the breadth of the DOL regulations dispensed with the balancing test favored by the FMLA, and created a rigid rule that penalizes unwary employers.¹¹⁵

The Eighth Circuit, therefore, did not invalidate all notice provisions the DOL might promulgate.¹¹⁶ Rather, the court emphasized that a narrower notice regulation that tied the cause of action to interference with substantive rights could survive a challenge in the Eighth Circuit.¹¹⁷ The Eleventh Circuit, in *McGregor*, failed to include such a helpful caveat. The *McGregor* court did not consider whether the plaintiff could have returned to work after her allotted leave time.¹¹⁸ In fact, since the plaintiff in *McGregor* took maternity leave, it could be inferred that she could have returned to work had

107. *Id.* at 939.

108. *Id.* at 939-40.

109. *Id.* at 940.

110. *Id.* at 939-40.

111. *Id.* at 940.

112. *See id.* at 935.

113. *Id.* at 940.

114. *See id.*

115. *Id.* at 939.

116. *See id.*

117. *See id.*

118. *See McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999).

she known that she did not have an additional twelve weeks of leave available after her paid leave ended.¹¹⁹ Therefore, the Eleventh Circuit may have invalidated the notice provisions even if failure to give notice interfered with the employee's substantive rights. Such an interpretation of *McGregor's* holding differs significantly from the Eighth Circuit's ruling in *Ragsdale* in that *McGregor* could potentially mean that notice of FMLA designation is never required, even when lack of notice would affect an employee's substantive rights. This Note does not advocate adopting this particular interpretation of the *McGregor* rule, however, because that rule would, in many cases, directly conflict with the FMLA by encouraging employers to interfere with employees' FMLA rights, as prohibited by the statute.¹²⁰

The Supreme Court granted certiorari on the *Ragsdale* case and will hear arguments this Term.¹²¹ This Note advocates affirming the Eighth Circuit's ruling.

3. *Nolan v. Hypercom Manufacturing Resources*: The Policy Argument

The District of Arizona joined with the Eighth and Eleventh circuits in invalidating 29 C.F.R. § 825.208 with a well-reasoned policy argument in *Nolan v. Hypercom Manufacturing Resources*.¹²² In *Nolan*, the plaintiff began a medical leave of absence in November, did not receive notice of FMLA designation until January of the next year.¹²³ When the plaintiff returned to work in March, the company had eliminated his position.¹²⁴ Whether the employer had an obligation to reinstate the plaintiff depended upon when his FMLA leave began, which in turn depended on the validity of the prohibition against retroactive designation under 29 C.F.R. § 825.208(c).¹²⁵

The court in *Nolan* viewed the issue as "whether the employer or the employee bears the burden of figuring out the employment consequences" of a leave greater than twelve weeks.¹²⁶ While 29 C.F.R. § 825.208(c) provides a bright line rule, so that

119. *See id.*

120. *See* 29 U.S.C. § 2615(a) (1994) (prohibiting employer interference with the exercise of employee FMLA rights).

121. *See Ragsdale*, 218 F.3d at 933, *cert. granted*, 121 S. Ct. 2548 (2001) (mem.).

122. No. CIV 00-802-PHX-RCB, 2001 WL 378235, at *6-7 (D. Ariz. Mar. 26, 2001).

123. *Id.* at *1.

124. *Id.*

125. *See id.* at *3.

126. *Id.* at *6.

both sides understand that FMLA leave begins only after proper notice, the court reasoned that the rule did not speak to the reasonable expectations that the FMLA gives to employers and employees in general.¹²⁷ Recognizing that the FMLA represents a balance between employers and employees, the court emphasized that the FMLA actually puts some of the responsibility for calculating FMLA leave on the employee.¹²⁸

Therefore, the court held that the regulation was invalid because it had “the perverse effect of creating a game, such that employees gamble on the amount of leave they might obtain outside the twelve weeks provided by the FMLA.”¹²⁹ While the court did not explain in detail the “game” that the regulation creates, one can assume the court envisions employees staying out on leave indefinitely until they have received proper notice of FMLA designation. The court seemed to be saying that a scenario in which an employee returns to work when ready and able, instead of when forced to return, better effectuates the vision of Congress in enacting the FMLA. The court found that the game created by the DOL regulations upset the intended balance between employers’ interests in filling jobs and employees’ need for medical leave.¹³⁰ Thus, the court suggested that employees should assume more responsibility for calculating their prescribed leave periods.¹³¹

B. “Congress Left Gaps”: Cases Upholding 29 C.F.R. § 825.208(c)

1. Plant v. Morton International, Inc.: The Sixth Circuit

In *Plant v. Morton International, Inc.*, The Sixth Circuit expressly disagreed with the position above, and upheld 29 C.F.R. § 825.208(c) under the *Chevron* test.¹³² The plaintiff Plant had in-

127. *Id.*

128. *See id.* at *7 (“There is no reason why employees should not be required to understand the extent of their guaranteed leave.”). For example, employees have a duty to notify employers of foreseeable births and planned medical treatments. *Id.* (citing 29 U.S.C. § 2612(e) (1994)). The court also noted that the employee is in a much better position to anticipate leaves that will last longer than twelve weeks. *See id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. 212 F.3d 929, 936 (6th Cir. 2000). In addition, the Ninth Circuit applied 29 C.F.R. § 825.208(c) without discussion of its validity in *Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115, 1118-19 (9th Cir. 2001). In *Rowe*, the plaintiff, a salaried employee, sued for overtime pay under the Fair Labor Standards Act (“FLSA”), claiming that since her employer paid her by the hour while she worked part-time due to an ankle injury, she was classified as “exempt” under the

jured his back at work and received both a leave of absence and accommodations for his disability upon return to work.¹³³ After later aggravating his injury, Plant took another leave of absence without following any FMLA or employer-created procedures to request leave.¹³⁴ Citing poor performance on unrelated matters, Plant's employer, Morton, terminated Plant six weeks into his leave of absence.¹³⁵ Plant claimed that his termination was the result of discrimination for taking leave and brought suit under the FMLA.¹³⁶ Plant admitted that he would not have been able to return to work within twelve weeks, but argued that his FMLA leave entitlement never began to run since Morton never notified him that it designated his leave as FMLA leave.¹³⁷ Therefore, Plant argued that he should have had additional leave time beyond twelve weeks.¹³⁸

The Sixth Circuit held that 29 C.F.R. § 825.208(c) was valid and applicable in this case.¹³⁹ Applying the *Chevron* test, the court first noted the FMLA's silence as to the notice an employer must give an employee before designating paid leave as FMLA leave.¹⁴⁰ The court then held that 29 C.F.R. § 825.208(c) evinced a reasonable understanding of the FMLA, reflecting Congress's concern with providing ample notice to employees of their rights under the Act.¹⁴¹ Furthermore, the *Plant* court ruled that allowing more than twelve weeks leave in some circumstances did not manifestly contradict Congress's intent to mandate a minimum of twelve weeks leave.¹⁴² The court emphasized the word "minimum" in justifying and approving of the possibility that an employee may receive more than twelve weeks of leave, especially since this regulation would only provide more than twelve weeks leave upon "an employer's failure to notify employees that the clock has started to run on their allot-

FLSA and entitled to overtime. *Id.* at 1117. The employer countered that it only paid her by the hour because she worked a reduced schedule, pursuant to the FMLA, and therefore, she was not classified as "exempt." *Id.* (citing § 2612(c) and 29 C.F.R. § 825.206(a), which provide that deducting salary for intermittent FMLA leave does not affect the exempt status of an employee). The court, citing 29 C.F.R. § 825.208(c), held the leave to be FMLA qualifying even though the employer had provided no notice to the employee of FMLA designation. *Id.* at 1118-19.

133. *See Plant*, 212 F.3d at 932.

134. *See id.*

135. *See id.*

136. *See id.* at 933.

137. *Id.* at 934.

138. *Id.*

139. *Id.* at 935.

140. *Id.*

141. *Id.*

142. *Id.* at 935-36.

ted period of leave."¹⁴³ Accordingly, even though Plant would not have been able to return to work after twelve weeks, his FMLA claim survived summary judgment.¹⁴⁴ The court did not discuss whether, upon remand, Plant's claim could prevail without a showing that Morton interfered with his FMLA rights by failing to give notice under 29 C.F.R. § 825.208(c).¹⁴⁵

2. Lower Courts

Two district courts had previously upheld 29 C.F.R. § 825.208(c) under similar facts, but using more elaborate reasoning than *Plant*.¹⁴⁶ In *Chan v. Loyola University Medical Center*, the plaintiff contended that her employer did not notify her until approximately twelve weeks into her leave that her paid sick leave also counted toward her FMLA entitlement.¹⁴⁷ As a result, the plaintiff alleged that she continued to request extensions of her leave, thinking that her employer would still restore her position upon her return to work.¹⁴⁸ Instead, her employer terminated her at the end of her extended leave.¹⁴⁹

In applying the *Chevron* test, the *Chan* court first recognized clear gaps in the FMLA.¹⁵⁰ One gap was regarding employee notice of substitution of paid leave for FMLA leave;¹⁵¹ the other gap concerned the question of when FMLA leave begins.¹⁵² Next, the court noted that the FMLA authorized the DOL to prescribe such regulations as are necessary to implement the FMLA.¹⁵³ Because the

143. *Id.*

144. *Id.* at 934, 936.

145. See *Ragsdale v. Wolverine Worldwide Inc.*, 218 F.3d 933, 939-40 (8th Cir. 2000) (holding that notice regulations that penalized an employer who failed to give proper notice of FMLA designation, and thereby interfered with the employee's substantive FMLA rights, were valid), *cert. granted*, 121 S.Ct. 2548 (2001) (mem.).

146. See *Ritchie v. Grand Casinos of Miss., Inc.*, 49 F. Supp. 2d 878, 881 (S.D. Miss. 1999); *Chan v. Loyola Univ. Med. Ctr.*, No. 97 C 3170, 1999 WL 1080372, at *10 (N.D. Ill. Nov. 23, 1999).

147. 1999 WL 1080372, at *3.

148. *Id.*

149. *Id.*

150. *Id.* at *7.

151. *Id.* ("The FMLA provides that an employer or an employee may substitute paid leave for unpaid leave, but it does not specify how or when an employer or employee must inform the other that paid leave will be substituted for unpaid leave."); 29 U.S.C. § 2612(d)(2) (1999) (discussing substitution of paid leave).

152. *Chan*, 1999 WL 1080372, at *7 ("The FMLA does not specify when the twelve weeks of FMLA leave begin or how FMLA leave is initiated."); § 2612(a)(1) (establishing twelve-week leave entitlement).

