NATIONAL EMPLOYMENT LAW INSTITUTE

COMPLEX FMLA ISSUES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

COMPLEX FMLA ISSUES

With the passage of the Family and Medical Leave Act of 1993 (FMLA) twenty years ago, employers both public and private were faced with a vast new landscape of legal obligations to their employees. Compliance with the FMLA requires both knowledge of, and adherence to, its many requirements. This paper overviews those requirements and recent legal developments in their application and interpretation. The paper addresses the application of the FMLA to public and private employers and the Act's notice obligations, including constructive notice and retroactive designation. It also discusses the requirements and nuances associated with the care of adult children, the certification process, intermittent leave, and military leave. The final sections overview the standards for interference and retaliation claims as well as recent legislative activity and Department of Labor guidance on FMLA issues that may further modify employer obligations.

I. FMLA OVERVIEW

The FMLA provides qualified employees up to 12 weeks of unpaid leave for the employee's own serious health condition or to care for family members under certain circumstances.[1] The purpose of the Act is to allow employees to balance their work and family lives by providing job protected leave for certain personal and familial obligations.[2] The FMLA specifically entitles "eligible employees" to leave for one or more of the following reasons: (a) the birth of a child of the employee; (b) the placement of a child with the employee for adoption or foster care; (c) in order to care for the employee's spouse, child or parent, if such family member has a serious health condition; or (d) because of a serious health condition that makes the employee unable to perform the functions of his or her job.[3]

In addition, the Act was amended in 2008 by the National Defense Authorization Act (NDAA) to provide up to 12 weeks of leave due to a qualifying exigency arising out of active duty or a call to active duty military service of the spouse, child or parent of the employee,[4] and up to 26 weeks of leave for an employee who is the spouse, child, parent, or next of kin of a covered servicemember to care for that servicemember in the event of injuries sustained as a result of their service.[5]

To qualify for leave under the FMLA, an employee must have been employed by the employer for at least twelve months, though that time need not have been consecutive.[6] In addition, the employee is required to have worked for the employer for at least 1,250 hours of service during the twelve-month period immediately preceding the leave. If employed by a

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[1] 29 U.S.C. § 2612(a).

[2] 29 C.F.R. § 825.101(a), (b).

[3] 29 U.S.C. § 2612(a)(1).

[4] *See* U.S. Dept. of Labor Fact Sheet #28A: The Family and Medical Leave Act Military Family Leave Entitlements, *available at* http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf.

[5] 29 U.S.C. § 2612(a)(3).

[6] 29. C.F.R. § 825.110(a)(1), (b).

private employer, the employee must also be employed at a worksite where fifty or more employees are employed within seventy-five miles of the worksite.[7] As discussed further below, all public agencies, regardless of the number of employees, are subject to the Act.

A. California Family Rights Act (Cal. Gov't Code § 12945.2)

In 1991, two years before Congress enacted the FMLA, California passed the California Family Rights Act (CFRA). The CFRA, which is contained within the Fair Employment and Housing Act, is intended to "give employees an opportunity to take leave from work for certain personal or family medical reasons without jeopardizing job security."[8]

Like the FMLA, the CFRA provides qualified employees up to 12 weeks of unpaid leave for the employee's own serious health condition or to care for family members under certain circumstances.[9] Specifically, the CFRA provides "eligible employees" up to 12 work weeks of unpaid leave in a 12 month year for one or more of the following reasons: (a) the birth of a child of the employee; (b) the placement of a child with the employee for adoption or foster care; (c) in order to care for the employee's spouse, registered domestic partner, child or parent, if such family member has a serious health condition; or (d) because of a serious health condition that makes the employee unable to perform the functions of his or her job.[10]

The CFRA also outlaws an employer's ability "to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of" his or her "exercise of the right to family care and medical leave."[11]

B. California Pregnancy Disability Leave Law (Cal. Gov't Code § 12945)

Pursuant to the California Pregnancy Disability Leave Law (PDLL), an employee who is disabled due to pregnancy, childbirth, or a related medical condition is entitled to up to four months of leave during the period in which she is disabled. This leave is separate and distinct from an employee's right to take CFRA leave (which excludes leaves taken on account of pregnancy disability) but runs concurrently with FMLA leave. As of December 30, 2012, employers must provide reasonable accommodation, including a transfer or temporary reassignment to a less strenuous position, for female employees "affected by pregnancy." For employees who are "disabled by pregnancy," an employer must provide disability leave of up to four months per pregnancy for the period of actual disability. The law defines "affected by pregnancy" as medically advisable for an employee to obtain a reasonable accommodation; an

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[7] 29 C.F.R. § 825.110(a)(2), (3).

[8] *Nelson v. United Techs.*, 74 Cal. App. 4th 597, 606 (1999); *see also* Assembly Daily Journal, 1991-92 Reg. Sess. 5547, ¶ e1. ("The overarching theme of this legislation has been the need to permit workers to take leave to care for their families without fear of job loss, and, except for limitations based on number of employees or familial relationship, the bill should have the broadest possible implementation.").

[9] Cal. Gov't Code § 12945.2(a); Cal. Code Regs. tit. 2, § 7297.3(a).

[10] Cal. Gov't Code § 12945.2(c)(3). One notable difference between the CFRA and the FMLA is that the CFRA allows employees to take leave to care for a registered domestic partner, whereas the FMLA limits coverage to those employees caring for a spouse, child or parent.

[11] *Id.* § 12945.2(*l*).

employee is "disabled by pregnancy" if she cannot perform one or more of her essential job functions due to the pregnancy. In addition to accommodating and/or granting a leave of absence, employers must reinstate the employee to the same or a comparable position at the conclusion of the leave period.

C. Interplay Between The FMLA, The CFRA, And The PDLL

Provisions of state or local laws providing greater family or medical leave rights than required under the FMLA are not superseded by the Act. Therefore, employers must comply with whichever law provides more expansive employee rights.[12] The United States Department of Labor (DOL) will not enforce state family leave laws and states may not enforce the FMLA.[13]

Employees are not required to designate whether the leave they are taking is FMLA leave or leave under state law. As a result, an employer must comply with the appropriate and applicable provisions of both laws. An employer covered by only one law, however, must comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with only that law.[14]

If leave qualifies as both FMLA leave and leave under state law, the leave used counts against the employee's entitlement under both laws.[15]

NOTE: This paper will primarily discuss the FMLA, but it will also note key distinctions between federal and California state law.

II. APPLICATION TO PUBLIC AND PRIVATE EMPLOYERS

The FMLA applies to both public and private employers.[16] A private employer is covered by the Act if they have fifty or more employees during twenty or more calendar workweeks in the preceding calendar year.[17] However, the regulations for the FMLA explain that all public agencies regardless of the number of employees, are subject to the Act.[18] Further, an entity is considered a "public" agency if it has taxing authority or if the chief administrative officer or board is elected by the voters or their appointment is subject to approval by an elected official.[19]

The DOL administers the FMLA over most employers both public and private.[20] However, the Office of Personnel Management (OPM) administers the FMLA for most

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[12] 29 C.F.R. § 825.701(a).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] 29 U.S.C. § 2611(4).

[17] *Id.* § 2611(4)(A)(i).

[18] 29 C.F.R. § 825.104(a).

[19] *Id.* § 825.108(b).