153. *Chan*, 1999 WL 1080372, at *8.

FMLA left such gaps and delegated to the DOL the authority to fill them in, the court, in accordance with *Chevron*, would only overturn regulations that were “arbitrary, capricious, or manifestly contrary to the statute.”¹⁵⁴

The *Chan* court held that the regulations did not rise to this arbitrariness standard, and instead “reflected a reasonable accommodation of conflicting policies.”¹⁵⁵ The *Chan* court did not agree with the *McGregor* opinion that 29 C.F.R. § 825.208(c) skewed the intended FMLA balance in favor of employees at the expense of employer interests.¹⁵⁶ First, the court observed that employers could easily avoid granting more than twelve weeks of leave by complying with the “modest burden” of a flexible notice requirement.¹⁵⁷ Moreover, the *Chan* court considered the regulations to be valuable because they had the salutary effect of motivating employers to make employees aware of their rights under the FMLA.¹⁵⁸ The court found that the regulations helped to prevent misunderstandings, such as that in *Chan*, where an employee erroneously believed her job was safe and failed to return to work under circumstances where it might have been possible.¹⁵⁹ This reasoning echoes the *Ragsdale* court’s caveat that notice regulations with severe consequences make more sense when failure to give notice interferes with an employee’s substantive FMLA rights.¹⁶⁰

Ritchie v. Grand Casinos of Mississippi, Inc. similarly upheld 29 C.F.R. § 825.208(c) as a permissible construction of the FMLA.¹⁶¹ The *Ritchie* court characterized the gap in the FMLA in a slightly different manner, but its explanation is instructive. Acknowledging that the FMLA provides only twelve weeks of leave, the court could not ascertain from the statute what event “triggers” the twelve-week period calculation.¹⁶² Given this silence, the court held that

154. *Id.* (quoting *Chevron U.S.A., Inc v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

155. *Id.* at *10 (quoting *Chevron*, 467 U.S. at 845).

156. *See id.*

157. *Id.* at *9. The notice requirement is flexible because the employer may notify the employee orally or in writing. 29 C.F.R. § 825.208(b)(2) (2000). Furthermore, if the employer cannot ascertain whether leave is for an FMLA-qualifying reason, the employer may retroactively designate leave as FMLA leave. 29 C.F.R. § 825.208(c)-(d) (2000).

158. *Chan*, 1999 WL 1080372, at *9.

159. *Id.*

160. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938-40 (8th Cir. 2000), *cert. granted*, 121 S.Ct. 2548 (2001) (mem.).

161. 49 F. Supp. 2d 878, 881 (S.D. Miss. 1999).

162. *Id.* (“For example, does the [twelve]-week entitlement begin when the employee first takes leave related to an unforeseeable ‘serious medical condition’ or when the employer first

the DOL acted within its statutory authority in promulgating 29 C.F.R. § 825.208(c) under the first step of the *Chevron* test.¹⁶³ Without discussion, the court in *Ritchie* further held that the regulation was not “arbitrary, capricious, or manifestly contrary to the statute” under the second step of the *Chevron* test.¹⁶⁴

IV. RESOLUTION WITHOUT REGARD TO THE *CHEVRON* TEST

The foregoing cases demonstrate the differing views of courts on the purpose of notice requirements such as 29 C.F.R. § 825.208(c). The *McGregor* and *Plant* courts seemed to suggest that 29 C.F.R. § 825.208(c) functions as a “punitive” measure, regardless of interference with the plaintiff’s substantive rights, to encourage employers to give proper notice. On the other hand, the *Ragsdale* and *Chan* courts clearly felt that failure to give notice, under some circumstances, constitutes interference with FMLA rights, which gives rise to a cause of action under § 2615(a) of the FMLA under the U.S. Code.¹⁶⁵ These courts refused to punish employers without proof of interference.¹⁶⁶ Cases where a lack of notice constituted “interference,” however, arose long before courts began questioning the validity of 29 C.F.R. § 825.208(c).¹⁶⁷

These “interference cases” utilize reasoning similar to that of the Eighth Circuit in *Ragsdale* but they do not examine the validity of 29 C.F.R. § 825.208(c) or summarily uphold the regulation. These cases develop a rule that allows an employee to bring a cause of action for failure to notify of FMLA designation only if failure to notify caused the employee to forfeit substantive FMLA rights.¹⁶⁸ If

receives notice. Is the [twelve]-week entitlement period tolled during certification [from a health-care professional], and if so, can FMLA leave be counted retroactively?”).

163. *Id.*

164. *Id.*

165. See 29 U.S.C. § 2615(a) (1994) (“It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title.”).

166. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938-40 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 2548 (2001) (mem.); *Chan v. Loyola Univ. Med. Ctr.*, No. 97 C 3170, 1999 WL 1080372, at *9 (N.D. Ill. Nov. 23, 1999).

167. See *Fry v. First Fid. Bancorp.*, No. 95-6019, 1996 U.S. Dist. LEXIS 875, *1 (E.D. Pa. Jan. 30, 1996).

168. In addition to the *Fry* and *Mora* cases, see *Longstreth v. Copple*, 189 F.R.D. 401, 405-06 (N.D. Iowa 1999), which allowed a plaintiff’s case to proceed to the jury when plaintiff claimed that the sole reason she exceeded her FMLA leave was due to her employer’s failure to notify her that her leave was designated as FMLA leave. *Cf. Wilson v. Lemington Home for the Aged*, 159 F. Supp. 2d 186, 193-94 (W.D. Penn. 2001) (holding that employer violated the interference provision of the FMLA when it deemed an employee to have quit for failure to provide a medical certification because employer had not provided employee with written notification detailing specific FMLA expectations and obligations); *Klaiber v. Rinaldi*, No. 199CV00541, 2001 WL

the employee could have returned to work at the end of the leave, but did not do so in reliance on the employer's lack of notice, the employee has a valid cause of action for interference.¹⁶⁹

For example, in *Fry v. First Fidelity Bancorporation*, a district court held that an employee had an interference claim based on failure to notify.¹⁷⁰ The plaintiff, Fry, began taking paid vacation and disability leave, which allowed her a little over twelve weeks of paid leave, in anticipation of the birth of her child.¹⁷¹ At the end of this period, Fry requested an additional sixteen weeks of unpaid leave.¹⁷² The employer offered the sixteen-week unpaid leave as "additional family leave," as detailed in the employer's employee handbook and family leave application.¹⁷³

Upon returning to work after a total of approximately twenty-eight weeks leave, Fry's employer did not reinstate her to her former, or an equivalent, position, as required by the FMLA.¹⁷⁴ The employer argued that after Fry took twelve weeks of leave, the employer was no longer obligated to grant her the substantive protections of the FMLA.¹⁷⁵ Although the employer claimed to have sent Fry an explanation of its family leave policy, which stated that the first twelve weeks of the sixteen-week unpaid leave counted as FMLA leave, Fry denied receiving such notice.¹⁷⁶ As a result, Fry claimed that her employer misled her into requesting the additional

823529, at *5-6 (M.D.N.C. June 20, 2001) (holding that plaintiffs cannot maintain claim of FMLA violation without proof that plaintiffs suffered some sort of measurable injury as a result of violation).

169. If the employee is unable to return to work, obviously an interference claim will not stand because the employer is not obligated to restore the position of an employee who is unable to perform the essential functions of the position. 29 C.F.R. § 825.214(b) (2000) ("If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA.").

170. *Fry*, 1996 U.S. Dist. LEXIS 875, at *22. The facts in *Fry* occurred when interim regulations to the FMLA were in effect, but the interim regulations were substantively the same as the current regulations for purposes of notice discussions.

171. *Id.* at *3-4.

172. *Id.* at *4.

173. *Id.* at *2-3.

174. *Id.* at *4.

175. *Id.* at *8-9.

176. *Id.* at *4-5. Apparently, this particular employer did not require Fry to substitute her paid leave as FMLA leave, an option granted by the FMLA. 29 U.S.C. § 2612 (1994) ("An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid . . . leave . . . for leave provided under [the FMLA].") (emphasis added). This employer did, however, require Fry to substitute the first twelve weeks of the additional sixteen-week unpaid leave as "FMLA leave." *Fry*, 1996 U.S. Dist. LEXIS 875, at *2-3. According to the DOL regulations, this substitution triggers a notice requirement. See 29 C.F.R. § 825.208(c) (2000).

leave offered by her employer in excess of the FMLA mandate.¹⁷⁷ Therefore, according to Fry, the employer interfered with the exercise of Fry's FMLA right to reinstatement by causing her to forfeit FMLA protection after twelve weeks of unpaid leave.¹⁷⁸

The court agreed that Fry did have a cause of action for interference.¹⁷⁹ First, the court carefully noted that Fry did not claim FMLA protection after sixteen weeks of leave.¹⁸⁰ Rather, the court explained, Fry only claimed that the defendant's failure to explain its leave policy led her to believe that the employer offered more leave with guaranteed reinstatement than required by the FMLA.¹⁸¹ This understanding reflects the *McGregor* court's concern that the notice regulation could allow employees FMLA protection to continue after twelve weeks of leave, which conflicts with the explicit twelve-week minimum in the statutory language.¹⁸² The *Fry* court addressed this concern by clarifying that plaintiffs bringing interference claims for lack of notice do not necessarily claim a right to more than twelve weeks of leave.¹⁸³ These plaintiffs simply assert the right to receive notice that they are using up their FMLA entitlement, so they can choose whether to come back to work.¹⁸⁴

Second, the court refused to grant summary judgment.¹⁸⁵ The court explicitly held that if an employer fails adequately to notify its employees of the impact of its own family leave policies on FMLA rights, such conduct can constitute interference with an employee's FMLA rights, if it causes an employee unwittingly to forfeit the protection of the FMLA.¹⁸⁶ The court could not, however, deter-

177. *Fry*, 1996 U.S. Dist. LEXIS 875, at *10-11.

178. *Id.* at *11.

179. *Id.*

180. *Id.*

181. *Id.* at *12.

182. See *McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999).

183. See 1996 U.S. Dist. LEXIS 875, at *11 ("Contrary to defendant's argument, we find nothing in plaintiff's complaint or in the record which suggests that plaintiff claims that she was absolutely entitled to the full protection of the FMLA after sixteen weeks of leave.")

184. *Id.* at *11-12 ("Rather, [plaintiff] contends that defendant's failure to fully and clearly explain its FMLA policies led her to believe that her employer offered more leave with guaranteed reinstatement than is required by the FMLA, a policy which would certainly be consistent with the statute.")

185. *Id.* at *21-22.