[20] *See* 29 C.F.R. § 825.109(a).

employees of the federal government.[21] Statutory authorization for federal employees is found in Title II of the FMLA and is virtually identical to the general FMLA statute.[22] That said, some federal employees still fall under the jurisdiction of the DOL including employees of the Postal Service, employees of the Postal Regulatory Commission, part-time federal employees without regular tours of duty during the week, and other federal executive agencies not covered by Title II of the FMLA.

The requirements of the FMLA apply to both public and private employers equally. The legal standards and responsibilities of employers are the same in both contexts. However, in regards to enforcement of the FMLA in the public sector, there are unresolved questions as to whether public employees can be held individually liable for FMLA violations and whether state sovereign immunity under the Eleventh Amendment protects states from suit under certain provisions of the FMLA.

A. Individual Liability

The FMLA statute provides for individual liability of employers. An "employer" is defined by 29 U.S.C. § 2611(4)(A) as follows:

> (i) any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;
>
> (ii) includes—
> (I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
> (II) any successor in interest of an employer;
>
> (iii) includes any "public agency", as defined in section 203(x) of this title; and
>
> (iv) includes the Government Accountability Office and the Library of Congress.

By including "any person who acts…in the interest of an employer" in the definition of "employer," the Act makes it possible for supervisors and managers of an organization to be held personally liable for FMLA violations.[23] In the private sector, courts have consistently found that individual managers and supervisors acting on behalf of their employer may be individually liable for violating an employee's FMLA rights. However, the federal circuit courts have split on the issue in the public sector based on highly technical textual and contextual interpretations of the FMLA's definition of "employer."

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[21] *Id.*

[22] *See* 5 U.S.C. §§ 6381–6387. Given the similarities between the requirements in Title I and II of the FMLA, this paper will focus on the guidance provided by Title I and the DOL Regulations on the FMLA.

[23] 29 U.S.C. § 2611(4)(A)(ii).

In *Modica v. Taylor,* an employee for the Texas Cosmetology Commission sued for a violation of her FMLA rights when she was terminated while on medical leave.[24] Finding that an employee of a public agency may be held individually liable under the FMLA, the Fifth Circuit explained that the construction of the statute suggests that Congress intended to link clauses (i)-(iv).[25] In addition, the Fair Labor Standards Act (FLSA) defines "employer" almost identically to the FMLA.[26] Given that individual liability had been imputed to employees of public agencies under the FLSA in that circuit, the Court held that Modica's supervisor could be held liable as an employer under the FMLA.

Similarly, in *Haybarger v. Lawrence County Adult Probation and Parole*, the Third Circuit held that an individual supervisor in the public sector could be held individually liable for violations of the FMLA separate from, and in addition to, the employer.[27] The employee at issue had continuing health problems that required regular absences from work and was placed on a six-month probation for poor work performance. Six months later, her supervisor concluded that her performance had not improved and recommended that her employment be terminated. She brought suit against her supervisor, and the district court imposed individual liability. The Third Circuit upheld the decision, finding that the supervisor acted in the interest of the employer by supervising the employee and recommending her termination.

Other courts have arrived at the opposite conclusion, refusing to impose individual liability. In *Mitchell v. Chapman,* for instance, the Sixth Circuit held that the FMLA did not subject public employers to individual liability.[28] The Court held that statutory construction of 29 U.S.C. § 2611(4)(A) dictated that the provisions related to individual liability and public employers should be read as two separate clauses and as a result, no individual liability.[29]

The Supreme Court has yet to resolve this issue, but depending on the jurisdiction, it is important to note that public employees acting on behalf of their employer may be held personally liable for violations under the FMLA.

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[24] 465 F.3d 174 (5th Cir. 2006) (explaining that statutory construction justifies finding that individual liability applies to public employees under the FMLA).

[25] *Id.* at 185.

[26] *Id.* at 186, *quoting Wascura v. Carver,* 169 F.3d 683, 686 (11th Cir. 1999) ("[t]he fact that Congress, in drafting the FMLA, chose to make the definition of `employer' materially identical to that in the FLSA means that decisions interpreting the FLSA offer the best guidance for construing the term `employer' as it is used in the FMLA.")).

[27] 667 F.3d 408 (3d Cir. 2012).

[28] 343 F.3d 811 (6th Cir. 2003).

[29] *Id.* at 830.

B. Sovereign Immunity

The Eleventh Amendment of the U.S. Constitution protects nonconsenting states from suit in federal court under the theory of sovereign immunity. In order to infringe upon that power, Congress must "unequivocally declare its intent to abrogate and must act pursuant to a valid exercise of its power."[30]

In a 2003 decision, *Nevada Department of Human Resources v. Hibbs*, the U.S. Supreme Court ruled that Congress validly abrogated state government immunity with respect to the FMLA's provision for care of family members with a serious health condition.[31] The Court explained that a historical record of sex discrimination in state leave policies provided a Fourteenth Amendment rationale for extending the family care provision to the states.

In contrast, the Supreme Court held in a March 2012 decision, *Coleman v. Court of Appeals of Maryland*, that state sovereign immunity bars FMLA claims based on the employee's *own* serious health-care condition.[32] Coleman, an employee of the Court of Appeals of the State of Maryland, sued his employer in federal district court for denying him sick leave. The district court dismissed the suit on the ground that the Maryland Court of Appeals, an entity of the State of Maryland, was immune from damages on the ground of sovereign immunity, and the Fourth Circuit affirmed.

On review, a plurality of the justices on the Supreme Court upheld the decision and found that the self-care provision, standing alone, did not validly abrogate Maryland's immunity from suits for damages.[33] Justice Kennedy argued that Congress's evidence failed to show a pattern of state constitutional violations when it wrote the self-care provision; instead, Congress considered evidence that men and women are on medical leave in roughly equal numbers. In contrast, Congress often referred to its concerns about discrimination against women when constructing the family-care portion of the FMLA. Thus, the Court held that the self-care leave provision was not a congruent and proportional response to discriminatory conduct under § 5 of the Fourteenth Amendment and did not abrogate Maryland's sovereign immunity.

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[30] *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 191 (4th Cir. 2010).

[31] 538 U.S. 721 (2003).

[32] 132 S. Ct. 1327 (2012).

[33] *Id.*

III. NOTICE

A. Employee Notice Requirements

FMLA regulations require an employee to provide his or her employer with notice of the need for leave.[34] When the need for leave is foreseeable, an employee must provide the employer at least 30 days advance notice.[35] If 30 days notice cannot be provided, the employee must give notice as soon as practicable.[36] Where leave is unforeseeable, the employee must give notice as soon as practicable under the facts and circumstances of the particular case.[37]

Additionally, whether foreseeable or not, an employee must comply with an employer's usual and customary notice requirements for requesting leave provided there are no unusual circumstances.[38] Where leave is foreseeable, an employer might require written notice or require that an employee contact a specific individual to request leave.[39] For unforeseeable leave, an employer might require employees to call a designated number or contact a certain person.[40] An employee's failure to comply with the employer's absence procedures may be grounds for delaying or denying an employee's request for FMLA coverage.[41]

Though an employee must provide notice of leave, he or she need not explicitly assert rights under the FMLA or even mention the statute.[42] Rather, the employee must merely explain the reasons for the leave such that the employer can determine whether the leave qualifies under the Act.[43] In a 2012 decision, *Lichtenstein v. University of Pittsburgh Medical Center*, an employee who had a history of poor attendance and continued failing to report to work was terminated after she called her supervisor and said she was in the emergency room with her mother and would be unable to attend work that day.[44] The trial court dismissed the employee's case on summary judgment, but the Third Circuit reversed the decision, finding that an employee "need not expressly assert rights under the FMLA or even mention the FMLA" for the Act to apply.[45] Because the employee informed the supervisor that her mother was ill and in the hospital and the FMLA would potentially cover such absences, the court held that the employer should not have terminated the employee without initiating the FMLA designation process.

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[34] 29 C.F.R. §§ 825.302(a), 825.303(a).

[35] *Id.* § 825.302(a).

[36] *Id.*

[37] *Id.* § 825.303(a).

[38] *Id.* §§ 825.302(d); 825.303(c).

[39] *Id.* § 825.302(d).

[40] *Id.* § 825.303(c).

[41] *Id.* §§ 825.302(d); 825.303(c).

[42] *Id.* §§ 825.302(c); 825.303(b).

[43] *Id.* § 825.301(b).

[44] 691 F.3d 294 (3d Cir. Aug. 3, 2012).

[45] *Id.* at 313.

Indeed, there may be circumstances where a change in employee behavior may be held to have put the employer on notice of the need for leave despite the fact that the employee has not expressly requested leave. For instance, in *Byrne v. Avon Productions, Inc.,* the Seventh Circuit held that an employee can be considered to have given notice where either the employee was unable to give verbal or written notice or where the employee's change in behavior itself constituted notice of the need for FMLA leave.[46] In *Byrne*, the employee had been a model employee for more than four years until he suddenly began sleeping on the job.[47] After a series of other odd incidents including Byrne missing an appointment with his supervisors to discuss his erratic behavior, Avon fired Byrne based on his work performance.[48] However, during this time Byrne was afflicted with severe depression; he was experiencing hallucinations and on the date of his proposed meeting with employers, he tried to commit suicide.[49] The court held that either Byrne's unusual behavior or his inability to communicate notice could satisfy the requirements of the statute.[50]

Byrne has not been relied on in many cases and even the Seventh Circuit has placed limits on the application of the exception to notice. In *Burnett v. LFW Inc.,* the Court held that *Byrne* did not apply because, the employee did not exhibit any dramatic, observable change in his performance or behavior nor did his condition prevent him from communicating with his employer.[51] Similarly, in *de la Rama v. Illinois Department of Human Services,* the plaintiff contended that because she was taken from work to the emergency room, later absences should have been excused under *Byrne.*[52] The Court explained that employers are "not require[d] . . . to play Sherlock Holmes" and that absent dramatic, observable change or an inability to communicate, the employee should have provided notice of leave.[53] The court did not apply *Byrne,* finding that de la Rama did not exhibit observable changes in performance and her condition did not prevent her from communicating.[54]

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[46] 328 F.3d 379 (7th Cir. 2003); *see also Stevenson v. Hyre Elec. Co.,* 505 F.3d 720 (7th Cir. 2007) (clarifying that only one not both conditions in *Byrne* need to be satisfied to apply the exception – either unusual behavior constituted notice or the employee was unable to communicate the notice).

[47] *Id.* at 380.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 382.

[51] 472 F.3d 471, 480–81 (7th Cir. 2006).

[52] 541 F.3d 681, 687 (7th Cir. 2008).

[53] *Id.*

[54] *Id.*

B. Employer Notice Requirements

The FMLA requires employers to post notice of the statute and its provisions in a conspicuous place to help inform employees of their rights.[55] The notice should provide information on procedures for filing complaints of violations and should be in a location where it can be prominently seen by employees.[56] The Department of Labor publishes a poster (WH Publication 1420), which includes the necessary information.[57] The poster must be displayed at all locations even if there are no employees eligible for FMLA at the location (e.g., there are fewer than 50 employees employed within a 75-mile radius of the worksite).[58] In February 2013, the DOL released a new FMLA poster for employers to use to satisfy their notice requirements.

In addition to the poster, if an FMLA employer has any eligible employees, the employer must include a general notice of leave benefits or employee rights in an employee handbook or other written materials if such materials exist.[59] Otherwise, the employer can distribute a general notice to each employee upon hiring.[60] Both the posting requirement and distribution requirements may be accomplished electronically.[61]

1. Eligibility and Rights and Responsibility Notice

When an employee requests FMLA leave or the employer becomes aware that an employee's leave may be for an FMLA qualifying reason, the employer must inform an employee of his or her eligibility for leave within five business days.[62] The eligibility notice must state whether the employee is eligible, and if not, must provide at least one reason why not.[63] This notice can be given orally or in writing.[64]

In addition to the eligibility notice, the employer must also provide notice of the expectations and obligations of the employee including the consequences for failure to meet these requirements.[65] This employer notice should be provided to the employee within one or two business days after receiving the employee's notice of need for leave and include the following:

- that the leave will be counted against the employee's annual FMLA leave entitlement;

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[55] 29 U.S.C. § 2619(a).

[56] 29 C.F.R. § 825.300(a)(1).

[57] http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[58] 29 C.F.R. § 825.300(a)(2).

[59] *Id.* § 825.300(a)(3).

[60] *Id.*

[61] *Id.* § 825.300(a)(1), (3).

[62] *Id.* § 825.300(b)(1).

[63] *Id.* § 825.300(b)(2).

[64] *Id.*

[65] *Id.* § 825.300(c).

- any requirements for the employee to furnish medical certification and the consequences of failing to do so;
- the employee's right to elect to use accrued paid leave for unpaid FMLA leave and whether the employer will require the use of paid leave, and the conditions related to using paid leave;
- any requirement for the employee to make any premium payments for maintaining group health insurance and the arrangement for making such payments;
- any requirement to present a fitness-for-duty certification before being restored to his/her job;
- rights to job restoration upon return from leave;
- employee's potential liability for reimbursement of health insurance premiums paid by the employer during the leave if the employee fails to return to work after taking FMLA leave; and
- whether the employee qualifies as a "key" employee and the circumstances under which the employee may not be restored to his or her job following leave.[66]

The DOL produces optional model forms that provide both eligibility and employee responsibility notices.[67]

2. Designation Notice

The employer is responsible for designating leave as FMLA-qualifying and providing notice to the employee.[68] Specifically, once the employer has sufficient information to determine whether the leave qualifies under the Act, the employer must notify the employee in writing within five business days, absent extenuating circumstances, whether the leave will be designated and counted as FMLA leave.[69] If the employer requires paid leave to be substituted for FMLA leave, the designation notice must so indicate.[70] And if the employee will have to submit to a fitness-for-duty certification upon returning to work, the designation notice must also inform the employee of this obligation or it cannot be imposed.[71]

3. Failure to Comply

If an employer fails to comply with the notice requirements in the regulations, the conduct may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights.[72] As a result, an employer may be found liable for monetary damages and other equitable relief tailored to the circumstances of the particular case.[73] Further, an employer that

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[66] *Id*. § 825.300(c)(1)(i)-(vii); *see also* http://www.dol.gov/whd/regs/compliance/1421.htm.

[67] *See* Form WH-381 *available at* http://www.dol.gov/whd/forms/wh-381.pdf.

[68] 29 C.F.R. § 825.300(d); *see* DOL Form WH-382 *available at* http://www.dol.gov/WHD/fmla/index.htm.

[69] 29 C.F.R. § 825.300(d)(1).

[70] *Id*.

[71] *Id*. § 825.300(d)(3).

[72] 29 C.F.R. 825.300(e); regulatory notice requirements can be found in 29 C.F.R. § 825.300(a)-(f).