186. *Id.* at *12-13; see also *Dirham v. Van Wert County Hosp.*, No. 3:99cv07485, 2000 U.S. Dist. LEXIS 6417, at *8 (N.D. Ohio Mar. 3, 2000) (denying employer's motion to dismiss when employee claimed that she exceeded her FMLA leave because she did not know that she was using her FMLA leave).

mine as a matter of law whether this employer's notice did indeed mislead the employee.¹⁸⁷

Similarly, the plaintiff in *Mora v. Chem-tronics, Inc.* did not receive all of the notice required by the FMLA and DOL regulations.¹⁸⁸ As a result, Mora took extensive intermittent leave to care for his seriously ill son, without properly notifying his employer of the need for leave.¹⁸⁹ Mora brought suit against his employer after being terminated for excessive absences.¹⁹⁰ The court allowed Mora's case to proceed to trial so that a jury could assess whether the employer's inadequate notice caused Mora to forfeit any FMLA rights.¹⁹¹

Agreeing with *Fry*, the *Mora* court viewed this case as an interference claim for lack of notice.¹⁹² First, the court emphasized that the "point of having a notice requirement is to ensure that an employee understands his or her rights and does not forfeit them unwittingly."¹⁹³ Therefore, the court reasoned, an interpretation of the FMLA that allows employees to recover for notice violations when the employee was adequately informed by other means would make the FMLA "unnecessarily harsh."¹⁹⁴ Following on that observation, the *Mora* court pointed out that one violation of merely one of the notice requirements in the FMLA or DOL regulations would not automatically give rise to an interference claim.¹⁹⁵ Instead, the court reviewed the adequacy of all of the notices utilized by the employer to assess whether Mora truly understood his rights and responsibilities under the FMLA.¹⁹⁶

Further, the court assessed whether Mora's understanding (or misunderstanding) of his FMLA rights caused him to forfeit any rights.¹⁹⁷ In this case, the court found that the jury could find two

187. See *Fry*, 1996 U.S. Dist. LEXIS 875, at *17. At the time of publication, research did not reveal that the *Fry* case ever resulted in an opinion on the merits after this disposition.

188. See *Mora v. Chem-tronics, Inc.*, 16 F. Supp. 2d 1192, 1227 (S.D. Cal. 1998). The court catalogued the employer's notice deficiencies, including failure to hang a poster listing FMLA rights, failure to provide a detailed written description of FMLA rights and responsibilities upon an employee's request for leave, failure to include sufficient information in the employee manual, and failure to educate human resource employees fully to respond to employee questions regarding the FMLA. See *id.* at 1220-27.

189. See *id.* at 1199.

190. See *id.*

191. See *id.* at 1234.

192. See *id.* at 1220.

193. *Id.*

194. *Id.*

195. *Id.*

196. See *id.* at 1220-28.

197. See *id.* at 1227.

possible interferences with Mora's rights.¹⁹⁸ First, lack of notice might have prevented Mora from using accrued vacation or sick time to care for his son, the use of which would not have counted as absences and led to his termination.¹⁹⁹ Second, Mora alleged that lack of notice caused him to not satisfy his own notice requirement under the FMLA, which presumably would have triggered his employer to provide more detailed information regarding his FMLA rights and responsibilities.²⁰⁰

One district court, ruling against an employee in an interference case, listed some additional situations where lack of notice would constitute interference with FMLA rights.²⁰¹ These situations mirror the caveat in *Ragsdale*, in which the Eighth Circuit found that certain notice regulations could pass the *Chevron* test when the plaintiff could prove interference.²⁰² For example, this court wrote that if an employee's need for leave was anticipated or if the employee needed leave to care for a family member, lack of notice would interfere with the employee's ability to schedule this leave for holidays or other periods of time that would not count as absences.²⁰³ Furthermore, the employee caring for a family member could arrange for other people to care for the relative if the employee knew the amount of FMLA leave already used.²⁰⁴ Finally, where an employee needs less than twelve weeks of leave, lack of notice could interfere with the management of future leave by causing the employee unwittingly to use more time than necessary for the present leave.²⁰⁵

More often, courts hold that a particular case of failure to notify does not constitute interference with FMLA rights. Cases holding that the employee suffered no "interference" usually follow one of two fact patterns that lack a causal connection between the lack of notice and the employee's decisions regarding leave. The first occurs when the employee could not return to work at the end

198. *Id.*

199. *Id.* at 1227-28.

200. *Id.* at 1227. Because of genuine issues of fact, the court did not rule on these causal connections as a matter of law. *Id.* at 1228.

201. See *Donnellan v. N.Y. City Transit Auth.*, No. 98 Civ. 1096, 1999 U.S. Dist. LEXIS 11103, at *14 (S.D.N.Y. July 20, 1999) (holding that lack of notice in this case did not interfere with the plaintiff's rights because she could not return to work at the end of twelve weeks anyway; and, therefore, 29 C.F.R. § 825.208(c) did not apply to the present situation); see also *Holmes v. e.spire Communications, Inc.*, 135 F. Supp. 2d 657, 665-66 (D. Md. 2001) (same).

202. See 218 F.3d 933, 939-40 (8th Cir. 2000), cert. granted, 121 S. Ct. 2548 (2001) (mem.).

203. See *Donnellan*, 1999 U.S. Dist. LEXIS 11103, at *14.

204. *Id.*

205. *Id.*

of the leave, and therefore, did not forfeit substantive FMLA rights.²⁰⁶ In other words, even if the employer had complied with a notice regulation, the employee's behavior and leave schedule would not have changed. As a result, the employee received full protection under the FMLA by receiving twelve weeks leave and the employer would no longer have FMLA obligations toward that employee, such as reinstatement, after twelve weeks.

The second situation occurs when the employee knew of FMLA rights despite the employer's failure to notify under one of the DOL regulations, and therefore, did not rely on the (violated) notice requirement to exercise substantive FMLA rights.²⁰⁷ For example, the district court in *Voorhees v. Time Warner Cable National Division* granted summary judgment for the employer when, despite a genuine issue of material fact regarding whether an employee received notice under 29 C.F.R. § 825.208(c), the employee testified that she understood that her leave of absence counted as FMLA leave.²⁰⁸

A few of these interference cases uphold 29 C.F.R. § 825.208(c) as a valid interpretation of the FMLA. For example, the court in *Longstreth v. Copple*, similar to the Eighth Circuit in *Ragsdale*, narrowly construed *McGregor*.²⁰⁹ The *Longstreth* court distinguished the present case from *McGregor* in that the plaintiff in *McGregor* never stated that she would have returned to work within twelve weeks if she had known her leave was designated as FMLA leave.²¹⁰ Furthermore, the court narrowly construed *McGregor* to invalidate only those portions of 29 C.F.R. § 825.208 that convert the minimum mandate of unpaid leave into an enti-

206. *E.g.*, *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 162 (2d Cir. 1999); *Donnellan*, 1999 U.S. Dist. LEXIS 11103, at *13; *Santos v. Shields Health Group*, 996 F. Supp. 87, 93-94 (D. Mass. 1998); *see also* 29 C.F.R. § 825.214(b) (2000) ("If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA.").

207. *See, e.g.*, *Mora v. Chem-tronics, Inc.*, 16 F. Supp. 2d 1192, 1220 (S.D. Cal. 1998) (holding that violation of one notice requirement does not automatically give rise to an interference claim); *Voorhees v. Time Warner Cable Nat'l Div.*, No. 98-1460, 1999 U.S. Dist. LEXIS 13227, at *26 (E.D. Pa. Aug. 26, 1999); *cf.* *Howell v. Standard Motor Prods., Inc.*, No. 4:99-CV-987-E, 2001 U.S. Dist. LEXIS 12332, at *10 (N.D. Tex. Aug. 10, 2001) (holding that where employee handbook clearly stated that FMLA leave is the only leave policy in place, there is no need for employer to notify employee of FMLA designation because the leave could not have been anything else).

208. *See Voorhees*, 1999 U.S. Dist. LEXIS 13227, at *24-27.

209. *Longstreth v. Copple*, 189 F.R.D. 401, 404 (N.D. Iowa 1999).

210. *Id.* In an affidavit, the plaintiff in *Longstreth* stated that had she been notified that her leave was designated as FMLA leave, she would have returned to work at the end of the twelve weeks. *Id.*

tlement to an additional twelve weeks unless the employer notifies the employee that he or she was using FMLA leave.²¹¹ The *Longstreth* court apparently interpreted *McGregor* in a manner similar to the *Ragsdale* court's reasoning, stating that violation of the notice provisions would not result in a cause of action unless the violation interfered with the employee's substantive rights.²¹²

Most significantly, the *Fry* court premised its analysis of the notice regulations on the understanding that violation of regulations promulgated under a statute gives rise to a cause of action under the statute itself.²¹³ Without mentioning the *Chevron* test, the *Fry* court cited a case that held that "substantive agency" regulations have the force of law if authorized by Congress and promulgated to implement a statute."²¹⁴ Since section 2654 of the FMLA clearly directed the Secretary of Labor to prescribe regulations necessary to implement the statute, the court concluded that the notice regulation in the DOL regulations was substantive in nature and therefore gave rise to a cause of action for interference with FMLA rights.²¹⁵ The court did not engage in any further discussion of the DOL's authority to prescribe this particular regulation and seemed to accept the regulation as valid.

Donnellan v. New York City Transit Authority, a later case discussing interference and the validity of 29 C.F.R. § 825.208(c), also upheld the regulation.²¹⁶ The Secretary of Labor submitted an amicus brief in that case arguing that the agency interpretation of the regulation did not redefine or expand the substantive rights of the statute (as the *McGregor* court accused the agency of doing), but only addressed the aspect of notice.²¹⁷ The *Donnellan* court gave the Secretary's interpretation controlling weight unless "plainly erroneous or inconsistent with the regulation," even though the interpretation was advanced in legal briefs to the court.²¹⁸ Since the court read the notice regulation as requiring additional leave only when the lack of notice interfered with the plaintiff's rights, the

211. *Id.*

212. See *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939-40 (8th Cir. 2000), cert. granted, 121 S.Ct. 2548 (2001) (mem.).

213. See No. 95-6019, 1996 U.S. Dist. LEXIS 875, at *9 (E.D. Pa. Jan. 30, 1996).

214. *Id.* (citing *United States v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232, 1238 (3d Cir. 1986)).

215. *Id.* at *9-10.