[73] *See* 29 C.F.R. § 825.300(e); *see also* 29 C.F.R. § 825.400(c).

willfully violates the general posting requirements of the FMLA may be assessed a penalty not to exceed $110 for each offense.[74]

4. Retroactive Designation

If an employer does not initially designate FMLA leave as such, the employer may retroactively designate the leave provided that the failure did not result in harm or injury to the employee.[75] If harm did occur as a result of an employer's failure to timely designate leave, this may constitute an interference with, restraint or denial of the exercise of an employee's FMLA rights,[76] opening the employer up to liability for monetary damages.[77]

In *Bosse v. Baltimore County,* plaintiff alleged, among other things, that the employer's failure to designate his absence as FMLA prevented his taking advantage of the County's policy allowing the use of paid leave in conjunction with FMLA leave.[78] Instead of paid leave, the County designated the time off as "absence without permission" and the plaintiff was not paid. In denying defendant's motion for summary judgment, the judge explained "Plaintiff has provided sufficient documentation of the dates on which he lost pay, such that a jury could find in his favor on the issue of whether he suffered an injury."[79] The regulations also provide other examples of damages stemming from an employer's initial failure to designate and retroactive designation (e.g., if an employee took time off to care for a son or daughter with a serious health condition believing it would not count toward FMLA entitlement and the employee planned to later use FMLA leave to provide care for a spouse who would need assistance when recovering from surgery).[80]

IV. QUALIFYING CIRCUMSTANCES

Both male and female employees who meet the length of employment, hours of service, and worksite requirements (if employed by a private employer) are entitled to FMLA leave in all qualifying circumstances: (a) birth of a baby and newborn care; (b) placement of a child for adoption or foster care; (c) care for an employee's spouse, child, or parent with a serious health condition; (d) an employee's own serious health condition; (e) a qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty or has been notified of a call to active duty in the Armed Forces; or (f) to care for a seriously ill or injured servicemember.[81]

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[74] *Id.* § 825.300(a); *but see Mullin v. Rochester Manpower, Inc.,* 204 F. Supp. 2d 556, 563 (W.D.N.Y. 2002) (explaining that the FMLA statute does not create an individual private right of action for an employer's failure to post general notice).

[75] 29 C.F.R. § 825.301(d).

[76] *Id.* § 825.301(e).

[77] *See id.* § 825.400(c).

[78] 692 F. Supp. 2d 574, 587 (D. Md. 2010).

[79] *Id.* at 587-88.

[80] 29 C.F.R. § 825.301(e).

[81] 29 U.S.C. § 2612(a)(1), (3); 29 C.F.R. § 825.120(a)(4).

A. Birth of a Son or Daughter and Care of the Newborn Child

An expectant mother is entitled to take leave under the FMLA *before* actual childbirth, for prenatal care, or if her condition renders her unable to work.[82] After the birth of the child, both the mother and the father are entitled to FMLA leave to be with the newborn child. Under the FMLA, the father has equal rights to take family leave for the birth of the child and its subsequent care.[83]

An employee's entitlement to leave for the birth of a child expires 12 months after the child is born.[84] As a result, any FMLA leave for this purpose must be concluded during that 12-month period. An employee may be entitled to a longer leave period if state law allows or if the employer permits; however, such leave beyond what FMLA requires would not count as FMLA leave.[85]

B. Placement of a Son or Daughter for Adoption or Foster Care

Eligibility for leave for the adoption or foster care placement of a child requires that the child be under age 18 or age 18 or older and "incapable of self-care because of a mental or physical disability." That is, to be eligible for leave, the child over 18 must require active assistance in providing daily self-care at the time that FMLA leave is to commence.[86] The FMLA adopts the definition of "physical or mental disability" provided under the Americans with Disabilities Act (ADAAA). As such, the term encompasses any physical or mental impairment that substantially limits one or more major life activities.[87]

The FMLA regulations define "adoption" as "legally and permanently assuming the responsibility of raising a child as one's own."[88] An employee adopting a child may request leave to begin before the child actually is placed in the employee's home.[89] The source of an adoption has no bearing on employee eligibility for leave. That is, there is no requirement that the adoption result from the efforts of a licensed placement agency.[90]

The FMLA regulations define foster care as 24-hour care for children in substitution for, and away from, their parents or guardian.[91] Under the regulations, "state action," rather than an informal arrangement, is necessary to create a foster care relationship. This state action may take two forms: (1) a voluntary agreement between the parent or guardian of the child and the state

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[82] 29 C.F.R. § 825.120(a)(4).

[83] 29 C.F.R. § 825.120(a)(1).

[84] 29 U.S.C. § 2612(a)(2).

[85] *Id.*

[86] 29 C.F.R. § 825.122(c).

[87] 29 C.F.R. § 825.122(c)(2).

[88] 29 C.F.R. § 825.122(e).

[89] 29 C.F.R. § 825.121(a)(1).

[90] *Id.*

[91] 29 C.F.R. § 825.122(f).

that the child shall be removed from the home and cared for by a foster family who agrees to provide that care; or (2) a judicial determination that foster care is required combined with an agreement by the foster family to provide the child with that care.[92] An employee awaiting the placement of a foster child may request leave to begin before the child actually is placed in the employee's home.[93]

An employee's entitlement to leave for the placement of a child for adoption or foster care expires 12 months after the date of the placement.[94] As a result, any FMLA leave taken due to the placement must be concluded during that 12-month period. An employee may be entitled to a longer leave period if state law allows or if the employer permits; however, such leave beyond what FMLA requires would not count as FMLA leave.[95]

C. Employee's Own Serious Health Condition

The FMLA provides leave for the "serious health condition" of oneself and a "serious health condition" of certain family members. A serious health condition under the FMLA means an illness, injury, impairment, or physical or mental condition that requires inpatient care or continuing treatment by a health care provider.[96] Although the definition of "serious health condition" appears to have been intended by Congress to be read broadly, the Congressional reports explain that the term was not meant to include minor or short-term ailments.[97]

The Act defines "inpatient care" as an overnight stay in a hospital, hospice, or residential medical care facility, or any period of incapacity or subsequent treatment connected with such in-patient care.[98] The regulations define "incapacity" as the inability to work, attend school, or perform other regular daily activities due to the condition, treatment for the condition, or recovery from treatment.[99] The regulations provide that an employee is "unable to perform the functions of the position" if a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act. An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.[100]

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[92] *Id.*

[93] 29 C.F.R. § 825.121(a)(1).

[94] 29 U.S.C. § 2612(a)(2).

[95] 29 C.F.R. § 825.120(a)(2).

[96] 29 C.F.R. § 825.113(a).

[97] Both the House and Senate reports state that the term was not intended to cover "short-term conditions for which treatment and recovery are very brief," "minor illnesses which last only a few days," or "surgical procedures which typically do not involve hospitalization and require only a brief recovery period," unless complications arise. H.R. Rep. No. 103-8, pt. I, at 40 (1993); S. Rep. No. 103-3, at 28 (1993).

[98] *Id.* § 825.114.

[99] *Id.* § 825.113(b).

[100] *Id.* § 825.123(a).

A physical or mental health condition involving "continuing treatment" includes a period of incapacity of more than three consecutive, full calendar days and any subsequent treatment or period of incapacity related to the same condition that also involves:

- Treatment two or more times within thirty days of the first day of incapacity, unless extenuating circumstances, by a health care provider, nurse under direct supervision of a health care provider, or by a provider of health services, such as a physical therapist, under orders of, or on referral by, a health care provider; or
- Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.
- The initial visit with the health care provider must have been in person and occurred within seven days of the first day of incapacity.[101]

In addition, a serious health condition involving continuing treatment also includes any period of incapacity due to pregnancy or prenatal care, chronic serious health conditions, permanent or long-term conditions for which treatment may not be effective, and periods of absence due to multiple treatments by a health care provider.[102]

CFRA Regulations
Under the CFRA an employee's own disability due to pregnancy, childbirth or related medical condition is not included as a serious health condition. Cal. Code Regs. tit. 2, § 7297.6(b).
PDLL Regulations
Under the PDLL regulations, an eligible employee may take up to four months of unpaid leave during the time she is actually disabled by pregnancy, childbirth, or a related medical condition. Cal. Gov't Code § 12945(a); Cal. Code Regs. tit. 2, § 7291.7(a). A woman is "disabled by pregnancy" if, in the opinion of the woman's health care provider, she is unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons. A woman is also considered to be "disabled by pregnancy" if she is suffering from severe "morning sickness" or needs to take time off for prenatal care. Cal. Code Regs. tit. 2, § 7291.2(f). The regulations list conditions, as examples of conditions, both prenatal and post-natal, for which an employee could be considered "disabled by pregnancy." (e.g., prenatal or postnatal care; bed rest; post-partum depression, gestational diabetes; pregnancy-induced hypertension; preeclampsia; childbirth; loss or end of pregnancy or recovery from childbirth. 2 C.C.R. § 7291.2(f).

[101] *Id.* § 825.115(a)(1)-(3).

[102] *Id.* § 825.115(b)-(f).

A combined condition can satisfy the requirements of a "serious health condition." In *Price v. City of Fort Wayne*, the employee suffered from "an assemblage of [conditions] including elevated blood pressure, hyperthyroidism, back pain, severe headaches, sinusitis, infected cyst, sore throat, swelling throat, coughing and feelings of stress and depression."[103] Employee saw her doctor eight times over a two month period and underwent a thyroid ultrasound, a needle biopsy, an excision of a mass, and a CT scan. There was no dispute that she was incapacitated. The court held that the conditions could be considered together and that a group of seemingly unrelated conditions that combine to incapacitate a person and to require continuing treatment, can, together, constitute a serious health condition.

1. Evidence of "Serious Health Condition"

The burden is on the employee to adduce evidence to establish their "serious health condition" as defined by the FMLA.[104] In *Lee v. United States Steel Corp.*, an employee informed his supervisors that he injured his back and would need leave for three days.[105] Thereafter, he provided medical certification indicating that he had visited a physician twice. However, the certifications only noted that he had been seen by a doctor; it did not include any description of his health condition. The employee's medical records also indicated that his back pain was "mild," "constant" and "tight."[106] The employer denied his request for leave, and the district court found no violation under the FMLA. The Eleventh Court affirmed, finding that the documentation provided by the employee was insufficient to establish that he was incapacitated for more than three consecutive days and that he was unable to perform the essential duties of his job or undergoing treatment during the time he was absent.

Similarly, in *Hood v. City of Cleveland,* the court upheld an employer's denial of leave where the employee merely submitted an affidavit stating that she was absent from work because of her bronchitis and she was under the care of a physician.[107] The court explained that this simply amounted to conclusory assertions. Without specific facts regarding her condition, the court held that her bronchitis did not qualify as a serious health condition.

2. Inability to Return to Work

Although an employee must be incapacitated in order to qualify for FMLA leave, several courts have ruled the FMLA does *not* provide protection to an employee who is not able to return to work after twelve weeks of leave. In *Hearst v. Progressive Foam Technologies, Inc*., for example, an employee extended his medical leave several times for additional medical procedures.[108] The company stated that he was initially covered by the FMLA, but

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[103] 117 F.3d 1022, 1023 (7th Cir. 1997).

[104] *See Cash v. Smith*, 231 F.3d 1301, 1307–08 (11th Cir. 2000) (explaining that to establish a prima facie case under the FMLA an employee must demonstrate that he or she exercised a protected right, he or she suffered an adverse employment decision, and there is a causal connection between the two).

[105] 450 F. App'x 834 (11th Cir. 2012).

[106] *Id.* at 838.

[107] No. 4:10-cv-00009-SA-DAS, 2011 WL 533676 (N.D. Miss. Feb. 15, 2011).

[108] 641 F.3d 276 (8th Cir. 2011).

contended when his FMLA protected leave eventually ended, he was terminated. The Eighth Circuit upheld the dismissal of his claim under the FMLA, finding that it was undisputed that he would not have been able to return to work at the end of his FMLA leave. Accordingly, he was not prejudiced at all by his termination and no relief could be granted.

Similarly, in *DeGraw v. Exide Technologies*, the Tenth Circuit held that an employee who was not able to return to work after his FMLA expired did not have a valid claim under the FMLA.[109] In that case, DeGraw complained to the company nurse that working mandatory overtime was aggravating his back pain. DeGraw took FMLA protected leave that expired in September 2006. Exide did not terminate him at that time, but rather instructed DeGraw not to return to work until he received medical clearance. DeGraw saw several doctors, and while one of his personal physicians lifted his work restrictions, another physician refused to lift the work restrictions. Exide found no other job for DeGraw that satisfied his work restrictions, and it discharged him in January 2007. The 10th Circuit rejected DeGraw's claim that Exide violated the FMLA by failing to reinstate him when he sought to return to work in November 2006. The court explained that the FMLA permits an employer to terminate an employee who cannot return to work after the 12 weeks of leave have expired. DeGraw exhausted all of his FMLA leave by the end of September 2006; thus, DeGraw was not entitled to reinstatement. But see discussion under VIII, D, Reinstatement, Page 38 infra.

V. CARE FOR FAMILY MEMBERS

A. Spouse

As noted, the FMLA entitles an eligible employee to take up to 12 workweeks of job-protected, unpaid leave "to care" for a parent, son or daughter, or spouse with a serious health condition.[110]

On June 26, 2013 the U.S. Supreme Court decided the case of *United States v. Windsor*, holding that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional.[111] Section 3 of DOMA provides that for purposes of federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife. [112] Although the FMLA was not directly at issue in the case, it is one of thousands of federal laws whose benefits were tied to DOMA's definition of "spouse." Despite the fact that the FMLA and its regulations define "spouse" as "a husband and wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized," the DOL held to the contrary in a 1998 Opinion Letter. Because the

[109] 462 F. App'x 800 (10th Cir. 2012).

[110] *See* 29 U.S.C. 2612(a)(1)(C). The regulations implementing the FMLA define "spouse" as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." This definition does not include a registered domestic partner, unless the state defines or recognizes domestic partners as spouses.

[111] 570 U.S.____ (June 26, 2013).

[112] 1 U.S.C. Section 7.

FMLA is a federal statute, the DOL indicated that only the Federal definition of marriage and spouse under DOMA applies for FMLA leave entitlement. Now, as a result of the *Windsor* decision, it is clear that state law in fact dictates who qualifies as a "spouse" for FMLA purposes. Therefore, same-sex couples who reside in states that recognize same-sex marriage should be entitled to benefits under the FMLA.

CFRA
Under California law, registered domestic partners are covered under the CFRA. Cal. Fam. Code § 297.5. Note that this may give a domestic partner more family leave, because, if the domestic partner uses CFRA leave to care for a domestic partner, he or she will not have exhausted his or her FMLA leave.