216. See No. 98 Civ. 1096, 1999 U.S. Dist. LEXIS 11103, at *13 (S.D.N.Y. July 20, 1999).

217. *Id.*

218. *Id.* at *13 n.9 (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997)).

regulation did not contradict the statute, and the court deferred to the Secretary's interpretation.²¹⁹

The Middle District of Pennsylvania, in *Gadinski v. Shamokin Community Hospital*, expressly held 29 C.F.R. § 825.208(c) valid in the specific situation where lack of notice might have interfered with the plaintiff's FMLA rights,²²⁰ as the *Ragsdale* court endorsed. In *Gadinski*, the employer agreed to give the plaintiff six months maternity leave.²²¹ The plaintiff took the six months maternity leave, but returned to find no work available in her position.²²² The employer argued that since the company provided the plaintiff with more than twelve weeks of leave, the employer had satisfied the FMLA.²²³ The court disagreed, reminding the employer that the FMLA obligation included not only twelve weeks of leave, but also required reinstatement of the employee after the protected leave.²²⁴

The court distinguished *Ragsdale* and *McGregor*, which held 29 C.F.R. § 825.208(c) invalid, finding that in those cases the plaintiffs took more leave than the employer offered, and thus, the FMLA did not require the employer to reinstate those plaintiffs.²²⁵ In *Gadinski*, however, the plaintiff complied with the agreed upon length of leave, so the court held that the employer should have kept her position open.²²⁶

While the court did not explicitly mention interference with FMLA rights, the *Gadinski* ruling accords with other courts' rulings holding employers liable for failing to provide notice and interfering with plaintiffs' rights. The court implied that since the employer agreed to allow six months leave, the employer led the plaintiff to believe she retained all FMLA rights, even though she took more than the prescribed twelve weeks of leave. One might assume that if the plaintiff had known she would have no job at the end, she would not have taken more than twelve weeks of leave; thus, "misleading" and failing to reinstate the plaintiff interfered with her FMLA rights.²²⁷

219. *Id.* at *13 n.8.

220. *Gadinski v. Shamokin Cmty. Hosp.*, 116 F. Supp. 2d 586, 590-91 (M.D. Pa. 2000); *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939-40 (8th Cir. 2000), *cert. granted*, 121 S.Ct. 2548 (2001) (mem.).

221. *Gadinski*, 116 F. Supp. 2d at 590.

222. *See id.*

223. *Id.*

224. *Id.*

225. *Id.* at 590 n.5.

226. *Id.* at 590-91.

227. Even though the court did not mention interference, one must interpret the case as finding interference in order to justify the holding under the FMLA. If the court simply felt that the

V. ANOTHER FMLA NOTICE PROVISION IN JEOPARDY

The courts also struggle with another notice requirement, a technical violation of which sometimes does not result in any harm to the plaintiff. A provision in section 825.110(d) of the DOL regulations requires that the employer notify an employee of his or her eligibility under the FMLA, or lack thereof, prior to the leave.²²⁸ If an employer fails to tell an employee that he or she does not qualify for FMLA protection, the employee will be deemed eligible, and the employer cannot deny the leave.²²⁹

The Seventh and Eleventh Circuits, and several district courts, have invalidated this provision as contrary to the plain language of the FMLA.²³⁰ Similar to the arguments in the cases above, these courts held that the FMLA contained no ambiguity as to eligibility requirements.²³¹ Therefore, a regulation that allows noneligible employees to receive FMLA rights should not receive deference under step one of the *Chevron* test.²³² As with the cases invalidating 29 C.F.R. § 825.208(c), these courts held that the regulation could be valid if relief under the regulation required that the employee rely to his detriment on employer notice, or lack thereof.²³³ These cases are analogous to those described in the previous part because they illustrate other courts' refusal to tolerate the DOL's

employer should have honored the agreement for six months of leave, the FMLA would not compel this ruling and the plaintiff would have to rely on a breach of contract-type action to enforce the agreement. *Cf.* Brief of Amici Curiae Equal Employment Advisory Council et al. at 14, *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (8th Cir. 2000) (No. 99-3319), available at 2001 WL 1191093 (arguing that employees have recourse under state or federal contract law when the employees rely to their detriment on employer-provided leave of more than twelve weeks). *But cf.* *Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132, 1137 (7th Cir. 2001) (holding employee handbook language entitled all eligible employees to FMLA leave, even though employer was not covered by FMLA).

228. See 29 C.F.R. § 825.110(d) (2000).

229. *Id.*

230. See *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 797 (11th Cir. 2000); *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000); see also *Sewall v. Chi. Transit Auth.*, No. 99 C 8372, 2001 WL 40802, at *6 (N.D. Ill. Jan. 16, 2001); *McQuain v. Ebner Furnaces, Inc.*, 55 F. Supp. 2d 763, 775 (N.D. Ohio 1999); *Seaman v. Downtown P'ship of Balt., Inc.*, 991 F. Supp. 751, 754 (D. Md. 1998); *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133, 1136-37 (E.D. Va. 1997).

231. *E.g., Brungart*, 231 F.3d at 796-97; *Dormeyer*, 223 F.3d at 582. The FMLA clearly provides that it only protects employees who have worked for the employer for at least twelve months and for at least 1250 hours during the previous twelve month period. 29 U.S.C. § 2611(2) (1994).

232. See *Brungart*, 231 F.3d at 796-97.

233. See *Dormeyer*, 223 F.3d at 582 ("If detrimental reliance were required, the regulation could be understood as creating a right of estoppel . . . and such a right might be thought both consistent with the statute and a reasonable method of implementing it, and so within the Department's rulemaking powers.").

method of enforcing regulations by allowing more than the FMLA actually confers as a penalty for violation of a notice requirement.²³⁴

VI. CHEVRON ANALYSIS

Even though many critics question the validity and usefulness of the *Chevron* test,²³⁵ it remains the most prevalent tool that courts use to assess whether an agency has overstepped its authority in issuing regulations. This Note argues that in promulgating 29 C.F.R. § 825.208(c), the DOL has overstepped its statutory (and therefore constitutional) authority. The Supreme Court should invalidate as contrary to the FMLA the portion of the regulation that denies retroactive designation of FMLA leave without proper notice,²³⁶ even without proof of interference with FMLA rights.

As demonstrated by the cases forming the circuit split on this issue, courts can easily manipulate the simplistic yet vague

234. Obviously, if an employee begins leave before satisfying FMLA eligibility requirements, employers face even more notice dilemmas. For example, in *Sewall*, an employee became “unfit for work” and commenced leave in November, before he had worked the requisite twelve months to receive FMLA protection. See *Sewall*, 2001 WL 40802, at *2. A month later, that employee had worked the requisite number of months, became eligible, and received FMLA paperwork. See *id.* He claimed that his leave began when he received the FMLA paperwork, and thus, he should receive FMLA protection because he satisfied the FMLA eligibility requirements at *that* time. *Id.* at *3. The court rejected this assertion and held that the employee’s leave began when he first became “unfit for work” and took a leave of absence, regardless of his eligibility or notice under the FMLA. *Id.* at *5. When the employee countered that this was retroactive designation of FMLA leave, the court replied that the employer could not possibly designate leave retroactively for an employee who was not eligible for FMLA leave at the commencement of the leave. *Id.* at *6. While this argument makes sense, the court ignored the fact that after December when the employee became eligible, the employee could receive FMLA leave for twelve weeks going forward. See 29 C.F.R. § 825.200(b)(3) (providing that an employer may choose the method of calculating the year in which the employee gets twelve weeks of leave, including the year forward from the date any employee’s first FMLA leave begins). The court does not mention whether new FMLA leave could start in the middle of non-FMLA leave, if the employee becomes eligible. Such a situation would present new notice problems for employers.

235. See Ernest Gellhorn & Paul Verkuil, *Delegation: What Should We Do About It? Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 993 (1999) (“Admittedly, the United States Supreme Court cases have limited the application of *Chevron* more often than they have applied it and the cases often are difficult to reconcile.”); Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995) (“The Supreme Court, however, has not applied the *Chevron* test in a consistent manner. Its post-*Chevron* jurisprudence is so confused that it is difficult to determine what remains of the original, highly deferential test.”).

236. See 29 C.F.R. § 825.208(c) (2000) (“If the employer . . . fails to designate the leave as FMLA leave . . . the employer may not designate leave as FMLA leave retroactively In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee’s 12-week FMLA leave entitlement.”).

Chevron test to reach any desired result.²³⁷ Furthermore, courts can avoid use of the *Chevron* test altogether, as the Supreme Court often does without explanation.²³⁸ This Note does not comment upon the extensive debate regarding the continuing use and validity of the *Chevron* test as it exists today. Rather, it uses the principles behind the existing legal framework to address the narrow issue of 29 C.F.R. § 825.208(c). It employs the rationale and the common sense concepts that form the basis of the *Chevron* test—statutory interpretation and separation of powers—to argue that the regulation is invalid.

A. *The Constitutional Message of the Chevron Test*

In *Chevron*, the Supreme Court unanimously established a seemingly universal and straightforward two-step test for judicial review of agency interpretations of agency-administered statutes.²³⁹ First, the court must examine whether Congress has directly spoken to the precise question at issue.²⁴⁰ If the intent of Congress is clear, the inquiry ends, and the court must give effect to that congressional intent.²⁴¹ If, however, the statute is silent or ambiguous with respect to the specific issue, the court must proceed to step two to decide whether the agency's interpretation is based upon a permissible construction of the statute.²⁴² If so, the court must defer to the agency interpretation.²⁴³

The Supreme Court's message in *Chevron* was that an administrative agency should receive broad deference in interpreting a law unless the agency's action actually changes the law it seeks to interpret.²⁴⁴ This message is derived from the U.S. Constitution's delicate separation of powers.²⁴⁵

237. See Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1259 (1997) ("The flexibility that we have always seen in the courts' use of the deference concept has not disappeared, but it is now usually oriented around *Chevron* terminology.").

238. See, e.g., *Atkins v. Rivera*, 477 U.S. 154, 167 (1986) (upholding a state health regulation interpreting federal Medicaid statutes because the federal statute was silent on the specific issue, without mentioning *Chevron*); see also Levin, *supra* note 237, at 1261.

239. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

240. *Id.* at 842.

241. *Id.* at 842-43.

242. *Id.* at 843.

243. *Id.* at 844.

244. See *id.* at 844-45.

245. See Gellhorn & Verkuil, *supra* note 235, at 989 (describing the delegation doctrine, which requires legislation to include "intelligible principles" for measuring the scope and goals of agency delegation).

The *Chevron* Court emphasized that the legislature alone possesses the power to choose between conflicting policies.²⁴⁶ At the same time, the Court noted that often Congress does not have the expertise to make certain choices, or simply does not consider a matter at all.²⁴⁷ In these cases, the Court reasoned, Congress intends for an administrative agency to fill in the gaps in the statutory scheme, as long as the principal policymaking authority remains with Congress.²⁴⁸ In practice, congressional directives to agencies are broad and general, eliciting concerns from scholars that Congress has impermissibly delegated too much of its lawmaking authority.²⁴⁹ Even with very specific legislation, however, unanticipated issues still lead to gaps that agencies must fill.²⁵⁰

The role of the courts is not to assess the wisdom of an agency's policy choice, but merely to decide whether the agency regulation "is a reasonable choice within a gap left by Congress."²⁵¹ A common perception is that agencies are continually pressing for expansion of their powers.²⁵² The courts must ensure that agencies do not expand their powers such that they are effectively enacting laws that have not complied with the bicameralism and presentment requirements of the Constitution.²⁵³ The courts will, however, presume that an agency regulation promulgated under agency authority properly delegated from Congress satisfies these constitutional requirements.²⁵⁴

B. The Chevron Test Today

In the thirteen years since *Chevron*, the Supreme Court's use of the test has been criticized as inconsistent and incoherent.²⁵⁵

246. See *Chevron U.S.A.*, 467 U.S. at 865.

247. *Id.*

248. See *id.* at 843-44.

249. See Gellhorn & Verkuil, *supra* note 235, at 990.

250. See *id.* at 991.

251. *Chevron U.S.A.*, 467 U.S. at 866.

252. See Gellhorn & Verkuil, *supra* note 235, at 991.

253. See U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes Law, be presented to the President of the United States . . ."); Gellhorn & Verkuil, *supra* note 235, at 992; see also *Brungart v. BellSouth Telecomm., Inc.*, 231 F.3d 791, 797 (11th Cir. 2000) ("But when an administrative agency seeks to improve legislation by altering the basic covering provisions that Congress has written into law, it has gone too far. The rule of law in general, and separation of powers principles in particular, require that such administrative hubris be reigned in, and that the task of improving the basic provisions of statutes be left to the same body that wrote them in the first place.").

254. See Gellhorn & Verkuil, *supra* note 235, at 993.

255. See *id.*; Pierce, *supra* note 235, at 750.

Originally lauded as a tide-change toward greater deference to agency interpretations,²⁵⁶ the *Chevron* test as applied now signifies a less deferential attitude than originally supposed.²⁵⁷ Studies have shown that the Supreme Court has not been noticeably more deferential to agency interpretations since *Chevron* than before the decision.²⁵⁸

Furthermore, the Court's decisions have muddled the difference between the two steps of the *Chevron* test. Most decisions invalidating an agency regulation either rely on step one, by divining a clear and unambiguous congressional intent on the issue, or else they do not use the *Chevron* framework at all.²⁵⁹ To add to the confusion, the second step of the *Chevron* test, whether the agency interpretation is a reasonable construction of the statute, seems to overlap with the Administrative Procedure Act's ("APA") "arbitrary and capricious" standard for agency review.²⁶⁰

The cases forming the circuit split over 29 C.F.R. § 825.208(c)²⁶¹ illustrate this confusion over the *Chevron* framework. The district court in the *McGregor* case seemed to suggest that the regulation failed step one of the *Chevron* test, namely that Congress had spoken directly to the precise question at issue.²⁶² The Eighth and Eleventh Circuits, on the other hand, did not attempt to determine which step of the *Chevron* test invalidated the regulation.²⁶³

256. See Levin, *supra* note 237, at 1256. Some scholars argue, however, that evidence indicates that the six Justices who heard the *Chevron* case did not intend for the case to effect a major transformation in administrative law. See *id.* at 1257.

257. See *id.* at 1257-58.

258. See *id.* at 1258 (citing a study by Professor Thomas Merrill). Professor Merrill surveyed all of the U.S. Supreme Court's decisions involving an agency deference question from the 1981 Term through the 1990 Term. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 359 (1994). He found that *Chevron U.S.A.*, decided in 1984, had not made a dramatic difference in the frequency with which the Court deferred to an agency interpretation of statutes. *Id.* "If anything, the number of deference cases and the rate at which the Supreme Court accepted the agency view went down somewhat after *Chevron* was decided." *Id.* Even more counterintuitive to the idea that *Chevron* should result in greater deference to agency view, Merrill found that where the Court did apply *Chevron*, it was less likely to defer to agency interpretation than when the Court did not invoke the *Chevron* standard at all. *Id.* at 359-60.

259. See Levin, *supra* note 237, at 1258.

260. See *id.* at 1254 (citing 5 U.S.C. § 706(2)(A) (1996)); see also Levin, *supra* note 237, at 1274-75 (citing *Arent v. Shalala*, 70 F.3d 610, 615-16 (D.C. Cir. 1995) ("*Chevron* is principally concerned with whether an agency has authority under a statute. . . . The only issue here is whether [the agency's] discharge of that authority was reasonable," an issue that "falls within the province of traditional arbitrary and capricious review.")).

261. 29 C.F.R. § 825.208(c) (2000).

262. See *Cox v. AutoZone, Inc.*, 990 F. Supp. 1369, 1376 (M.D. Ala. 1998).

263. See *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939-40 (8th Cir. 2000) (same), *cert. granted*, 121 S. Ct. 2548 (2001) (mem.); *McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308

Due to this current confusion, this Note will discuss issues that permeate both steps of the *Chevron* test. In this case, dividing the framework into two steps results in redundancy and incoherence, as the Eighth and Eleventh Circuits implicitly realized. For example, if the analysis concentrates on step one of the *Chevron* test, as the Supreme Court most often does,²⁶⁴ one must decide whether Congress left a gap that 29 C.F.R. § 825.208(c) should fill. The outcome depends on how one defines this gap.

Because of this confusion, it is possible to reach the same result by two different, though ultimately related, routes. One can argue that Congress left gaps for simply ministerial provisions to implement the FMLA, such as a notice provision. Therefore, one could then proceed to step two of the *Chevron* test and argue that by creating the possibility of extending leave beyond twelve weeks, the DOL filled this gap in a way that made law contrary to the statute. On the other hand, one could argue that Congress left no room for the DOL to allow FMLA leave to extend beyond twelve weeks, and therefore, there is no gap. Using this definition of gap, one would never reach step two. Both arguments, however, utilize the same concepts, which will be explored below, and result in the same outcome. Therefore, this Note will not rely on the formalistic *Chevron* framework, but will concentrate instead on the concepts and rationale behind a *Chevron* argument.

Two recent Supreme Court cases applying the *Chevron* test support the approach to *Chevron* utilized in this Note. First, *FDA v. Brown & Williamson Tobacco Corp.* provides a useful explanation regarding step one of the test, determining whether the statute contains ambiguity.²⁶⁵ In this case, the Supreme Court reviewed, and struck down, the FDA's regulation of tobacco as a "drug," as defined in the Food, Drug, and Cosmetic Act ("FDCA").²⁶⁶ The majority held that a reviewing court should always examine the "meaning"—or ambiguity—of a statutory provision by reference to its *context*.²⁶⁷ The court listed three elements to the context that a court must

(11th Cir. 1999) (applying *Chevron*, but stating that the regulation would fail under either step of the test).

264. See Levin, *supra* note 237, at 1261 (noting that in 1997, no case analyzed under the *Chevron* test had yet struck down an agency's interpretation by relying squarely on step two); Note, *A Pragmatic Approach to Chevron*, 112 HARV. L. REV. 1723, 1724 (1999) (noting that the Supreme Court has provided little guidance as to what constitutes a reasonable interpretation of an ambiguous statute since the Court has "rarely, if ever, relied expressly on the second step to invalidate an agency interpretation").

265. 529 U.S. 120, 125-26 (2000).

266. *Id.* at 131.

267. *Id.* at 132.

consider: (1) the place of the provision in the overall statutory scheme; (2) the existence of other statutes that may affect the meaning of the provision; and (3) common sense as to the manner in which Congress is likely to delegate a particular policy to an administrative agency.²⁶⁸ Since the overall purpose of the statute was to ensure "safe and effective" products, and since cigarettes could never be safe, the Court reasoned that the overall structure of the FDCA did not support the FDA's interpretation of cigarettes as a "drug."²⁶⁹ Similarly, the approach advocated in this Note, and often used in federal courts addressing the validity of 29 C.F.R. § 825.208(c), significantly makes reference to the overall FMLA scheme and the common sense of delegating this particular policy to the DOL.

Second, *AT&T Corp. v. Iowa Utilities Board* provided some rare guidance from the Court on invalidating a regulation under step two of the *Chevron* test.²⁷⁰ This case involved the FCC's interpretation of the Telecommunications Act of 1996, which required local exchange carriers to provide competitors with "necessary" access to certain network features, denial of which would "impair" the competitors' services.²⁷¹ In interpreting "necessary" and "impair," the FCC basically allowed the competitors blanket access to any network features they wanted.²⁷² The Court struck down this regulation, even though the words carried ambiguity, reasoning that if Congress had wanted to provide blanket access to the network features, it would not have included the provision limiting access with the "necessary" and "impairment" standards.²⁷³ Instead, the Court reasoned, the statute would have stated that the carriers must provide whatever feature requested by the competitor.²⁷⁴

Importantly, *AT&T Corp.* illustrates how both steps of the *Chevron* test often collapse into one another to invalidate a regulation. Whether the agency acted unreasonably, went beyond the bounds of ambiguity, or blatantly contradicted a statute, the out-

268. *Id.* at 133.

269. *Id.* at 142-43 (reasoning that since cigarettes could never be safe, the FDA's regulation of them would have to result in a ban on cigarettes, which would contravene Congress's clear intent in other tobacco-specific legislation).

270. 525 U.S. 366, 390 (1999).

271. *Id.* at 388.

272. *See id.* at 389 ("[I]t is hard to imagine when the incumbent's failure to give access to the element would not constitute an 'impairment' under this standard.").

273. *Id.* at 390.

274. *Id.*

come remains the same.²⁷⁵ Following suit, this Note will discuss both reasonableness and blatant contradiction, recognizing that the language of both steps leads analytically to the same conclusion.

C. *The Evolution of the FMLA*

Whether or not one can distill the constitutional principles behind the *Chevron* doctrine into a simple test, the validity of 29 C.F.R. § 825.208(c) depends on whether the DOL changed the FMLA's general scheme or merely elaborated upon it as Congress intended. While Congress did provide the DOL with authority to prescribe regulations to carry out the FMLA,²⁷⁶ Congress could not have intended for the DOL to upset the policy balance enacted in the statute by imposing a disproportionate penalty for violation of this regulation.