B. Adult Child

In a January 14, 2013 Administrator's Interpretation, the Wage and Hour Division ("WHD") of the DOL broadly interpreted the definition of an adult "son or daughter" for whose care an eligible employee may take job-protected leave under the FMLA.[113] The interpretation addresses and clarifies three issues. First, for purposes of "son or daughter" coverage under the FMLA, an adult over the age of 18 must have a disability, but that disability need not have first manifested before age 18. Second, the Americans with Disabilities Amendments Act's ("ADAAA") expanded definition of "disability" applies to the FMLA definition of an adult "son or daughter." Finally, after taking up to 26 weeks of military caregiver leave in a single year, a parent of an adult son or daughter wounded in military service may take an additional 12 weeks of FMLA leave in a subsequent year, provided all other requirements are met.

The FMLA provides eligible employees with job protected leave to care for a son or daughter with a serious health condition.[114] A "son or daughter" is "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is – (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability."[115] Thus, all eligible employees seeking FMLA leave to care for an adult son or daughter must show that (i) the son or daughter needs care, (ii) as a result of a serious health condition. Parental caregivers of adult patients must make two additional showings: (iii) the patient is incapable of self-care, (iv) because of a disability.

In its recent interpretation, the WHD announced that the onset age of an adult's disability is irrelevant to whether that individual is a "son or daughter" under the FMLA. Thus, providing that the other requirements are met, a parental caregiver is eligible for FMLA leave to care for a son or daughter whose disability manifested before or after the age of 18. Previously, there was confusion on this point, resulting from the WHD's statement that an adult "son or daughter" has

[113] Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2013-1 (January 14, 2013).

[114] 29 U.S.C. § 2612(a)(1)(C).

[115] *Id.* § 2611(12).

a "continued" need for care in adulthood.[116] The WHD's most recent interpretation clarifies that there is no need for the disability to have first manifested when the patient was a minor.

The WHD's interpretation also affirmed that the expanded definition of "disability" found in the ADAAA applies to the definition of an adult "son or daughter" in the FMLA. The WHD observed that many impairments will meet both the ADAAA definition of a "disability" and the FMLA definition of a "serious health condition." The WHD further observed that the expanded definition will enable more parents to take FMLA-protected leave to care for their adult sons and daughters.

The ADA defines "disability" as an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment.[117] A "major life activity" includes self-care, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.[118] The ADAAA added to this list the "operation of a major bodily function," such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[119] Furthermore, an impairment of a major life activity can be "substantial" without preventing that activity or even severely restricting it. Additionally, under WHD's interpretation, the ADAAA categorizes an impairment that is currently in remission as a disability if it would substantially impair a major life activity were it not in remission.

Finally, under WHD's new interpretation, parental caregivers can be eligible for 12 weeks of FMLA leave to care for an adult son or daughter wounded in military service, in addition to the 26 weeks of job-protected leave provided for parents of covered service members who sustained serious injury or illness. The employee who takes military caregiver leave is not excluded from taking FMLA leave in subsequent periods to care for the same service member, provided all other requirements are met. Thus, the parental caregiver of a wounded service member may take an additional 12 weeks of leave in a subsequent FMLA leave year if the service member develops a disability that leaves him or her incapable of self-care and if he or she requires care due to a serious health condition.

C. Psychological Comfort

The FMLA's protection for employees to provide "care" for a parent, son or daughter, or spouse encompasses both physical and psychological care.[120] Courts have not established a bright line in determining what behavior constitutes "psychological comfort," but the degree between the employee's psychological support and the family member's illness appears to matter.

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[116] Department of Labor, Wage and Hour Division, Opinion Letter FMLA2003-2 (June 30, 2003).

[117] 42 U.S.C. § 12102(1).

[118] *Id.* § 12102(2)(A).

[119] *Id.* § 12102(2)(B).

[120] 29 C.F.R. § 825.124(a).

For example, in *Scamihorn v. General Truck Drivers*, the Ninth Circuit held that a son who took FMLA leave to care for his father who was diagnosed with depression after the death of his daughter (the employee's sister) "cared for" the father when he performed daily chores such as shoveling snow, chopping wood, and clearing the yard.[121] The court relied upon the fact that the son was a "constant presence" in his father's life, was available to speak with his father regarding his sister, and occasionally drove his father to appointments.

In contrast, the court in *Alsoofi v. ThyssenKrupp Materials NA*, held that a son who took FMLA leave to care for his sick mother did not provide psychological comfort when he left her to travel with his one sister to Yemen for his other sister's wedding.[122] According to the son, he psychologically cared for his mother by accompanying his sister to Yemen as required by religion and custom. The court disagreed, finding that "traveling with his sister may have provided 'some degree of psychological comfort' [but] a mere 'collateral benefit' of activities [is] not otherwise encompassed in the FMLA."[123]

D. Direct Versus Indirect Care

Though it is clear that FMLA allows employees to provide physical and psychological care, courts have a difficult time determining whether such care directly or indirectly assists the family member suffering from a serious health condition.

For example, courts have considered an employee's decision about treatment is direct care, which the FMLA covers. In *Romans v. Michigan Department of Human Services*, the Sixth Circuit ruled that refusing to permit an employee to leave his shift to visit his dying mother in the hospital, and then terminating him for doing so, creates FMLA interference and retaliation claims.[124] In that case, a guard who was terminated for abandoning his post claimed that he told his supervisor he needed to leave to visit his dying mother in the hospital and to discuss with his sister whether to keep the mother on life support. His supervisor claimed the officer never told him why he needed to leave and that if he had known, he would have permitted the officer to leave. The employer still argued, however, that the leave was not protected, because the officer's sister was available to provide care for their mother. The Sixth Circuit ruled in favor of the officer, finding that he provided adequate notice of his need for FMLA leave, that the Act covers care related to decisions about treatment, and that the employee does not need to be the only family member available to provide the care.

In contrast, an employee's mere presence in a hospital provides only indirect care, not FMLA protected. The court in *Fioto v. Manhattan Woods Golf Enterprises, LLC*, ruled against the employee who took time off to be at the hospital the day his mother underwent brain surgery.[125] At trial, the employee offered no evidence about what he did at the hospital, and testified that he did not see his mother following the surgery. The court granted the employer's

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[121] 282 F.3d 1078, 1087-88 (9th Cir. 2002).

[122] No. 09-CV-12869, 2010 WL 973456 (E.D. Mich. Mar. 15, 2010).

[123] *Id.* at *6 (citing *Pang v. Beverly Hosp., Inc.,* 94 Cal. Rptr. 2d 643, 643 (Cal. Ct. App. 2000)).

[124] 668 F.3d 826 (6th Cir. 2012).

[125] 270 F. Supp. 2d 401 (S.D.N.Y. 2003), *aff'd*, 123 F. App'x 26 (2d Cir. 2005).

motion for judgment as a matter of law as to the jury's finding that the employee was entitled to leave under the FMLA. The court concluded that, while offering comfort and reassurance to a bedridden parent qualifies as "caring for" the parent under the FMLA, the record was devoid of any evidence that the employee was needed to provide either physical or psychological care for his mother, and the employee thus failed to meet his burden of demonstrating he was doing something to participate in his mother's care.