The various cases examining the validity of 29 C.F.R. § 825.208(c) disagree on which "gap" the regulation attempts to fill. Three possibilities emerge, and each possibility reflects a significant policy choice in the overall FMLA scheme. The *McGregor* case and its progeny suggest that 29 C.F.R. § 825.208(c) exploits a perceived flexibility in the twelve-week number for leave entitlement.²⁷⁷ The *Ragsdale* case agreed with this argument and also interpreted the regulation as elaborating upon the right to substitute paid leave for FMLA leave in § 2612(d)(2) of the FMLA under the U.S. Code.²⁷⁸ Finally, the Secretary of Labor stated in an amicus brief submitted in *Donnellan v. New York City Transit Authority*

275. DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 1998-1999, at 54 (Jeffrey S. Lubbers ed., 2000) [hereinafter DEVELOPMENTS] ("Congress may have been unclear and indecisive in many ways, but it at least determined that a potential competitor cannot simply show up and say to the existing [carrier]: 'Give me access to your network.'"); see also *Whitman v. Am. Trucking Ass'ns, Inc.*, 121 S. Ct. 903, 916 (2001) ("We conclude . . . that the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear.").

276. 29 U.S.C. § 2654 (1994).

277. See *McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999) ("29 C.F.R. § 825.208 converts the statute's minimum of federally-mandated unpaid leave into an entitlement of an additional 12 weeks of leave . . .").

278. See *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939-40 (8th Cir. 2000) ("Rather than simply recognizing that the purpose of § 2612(d)(2)(B) was to disadvantage neither employer nor employee by the existence of the FMLA when the employer already has a sufficient leave policy in place, the Secretary of Labor has apparently seized upon the 'employer may require' provision in § 2612(d)(2)(B) to justify the imposition of a disproportionate penalty in all cases where employers fail to designate leave as FMLA leave."), cert. granted, 121 S.Ct. 2548 (2001) (mem.).

that the only gap the regulation sought to fill was that regarding notice when paid leave was substituted for FMLA leave.²⁷⁹

Resolving this question of "gaps" is not necessary to the resolution of a *Chevron* analysis of 29 C.F.R. § 825.208(c) because the regulation's impact on any one of these "gaps" results in an impermissible change in a politically significant element of the FMLA scheme, the FMLA's *context*, to use the wording of the Court in *Brown & Williamson Tobacco Corp.*²⁸⁰ That scheme is the result of a balance that FMLA supporters fought for years to attain. The courts should not permit an administrative agency to make such a significant change to legislation.

1. The Twelve-Week Entitlement Figure

All of the courts invalidating 29 C.F.R. § 825.208(c) express concern with the DOL regulation's potential for extending the twelve-week mandate.²⁸¹ The language of the FMLA is perfectly clear and does not allow for any flexibility regarding the twelve-week figure.²⁸² As a policy matter, the twelve-week figure represents a hard-fought compromise to enact the bill into law.²⁸³

The FMLA bill faced stiff opposition from most Republicans and the U.S. Chamber of Commerce and was vetoed twice by President Bush before becoming law.²⁸⁴ The original FMLA bill, intro-

279. See No. 98 Civ. 1096, 1999 U.S. Dist. LEXIS 11103, at *13 (S.D.N.Y. July 20, 1999) ("As the Secretary's amicus brief explains, 'the designation regulations do not 'attempt' to redefine the FMLA leave entitlement, but 'it is the aspect of notice which the regulation addresses.'").

280. 529 U.S. 120, 132 (2000).

281. See, e.g., *Ragsdale*, 218 F.3d at 937 ("Under the FMLA, twelve weeks of leave is both the minimum the employer must provide and the maximum the statute requires."); *McGregor*, 180 F.3d at 1308 ("The statute provides for only 12 weeks of leave."); *Twyman v. Dilks*, No. 99-4378, 2000 U.S. Dist. LEXIS 12942, at *37 (E.D. Pa. Sept. 6, 2000) ("First, the plain language of the FMLA is clear: all eligible employees are entitled to a total of twelve weeks of leave . . .").

282. See 29 U.S.C. § 2612(a)(1) (1994) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave . . ."); § 2612(d)(2)(B) ("An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave . . . for any part of the 12-week period of such leave . . .").

283. RUTH COLKER, *AMERICAN LAW IN THE AGE OF HYPERCAPITALISM: THE WORKER, THE FAMILY, AND THE STATE* 142 (1998); see also Brief of Amici Curiae Equal Employment Advisory Council et al. at 8-9, *Ragsdale v. Wolverine Worldwide Inc.*, 218 F.3d 933 (8th Cir. 2000) (No. 99-3319) ("Congress was extremely cognizant that it was providing a maximum of twelve weeks of protected leave under the statute. . . . Twelve weeks, therefore, was not a random figure but rather the product of years of debate and compromise."), available at 2001 WL 1191093.

284. CLARA BINGHAM, *WOMEN ON THE HILL: CHALLENGING THE CULTURE OF CONGRESS* 107, 109-10 (1997). The FMLA was the first bill signed into law by President Clinton. See *id.* at 110. Supporters of a mandatory leave policy, primarily labor and women's groups, said the country was overdue for federal minimum requirements to bring business in line with the changing

duced in 1985, provided for eighteen weeks of unpaid leave for birth, adoption, or serious illness of a child, and twenty-six weeks of unpaid leave for an employee's own serious health condition.²⁸⁵ The amounts were reduced in 1987 and 1989, and the leaves were combined into one twelve-week leave period in 1990.²⁸⁶

A congressman explained in testimony before the House Committee on Education and Labor that "that number was compromised down . . . because we could get more people to vote for 12 weeks than we could for 26, including members of this committee who didn't support the bill at the very beginning but began to support the bill after we modified the number of weeks involved."²⁸⁷ As demonstrated in a House Committee Report, Congress considered the twelve-week period a middle ground between the needs of families and the concerns of employers, who maintained that it was significantly easier to adjust work schedules or find temporary re-placements over a shorter time period.²⁸⁸

Given the significance of the twelve-week figure in the overall FMLA package, Congress could not have intended for a DOL regulation to allow for any more weeks of leave. The cases affirming 29 C.F.R. § 825.208(c) argue that, while the twelve-week figure is absolute, the FMLA does not specify when the twelve weeks begin and how FMLA leave is initiated.²⁸⁹ To the contrary, the FMLA and the DOL both identify the trigger for the twelve-week period:

demographics of the workplace. BRUCE C. WOLPE & BERTRAM J. LEVINE, *LOBBYING CONGRESS: HOW THE SYSTEM WORKS* 172 (2d ed. 1996). But the U.S. Chamber of Commerce, the Bush administration, and conservative Republicans argued that mandated leave was unwarranted government intrusion into the employer-employee relationship and would lead employers to cut other employee benefits. *Id.*

285. See COLKER, *supra* note 283, at 142-43.

286. See *id.* at 143. See generally Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 58-67 (1994) (detailing the legislative development of the FMLA).

287. COLKER, *supra* note 283, at 144; see also H.R. REP. No. 102-135, pt. 1, at 37 (1991) ("The amount of time available for leave also reflects a compromise."), cited in *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000), *cert. granted*, 121 S.Ct. 2548 (2001) (mem.).

288. H.R. REP. NO. 102-135, pt. 1, at 37.

289. See *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935-36 (6th Cir. 2000) ("Moreover, because the FMLA was intended to set out *minimum* labor standards, we do not believe that § 825.208(c) is inconsistent with legislative intent merely because it creates the possibility that employees could end up receiving more than twelve weeks of leave . . ."); *Chan v. Loyola Univ. Med. Ctr.*, No. 97 C 3170, 1999 WL 1080372, at *7 (N.D. Ill. Nov. 23, 1999) ("The FMLA does not specify when the 12 weeks of FMLA leave begin or how FMLA leave is initiated."); *Ritchie v. Grand Casinos of Miss., Inc.*, 49 F. Supp. 2d 878, 881 (S.D. Miss. 1999) ("The statute does not specifically identify a triggering event or any mechanism by which employees and employers can calculate the starting date of the 12-week entitlement.").

proper employee notice and actual leave.²⁹⁰ Under the DOL regulations, an employee must give an employer enough information to make the employer aware that the employee needs FMLA-qualifying leave.²⁹¹ The employer should then inquire further to obtain the details necessary to designate the leave as FMLA leave.²⁹² Once the employee has given proper notice and taken actual leave, the FMLA twelve-week entitlement is triggered if the employer determines that the employee meets the other requirements of the FMLA, such as eligibility and having a serious health condition.²⁹³ No court has even suggested any problem with the DOL regulation giving employees such lenient notice requirements. The FMLA and DOL scheme clearly provides for a trigger to the twelve-week entitlement and leaves no gap for 29 C.F.R. § 825.208(c) to fill.

The *Chan* court, in upholding 29 C.F.R. § 825.208(c), reasoned that the regulation imposes only a modest burden on employers to avoid having to offer more than twelve weeks leave.²⁹⁴ Many employers would argue that a notice requirement is not modest at all, since employees often do not give what the employer feels is adequate information to designate leave as FMLA qualifying.²⁹⁵

290. See 29 U.S.C. § 2612(e)(1)-(2) (1994) (requiring thirty days notice by employee before foreseeable leave is to begin); 29 C.F.R. § 825.302(c) (2000) ("An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave . . ."); 29 C.F.R. § 825.303(a) (2000) ("When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case.").

291. 29 C.F.R. § 825.302(c).

292. *Id.*

293. See § 2612(a)(1).

294. See *Chan*, 1999 WL 1080372, at *9.

295. See, e.g., *Hearing on the Family and Medical Leave Act [FMLA] of 1993: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Educ. and the Workforce*, 105th Cong. 9 (1997) (testimony of M. Theresa Hupp, Human Resources Director of Manufacturing, Hallmark Cards, Inc.) ("[E]mployers must now question employees as to what types of illnesses the employees and their family members have, in order to determine whether an absence should be designated as FMLA leave. This requirement gives rise to problems under the Americans with Disabilities Act (ADA), which limits what employers can ask employees about their physical and mental disabilities."); *Oversight of the Family and Medical Leave Act: Hearing Before the Subcomm. on Children and Families of the S. Comm. on Labor and Human Res.*, 104th Cong. 32-33 (1996) (prepared statement of Cynthia Graham, PHR Human Resources Analyst, Southern States Utilities) ("An employee coming back from a two week vacation disclosed that he had spent his time-off caring for a terminally ill relative and requested an additional twelve (12) weeks of unpaid leave. Had the [employer] known that the employee was using paid leave for purposes outlined under the FMLA, the two weeks could have been used as part of his twelve (12) week entitlement . . ."); Brief for Amici Curiae Equal Employment Advisory Council et al. at 19, *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (8th Cir. 2000) (No. 99-3319) ("Apparently, [the DOL] does not appreciate the paperwork burden this requirement generates for employers with thousands—let alone hundreds of thousands—of employees, any number of whom may be taking leave at any given moment."), available at 2001 WL 1191093.

Even though the FMLA scheme allows employers to designate FMLA leave retroactively if the employee does not provide adequate information regarding the reason for leave,²⁹⁶ the adequacy of the information is an after-the-fact determination made by the courts. Litigation to determine whether proper notice was given is not a “modest burden” at all.²⁹⁷ Further, if the law is to impose such burdens, it should be Congress that does so, and decides whether or not they are “modest,” not an administrative agency or a court.

2. Paid Leave Substitution

The FMLA allows an employer to require employees to substitute paid leave under employer-specific leave programs for the FMLA twelve-week entitlement so that employers never have to provide more than twelve weeks of total leave.²⁹⁸ As the *Ragsdale* court stresses, this language protects both the employer and employee.²⁹⁹ The employee may receive paid leave during FMLA leave, while the FMLA does not add an additional twelve weeks of leave to an employer’s leave policy already in place.³⁰⁰ Congress did not intend to disadvantage those employers who have already provided for a leave policy by enacting the FMLA.³⁰¹ In fact, one of the selling points of the FMLA to conservative Republicans was the number of businesses with leave plans already in place, making the FMLA easier to implement.³⁰²

The *Chan* court, upholding 29 C.F.R. § 825.208(c), noted that the FMLA does not specify how or when an employer must inform

296. See 29 C.F.R. § 825.208(d)-(e) (2000) (“If the employer learns that leave is for an FMLA purpose after leave has begun . . . the entire or some portion of the paid leave period may be retroactively counted as FMLA leave . . .”).

297. Amici argue that upholding the notice regulations will eliminate the threat of additional litigation over “these issues” by confirming that employers and employees have a duty to abide by the notice regulations. Brief of Amici Curiae National Employment Lawyers Association et al. at 15, *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (8th Cir. 2000) (No. 00-6029), available at 2001 WL 1077954. Naturally, resolution of this case either way will eliminate litigation of the issue. Both sides, however, will face litigation regardless of the outcome, either under the regulation or under the interference prohibition in the statute. Either way, employers *still* must provide notice of FMLA designation. The analysis offered by the court in *Ragsdale* will simply determine the correct remedy for failure to provide proper notice.

298. See § 2612(d)(2); see also text accompanying notes 27-30.

299. See *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000), cert. granted, 121 S.Ct. 2548 (2001) (mem.).

300. See *id.*

301. See *id.*; see also *McGregor v. AutoZone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999); *Twyman v. Dilks*, No. 99-4378, 2000 U.S. Dist. LEXIS 12942, at *39 (E.D. Pa. Sept. 6, 2000).

302. See *WOLPE & LEVINE, supra* note 284, at 175 (“[Lobbyists] also argued that the policy would not be difficult to put in place in part because many companies already had some sort of plan giving workers time off for a new baby or family medical emergency.”).

the employee that paid leave will be substituted.³⁰³ This argument fails to take account of another provision in the FMLA in which Congress specifically encourages employers to adopt more generous leave policies.³⁰⁴ Even if one agreed with *Chan* that the substitution provision left a gap, a construction of the gap that disadvantages employers with more generous leave policies would be manifestly contrary to the statute.³⁰⁵ The regulation disadvantages employers with leave policies because a technical violation of a notice provision would require employers to provide not only leave under their own policies, but also an additional twelve weeks.³⁰⁶ Many employers certainly find themselves more likely to be liable in a lawsuit after the DOL implemented the regulation than before, a result the FMLA expressly discourages.³⁰⁷

3. Notice Before FMLA Designation

While the FMLA does address some notice requirements in the statutory language,³⁰⁸ Congress likely meant for the DOL to address the ministerial aspects of notice in the regulation.³⁰⁹ In most respects, the DOL regulations have done so in a manner that complies with the intent of the FMLA.³¹⁰ Section 825.208(c), however, exceeds Congress's directive to the DOL simply to "carry out" the FMLA; it changes the dynamic of the statutory scheme.

303. See *Chan v. Loyola Univ. Med. Ctr.*, No. 97 C 3170, 1999 WL 1080372, at *7 (N.D. Ill. Nov. 23, 1999).

304. 29 U.S.C. § 2653 (1994).

305. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

306. See *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 938 (8th Cir. 2000), cert. granted, 121 S. Ct. 2548 (2001) (mem.).

307. See § 2653. Members of Congress have taken note of this unfortunate situation and sponsored bills to amend the substitution provision because the FMLA too often conflicts with employers' existing leave policies by adding an extraordinary administrative burden. See *Family and Medical Leave Clarification Act*, H.R. 4499, 106th Cong. § 6 (2000); S. 1530, 106th Cong. § 6 (1999).

308. See 29 U.S.C. § 2612(e)(1) (1994) (providing that employee give notice for foreseeable leave); 29 U.S.C. § 2614(b)(1)(A)-(B) (1994) (providing notice of "key employee" designation); 29 U.S.C. § 2619 (1994) (requiring the posting of FMLA rights).

309. See 29 U.S.C. § 2654 (1994) (instructing the DOL to prescribe regulations to carry out the FMLA); see also *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 935 (6th Cir. 2000) ("The FMLA itself is silent as to the notice an employer must give to an employee before designating his paid leave as FMLA leave."); *Chan v. Loyola Univ. Med. Ctr.*, No. 97 C 3170, 1999 WL 1080372, at *5 (N.D. Ill. Nov. 23, 1999) ("[T]he FMLA itself does not specify what notice an employer must provide an employee regarding FMLA leave.").

310. See 29 C.F.R. § 825.301 (2000) (requiring that employees' FMLA rights must be set forth in employee handbook and written notice); *id.* at § 825.302 (providing that employee notice for foreseeable leave); 29 C.F.R. § 825.303 (2000) (employee notice for unforeseeable leave); 29 C.F.R. § 825.304 (2000) (penalty for improper employee notice).

First, where Congress desired explicit notice provisions with significant consequences for their violation, Congress provided for them in the text of the statute.³¹¹ For example, Congress created for certain “key employees” a notice regime that resembles what the DOL attempted to create in 29 C.F.R. § 825.208(c).³¹² While the FMLA requires employers to restore employees to their positions after taking FMLA leave, the statute exempts employers from this requirement when denying restoration to an employee is “necessary to prevent substantial and grievous economic injury” to the employer.³¹³ Employees affected by this exception are defined as salaried, eligible employees who are among the highest paid ten percent of the employees at the place of business.³¹⁴ Employers may only, however, deny restoration to key employees when the employer has notified the employee of this designation and intent not to restore.³¹⁵

Therefore, Congress fully considered a scheme where lack of employer notice should preclude an employer from denying an employee an FMLA right. Furthermore, Congress declined to utilize a similar scheme when employees substitute paid leave for unpaid leave. In that situation, the FMLA is neither silent nor ambiguous and therefore does not invite DOL elaboration. Section 825.208(c)’s imposition of this approach for substitution of paid leave contradicts the intent of Congress and exceeds the DOL’s authority under the statute. Applying common sense regarding Congress’s delegation to the DOL, as the Court instructs in *Brown & Williamson Tobacco*,³¹⁶ indicates that the gap in the FMLA regarding notice was not a delegation to the DOL to act in the manner of 29 C.F.R. § 825.208(c).

Second, even though the Secretary of Labor stressed that the regulation only deals with the subject of notice,³¹⁷ the regulation has an impact on much more than notice. The cases evaluating 29 C.F.R. § 825.208(c) have clearly stated that the imposition of a no-

311. See *Ragsdale*, 218 F.3d at 938; *Twyman v. Dilks*, No. 99-4378, 2000 U.S. Dist. LEXIS 12942, at *39-40 (E.D. Pa. Sept. 6, 2000).

312. See § 2614(b)(1).

313. § 2614(b)(1)(A).

314. § 2614(b)(2).

315. § 2614(b)(1)(C); see also *Panza v. Grappone Cos.*, No. 99-221-M, 2000 U.S. Dist. LEXIS 16390, at *4 (D.N.H. Oct. 20, 2000) (precluding defendant from arguing that plaintiff was key employee because defendant did not inform plaintiff of that designation).

316. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

317. See *Donnellan v. N.Y. City Transit Auth.*, No. 98 Civ. 1096, 1999 U.S. Dist. LEXIS 11103, at *13 (S.D.N.Y. July 20, 1999) (quoting Secretary’s amicus brief).

tice requirement alone does not offend *Chevron* analysis.³¹⁸ Rather, it is the possible extension of the twelve-week leave entitlement that exceeds the DOL's authority.³¹⁹ Therefore, this regulation goes far beyond filling in a gap regarding notice and cannot withstand *Chevron* analysis.

VII. EMPLOYEES' RIGHTS ARE PROTECTED WITHOUT THIS REGULATION

This Note advocates invalidating the portion of 29 C.F.R. § 825.208(c) that disallows retroactive designation of FMLA leave and triggers the running of the twelve-week entitlement only upon proper notice of FMLA designation. The actual notice requirement does not offend *Chevron* analysis because, as mentioned earlier, one could persuasively argue that a gap exists in the statute as to employer notice.³²⁰ But there is no such gap providing for the extension of leave beyond twelve weeks. Employees' rights will be more than adequately protected without this invalid provision because employees can bring claims under the FMLA provision prohibiting interference with substantive FMLA rights.³²¹

The FMLA makes it unlawful for any employer to "interfere with, restrain, or deny" the exercise of FMLA rights.³²² The DOL regulations specify that any violation of the FMLA or DOL regulations constitutes interference.³²³ The DOL regulations further provide examples of interference: refusing to authorize FMLA leave, discouraging an employee from using such leave, or manipulating policies to avoid responsibilities under the FMLA such as reducing

318. See, e.g., *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000) ("It should be stressed that the court is not holding that any DOL regulation requiring employers to designate leave as FMLA leave would be invalid."), *cert. granted*, 121 S. Ct. 2548 (2001) (mem.); *Longstreth v. Copple*, No. C97-4100, 1999 U.S. Dist. LEXIS 16654, at *10 (N.D. Iowa Oct. 22, 1999) (holding that the *McGregor* holding stands for the "rather narrow proposition that this regulation is invalid insofar as it purports to require the employer to provide more than 12 weeks of leave time, unless the employer notifies the employee that her leave time is designated as such").