Likewise, an employee's physical care may be indirect if it is too far removed from the family member's illness. In *Lane v. Pontiac Osteopathic Hospital*, the plaintiff, Joe Lane, who lived with his mother, sought and was granted FMLA intermittent leave for six months to care for his mom, who suffered from diabetes, high blood pressure, weight loss and arthritis. [126] During the time he was caring for his mother, her basement flooded, and Joe was absent for four consecutive days in violation of the Hospital's personnel policies, failing to call in his absences. Thereafter, he informed the Hospital that he would need additional time off to clean up the flooding in his mom's basement. He claimed that the "flood cleaning days" should be excused because his mother had hepatitis and the stagnant water was a "breeding ground" for the disease.[127] The Hospital disagreed and terminated his employment. The district court rejected his FMLA interference claims, finding that:

- Cleaning the flood was not listed among his enumerated duties in the medical certification form;
- Joe had not established that cleaning mom's basement met the definition of "caring for" a family member with a serious health condition;
- Joe could not show that his mom's hepatitis was in danger of being aggravated if he did not clean the basement immediately; and
- In any event, Joe's request for leave to clean his mom's basement failed to put the employer on notice of the need for FMLA leave.

E. Support While Traveling

Distinguishing between direct and indirect care can be even more difficult when the employee and/or the sick family member are traveling. Courts have ruled against employees who have taken FMLA leave and traveled away from the sick family member. The Ninth Circuit in *Tellis v. Alaska Airlines, Inc.* ruled that an employee seeking leave to care for a family member must be in close and continuing proximity to that ill family member.[128] In *Tellis*, the court affirmed summary judgment in favor of the employer because the employee took FMLA leave to care for his wife but drove across the county to retrieve the family car and made phone calls to his wife while he was away. Similarly, the court in *Alsoofi,* described above, found the employee's trip to Yemen was not FMLA protected because he was not in close and continuing proximity to his ill mother.

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[126] No. 09-12634, 2010 U.S. Dist. LEXIS 61003 (E.D. Mich. June 21, 2010).

[127] *Id.* at *8-9.

[128] 414 F.3d 1045 (9th Cir. 2005).

When both the employee and sick family member travel together, there may be FMLA coverage. The recent decision *Ballard v. Chicago Park District* suggests that the care associated with FMLA leave to "care" for a family member need not take place at home.[129] In *Ballard*, the plaintiff was a swimming instructor who requested FMLA leave to care for her dying mother. Ballard was responsible for preparing her meals, administering her insulin shots, operating a pump to remove fluids from her mom's heart, and other tasks. A local charitable organization granted Ballard's mother's "make a wish" request for a trip to Las Vegas. Beverly requested six days of FMLA leave to care for her mother during the trip. The employer denied the request for leave, but Ballard went on the trip anyway. In addition to administering medicine and general care, Ballard also spent time with her mother "playing slots, shopping on the strip, people-watching and dining at restaurants."[130] Ballard readily acknowledged that her mother was not going to Las Vegas for any kind of medical care, therapy or other treatment. Rather, it was just a vacation for her mom.

Ballard's employment was terminated for unauthorized absences. However, the court held that the leave was FMLA protected, noting that it did not matter *where* the leave was being provided, as long as Ballard was providing it. The court noted that the FMLA only requires that an employee seek leave to "care for" her mom, who had a "serious health condition." "So long as the employee provides care to the family member, where the care takes place has no bearing on whether the employee receives FMLA protections." Accordingly, the claim was allowed to proceed to a jury.

In contrast, the First Circuit in *Tayag v. Lahey Clinic Hospital*, *Inc.* affirmed summary judgment for the employer who terminated an employee who took an unapproved seven-week leave to accompany her ailing husband on a spiritual healing pilgrimage to the Philippines.[131] The court determined that the pilgrimage did not constitute "medical care" and that the FMLA definition of "care" did not extend to cover "psychological comfort and reassurance" on lengthy trips unrelated to medical care.[132]

VI. MILITARY FAMILY LEAVE

The most recent changes to the FMLA altered leave for military family members.[133] Two types of leave are available for family members of military servicemembers – exigency leave and leave to care for an injured servicemember.[134]

A. Exigency Leave

Exigency leave allows the spouse, son, daughter or parent of a person on "covered active duty"[135] (or has been called to covered active duty) to take up to twelve weeks leave in order to

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[129] 900 F. Supp. 2d 804 (N.D. Ill. 2012).

[130] *Id.* at 807.

[131] 632. F.3d 788 (1st Cir. 2011).

[132] *Id.* at 791 n.2.

[133] *See* U.S. DOL, Fact Sheet #28A, http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf.

[134] 29 U.S.C. § 2612(a)(1)(E), (a)(3).

address specific familial circumstances arising as a result of the military service.[136] These exigencies include one or more of the following:

1. Short notice deployment which occurs when a covered military member is notified seven or less calendar days prior to the date of deployment of a call or order to active duty. This leave is limited to seven calendar days from the day the service member was notified;
2. military events and activities related to active duty service or a call to active duty status;
3. childcare and school activities such as arranging for alternative childcare, enrolling a child in a new school, or attending meetings with school officials and/or daycare staff;
4. to make updates to financial or legal arrangements to address the military servicemember's absence;
5. attend counseling related to the call to active duty status of the military member;
6. to spend time with the military service member on short-term, temporary rest and recuperation leave during active deployment;
7. post-deployment to attend arrival ceremonies, reintegration briefings, and other official programs for a period of ninety days following termination of the service member's active duty status; and
8. additional activities arising out of active duty or a call to active duty status provided the employer and employee agree to the timing and duration.[137]

Exigency leave is the only leave in the FMLA that does not require a medical justification. Employers may still require certification of the need for exigency leave by requesting a copy of the covered military member's orders or other official military documentation indicating that the service member is on active duty or has been called to active duty and the dates of this service. The employer may also require that the certification include a description of sufficient facts regarding the qualified exigency to support the leave.

CFRA
The CFRA does not contain a leave entitlement to address a "qualifying exigency" arising out active duty in the Armed Forces. Therefore, an employee does not use his or her CFRA leave when FMLA leave is used for this purpose.

B. Care for an Injured Servicemember

In 2009, the FMLA was amended to provide up to 26 weeks of leave for an employee who is the parent, child, spouse, or next of kin of a service member to care for the

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[135] The statute defines "covered active duty" in the case of a regular member of the Armed Forces as duty during the deployment to a foreign country, and in the case of a reserve member of the Armed Forces, duty during the deployment to a foreign country under a call or order to active duty. 29 U.S.C. § 2611(14).

[136] *Id.* § 2612(a)(1)(E).

[137] 29 C.F.R. § 825.126(a)(1)-(8).

servicemember in the event they are injured.[138] Eligible employees include a servicemember's spouse, son, daughter, parent, or next-of-kin. For purposes of this type of leave, a "covered servicemember" includes a member of the Armed Forces who is undergoing medical treatment for a serious injury or illness or a veteran who is undergoing medical treatment for a serious injury or illness and who was a member of the military in the five preceding years.[139]

No more than 26 weeks of leave is available for an employee who takes leave to care for an injured servicemember in addition to another qualifying reason in a single 12 month period.[140] The employer must designate time that qualifies as both care for an injured servicemember and care for a family member with a serious illness as servicemember leave.[141] The 12-month period associated with this type of leave is calculated differently than other FMLA time. Here, the 12-month period starts on the first day the employee takes leave to care for the servicemember and expires one year after. With other FMLA leave, the employer has options in the way that they choose to calculate the 12 month period.[142]

An employer may request certification for leave to be completed by an authorized healthcare provider for the servicemember. The employer may also request information from the employee regarding their relationship to the servicemember and an estimate of the amount of leave needed.[143] Unlike other types of FMLA leave, with leave for care of a covered servicemember an employer is not entitled to request second and third opinions or recertifications.[144]

CFRA Regulations

Although the CFRA does not provide military caregiver leave, if the servicemember is the spouse, child or parent of the employee, the employee would be eligible for CFRA leave to care for a spouse, parent, child with a serious health condition. Cal. Code Regs. tit. 2, § 7297.0(h)(2). An employee would not use his or her CFRA leave when he or she uses FMLA leave to care for a servicemember with a serious injury or illness who is not the employee's spouse, child, or parent. Note also that the CFRA does not contain a leave entitlement for an employee who is the servicemember's "next of kin."