319. See *Ragsdale*, 218 F.3d at 940.

320. See *supra* Part VI.C.3.

321. See 29 U.S.C. § 2615(a)(1) (1994).

322. *Id.* In addition to prohibiting interference, the FMLA also prohibits discrimination or retaliation for exercising FMLA rights. See § 2615(a)(2). The employer actions that support a claim of interference often also support a claim of retaliation, especially when an employee has suffered an adverse employment action before bringing suit. See *Schober v. SMC Pneumatics, Inc.*, No. IP99-1285-C-T/G, 2000 U.S. Dist. LEXIS 12478, at *19 (S.D. Ind. Aug. 21, 2000) ("It is noted, however, that actions which [the plaintiff] raises as retaliation may also constitute interference.").

323. See 29 C.F.R. § 825.220(b) (2000).

work hours to avoid employee eligibility.³²⁴ Some courts have interpreted this section of the FMLA as governed by a strict liability standard, holding irrelevant an employer's intent to violate any of an employee's substantive FMLA rights.³²⁵

An employee can establish a claim for interference by proving, by a preponderance of evidence, that the employee is entitled to the benefit of FMLA leave and that the employer interfered with or denied that benefit.³²⁶ The interference may come in the form of denial of leave or an adverse action taken against an employee for taking FMLA-qualifying leave.³²⁷ Furthermore, employer actions that "chill" an employee's assertion of FMLA rights may constitute interference, regardless of whether the employee ever even applied for FMLA leave.³²⁸

Instead of allowing the employee an additional twelve weeks of leave, as 29 C.F.R. § 825.208(c) does, the statutory FMLA scheme for interference violations would give the employee a private right of action, which would include whatever relief the judge finds appropriate for the particular case.³²⁹ If the employee had not relied on employer notice, the employer would not have interfered with

324. *Id.*

325. See *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998) (holding that the employer's subjective intent is not relevant when the employer has violated any of the substantive rights created by the FMLA); *Williams v. Shenango, Inc.*, 986 F. Supp. 309, 317-18 (W.D. Pa. 1997) (engaging in traditional statutory construction to find that a claim under § 2615(a)(1) is governed by a strict liability standard).

326. See *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353 (11th Cir. 2000) (establishing standard for interference claim); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997) (same).

327. See *Schober*, 2000 U.S. Dist. LEXIS 12478, at *29 (construing termination of employee after taking leave as interference); *Williams*, 986 F. Supp. at 321 (finding that denial of a leave request as interference).

328. See *Mardis v. Cent. Nat'l Bank & Trust*, No. 98-6056, 1999 U.S. App. LEXIS 7261, at *6 (10th Cir. April 15, 1999) (holding interference may occur regardless of whether employee actually applied for leave and subjected self to unwarranted consequences announced by employer); *Williams*, 986 F. Supp. at 321 (holding a lack of assurances of job security for taking leave constituted interference).

329. See 29 U.S.C. § 2615(a)(1) (1994) (prohibiting interference); 29 U.S.C. § 2617(a)(2) (1994) (creating a private right of action). The United States argued as amicus that the Secretary reasonably determined "that the predictability and ease of administration of a categorical rule make it preferable to a regime in which an individual's entitlement to relief under the Act would turn on a potentially difficult, retrospective inquiry into what steps the employee might have taken had he receive timely notice." Brief of Amicus Curiae United States at 20-21, *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (8th Cir. 2000) (No. 00-6029), available at 2001 WL 1082492. While undoubtedly easier to administer, the categorical rule advocated simply contradicts the statute, especially given that in some cases, Congress created a categorical rule and for this situation did not. See *supra* notes 311-315 and accompanying text (examining where Congress desired penalties for notice provisions and expressly provided for them in the statute).

any substantive rights, and the employee would have no right of action.

The case law supports the application of this remedy for improper notice. The courts have defined interference broadly, including violations of various notice provisions.³³⁰ For example, the plaintiff in *Schober v. SMC Pneumatics, Inc.* had taken extensive days off to care for her ill son.³³¹ After exhausting personal leave, she inquired about FMLA leave.³³² The employer required a written certification of her son's illness but provided no written guidance on the plaintiff's FMLA rights and obligations, as required by the DOL regulations.³³³ Fourteen days after giving the plaintiff the certification form, the employer terminated the plaintiff for excessive absences.³³⁴ The employer argued that by failing to return the certification form, the plaintiff had forfeited her FMLA rights.³³⁵ The court held that a reasonable jury could find that the employer interfered with the plaintiff's FMLA rights by failing to give her written notice of her rights and obligations, including a fifteen-day time limit in which she could return the medical certification form.³³⁶ If the employer had given proper notice, the court reasoned, the plaintiff would have had time to complete her duties under the FMLA and would not have forfeited its protection.³³⁷

As another example, the employer in *Mitchell v. Continental Plastic Containers, Inc.* assessed the plaintiff a disciplinary point for an absence arguably covered by the FMLA.³³⁸ An accumulation of points eventually led to the plaintiff's discharge.³³⁹ The employer argued that the plaintiff had not fulfilled his employee notice requirements, namely giving the employer enough information to be on notice that leave may be FMLA qualifying.³⁴⁰ The court held that

330. See *Mardis*, 1999 U.S. App. LEXIS 7261, at *6 (holding employer's conditioning employee's use of FMLA leave on employee's forfeiture of vested benefits constituted interference); *Schober*, 2000 U.S. Dist. LEXIS 12478, at *19 (holding improper notice of employee's obligations and consequences for failing to discharge those obligations constituted interference); *Mora v. Chem-tronics, Inc.*, 16 F. Supp. 2d 1192, 1219-20 (S.D. Cal. 1998) (same); *Mitchell v. Cont'l Plastic Containers, Inc.*, No. C-1-97-412, 1998 U.S. Dist. LEXIS 21465, at *34-35 (S.D. Ohio Mar. 3, 1998) (holding failure to post information regarding FMLA rights constituted interference).

331. See *Schober*, 2000 U.S. Dist. LEXIS 12478, at *3-4.

332. *Id.* at *6.

333. *Id.* at *6, 9-10.

334. *Id.* at *15.

335. *Id.* at *34-35.

336. *Id.* at *29; see 29 C.F.R. § 825.305(b) (2000) (fifteen-day deadline).

337. *Schober*, 2000 U.S. Dist. LEXIS 12478, at *29.

338. No. C-1-97-412, 1998 U.S. Dist. LEXIS 21465, at *2 (S.D. Ohio March 3, 1998).

339. See *id.*

340. See *id.* at *40-41.

the lack of notice on the *employer's* part might have led to improper notice on the *employee's* part, which led to termination, and thus supported a valid claim for interference.³⁴¹

Therefore, the FMLA still protects plaintiffs when proper employer notice could have prevented their ultimate terminations, without 29 C.F.R. § 825.208(c) creating a trap for unwary employers that leads only to windfalls for plaintiffs.³⁴² The courts need only discern one additional element to analyze an interference claim (as opposed simply to disallowing retroactive FMLA designation under the regulation): employee reliance.

The *Ragsdale* court in the Eighth Circuit recognized the harmony between the notice regulation and relief by an interference claim.³⁴³ As mentioned above, the *Ragsdale* court would not have invalidated a notice regulation based on interference.³⁴⁴ Cases with reasoning similar to *Ragsdale* combine to form the following nonexhaustive list of ways lack of notice could interfere with an employee's FMLA rights:

- Where the employee claims that the sole reason she exceeded her FMLA leave was the employer's lack of notice, and with proper notice, the employee would and could have returned to work at the end of twelve weeks;³⁴⁵
- Where the employee anticipated taking leave, such as for elective surgery, and the employer's lack of notice caused the employee to take more than needed at the current time;³⁴⁶

341. *See id.* at *41.

342. *See Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 939 (8th Cir. 2000), 121 S.Ct. 2548 (2001) (mem.). A recent Note in the *Iowa Law Review* also advocates invalidation of 29 C.F.R. § 825.208(c) based on the *Chevron* test, but advances from a different perspective. *See Ellen E. Daniels, Note, The Family and Medical Leave Act of 1993: Does Twelve Weeks Really Mean Twelve Weeks?*, 87 IOWA L. REV. 263 (2001). Daniels argues for amending the FMLA to fill the void left by invalidation of 29 C.F.R. § 825.208(c). *Id.* at 278-81. The present Note considers in greater depth the lower court decisions and rationales, and recent applications and permutations of the *Chevron* test. In contrast to Daniels, this Note does not make the argument, however valid, that amendment of the FMLA itself should fill the void. Rather, it presents ways to amend the *DOL regulations* in order to pass muster under *Chevron*, which is potentially an easier, more pragmatic, and less time-consuming alternative to Daniels' proposals.

343. *See id.* at 940.

344. *See id.*; *Longstreth v. Copple*, No. C97-4100, 1999 U.S. Dist. LEXIS 16654, at *8 (N.D. Iowa Oct. 22, 1999).

345. *See Ragsdale*, 218 F.3d at 939-40.

346. *See id.* at 940; *Fry v. First Fid. Bancorp.*, No. 95-6019, 1996 U.S. Dist. LEXIS 875, at *11 (E.D. Pa. Jan. 29, 1996).

- Where the employee anticipated taking leave and lack of notice deprived the employee of the opportunity to schedule the leave to coincide with work holidays;³⁴⁷
- Where the employee needed leave to care for a family member, and with proper notice could have managed the leave differently by arranging for other caregivers.³⁴⁸

VIII. CONCLUSION

To give the *Chevron* test its full constitutional meaning, courts must examine not only the form of agency action but also the results and consequences. While 29 C.F.R. § 825.208(c) seems at first glance to fill in a ministerial term of the FMLA legislative scheme, the regulation's results expand the FMLA beyond congressional intent. The regulation operates to allow employees to take more than twelve weeks of leave in circumstances where the employer has generously given the employee more than the FMLA minimum. In doing so, the regulation alters the balance achieved by Congress between the needs of families and the legitimate needs of businesses.³⁴⁹ Furthermore, disadvantaging employers in this way provides no additional protection to employees beyond the employees' cause of action for interference with FMLA substantive rights.³⁵⁰ As a matter of constitutional law, and common sense, the regulation as it stands now must be held invalid.

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347. See *Donnellan v. N.Y. City Transit Auth.*, No. 98 Civ. 1096, 1999 U.S. Dist. LEXIS 11103, at *14 n.10 (S.D.N.Y. July 20, 1999).

348. See *id.*

349. See 29 U.S.C. § 2601(b) (1994) (setting forth the congressional purpose of the FMLA).

350. See 29 U.S.C. § 2615(a) (1994) (prohibiting interference with FMLA rights).

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