[138] 29 U.S.C. § 2612(a)(3).

[139] *Id.* § 2611(15).

[140] *Id.* § 2612(a)(4).

[141] 29 C.F.R. § 825.127(c)(4).

[142] An employer may calculate the 12-month period by the calendar year, any fixed 12-month period such as a fiscal year, the 12-month period measured from the date of an employee's first FMLA leave, or a "rolling" 12-month period measured backward from the date an employee uses leave. *See id.* § 825.200(b)(1)-(4).

[143] 29 C.F.R. § 825.310(c).

[144] *Id.* § 825.310(d).

C. Recent Rule-Making: Expanded Military Caregiver and Exigency Leave

On February 5, 2013, the Department of Labor released its final rule implementing the 2010 amendments to the FMLA.[145] The final rule expands the availability of military caregiver leave to eligible employees caring for "covered veterans." A "covered veteran" is a veteran who was discharged or released (not dishonorably) within the 5 years preceding the start of the FMLA leave.[146] Additionally, the new regulation expands the definition of a servicemember's serious illness or injury to include conditions that pre-existed active duty but were aggravated in the line of service while on active duty.[147]

The new regulation also expands the exigency leave available to an eligible employee who is the spouse, son, daughter or parent of a covered service member. Under the new regulations, covered service members include members of the National Guard and Reserves, as well as the regular Armed Forces.[148] On the other hand, "covered active duty" under the new regulations requires deployment to a foreign country, thereby limiting the expansion for National Guard members.[149] The regulations also create a new category of exigency leave care of the parent of a covered service member who is incapable of self-care and who needs care as a result of the service member's covered active duty.[150] Finally, the regulations increase the maximum days available for job-protected exigency leave associated with a service member's rest and recuperation leave from 5 days to 15 days per leave period.[151]

In its February 5, 2013 final rule-making, the DOL also adopted new regulations for determining the FMLA eligibility of members of flight crews.[152] Under the new regulation, a flight crew member will be eligible for FMLA protection if, within the 12 month period preceding the job leave, he or she worked or was paid for a minimum 504 hours and not less than 60% of the applicable monthly guarantee, or the time for which the employer promised to pay the employee each month.[153] Similarly, the regulation adopts new leave periods available to eligible flight crew members, who may take 156 days for military caregiver leave or 72 days for all other covered grounds within a 12 month period.[154]

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[145] *See* 78 Fed. Reg. 8833-8947 (Feb. 6, 2013). The 2010 Amendments were codified in National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, 123 Stat. 2190.

[146] 29 C.F.R. § 825.122(a).

[147] *Id*. at § 825.127(c).

[148] *Id*. at § 825.126(a).

[149] *Id.*

[150] *Id.* at § 825.126(b)(8).

[151] *Id*. at § 825.126(b)(6).

[152] *See* 29 C.F.R. §§ 825.800 – 825.803.

[153] *Id*. at § 825.801(b).

[154] *Id*. at § 825.802(a).

VII. CERTIFICATION

An employer may require an employee to provide certification issued by the health care provider of the employee or the health care provider of the employee's family member for leave under the FMLA.[155] If such a certification will be required, the employer must provide notice to employees of the certification requirement.[156] An employer should request certification within five days of being informed of the need for the leave or five days after leave has commenced in the case of unforeseen leave.[157] The regulations further explain that an employee should submit the completed certification within fifteen business days unless that is not practicable under the circumstances of the particular situation.[158]

An employee is required to provide "complete and sufficient" certification to the employer.[159] Generally, certification is sufficient if it provides the date on which the serious health condition commenced, the probable duration of the condition, and appropriate medical facts regarding the condition.[160] Certification is incomplete when one or more applicable sections has not been completed.[161] Insufficient certification may be complete, but occurs when the information provided is vague, ambiguous, or non-responsive.[162]

If an employer determines a certification is incomplete or insufficient, the employer must notify the employee in writing what additional information is needed to make the certification complete and sufficient.[163] The employee has seven calendar days, unless otherwise impracticable, to remedy any deficiencies in their certification.[164] Incomplete or insufficient certification may serve as grounds for an employer to deny FMLA leave.[165] For example, in *Brady v. Potter*, the Sixth Circuit affirmed summary judgment for the Postmaster General and the U.S. Postal Service when they denied FMLA leave to an employee who refused to provide medical documentation.[166] There, the Postal Service found Brady's previous documentation insufficient to approve her two-month absence as FMLA leave because it stated that she would not need to be absent from work intermittently. The court found the Postal Service correct in requesting new certification showing that Brady's absence was due to incapacitation by her diabetes. Instead of providing the certification requested, Brady repeatedly submitted copies of

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[155] 29 U.S.C. § 2613(a).

[156] 29 C.F.R. § 825.305(a).

[157] *Id*. § 825.305(b).

[158] *Id*.

[159] *Id*. § 825.305(c).

[160] 29 U.S.C. § 2613(b).

[161] 29 C.F.R. § 825.305(c).

[162] *Id*.

[163] *Id*.

[164] *Id*.

[165] *Id. See also Mauder v. Metro. Transit Auth. of Harris Cnty., Tex.*, 446 F.3d 574 (5th Cir. 2006).

[166] 273 F. App'x 498 (6th Cir. 2008).

her old documentation. The court found that Brady "forfeited her ability to receive FMLA benefits" by refusing to cooperate in the medical certification process.[167]

Under the FMLA an employer may request the following information for certification:

- The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;
- The approximate date on which the serious health condition commenced, and its probable duration;
- A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy for example), or any other regimen of continuing treatment;
- If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (*see* § 825.123(b) and (c));
- If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;
- If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;
- If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and
- If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.[168]

[167] *Id.* at 504.

[168] 29 C.F.R. § 825.306(a)(1)-(8).

CFRA Regulations

In contrast to the FMLA, under the CFRA, disclosure of a specific "serious health condition" of the employee or family member is not required. Cal. Code Regs. tit. 2, § 7297.0(a)(1). Under the CFRA, if an employer provides a certification that, on its face, satisfies the requirements listed above, the employer cannot later "defend the suit by asserting that the employee, when requesting leave, provided insufficient evidence that the employee fell within the provisions of the CFRA." *Lonicki v. Sutter Health Cent.*, 43 Cal. 4th 201, 211 (2008).

The Department of Labor has developed two forms which an employer may use for medical certification. Form WH-380E is for use when an employee requests leave for his or her own serious health condition.[169] Form WH-380F is for use when an employee requests leave to care for a family member.[170] These forms are optional and an employer may develop its own forms as long as the information requested does not exceed what §§ 825.306, 825.307, and 825.308 specify.[171]

CFRA Regulations

The CFRA regulations contain a "Certification of Health Care Provider" form that may be used for certification of CFRA leaves. Cal. Code Regs. tit. 2, § 7297.11. Alternatively, an employer may create its own form seeking the same information, as long as the diagnosis of the serious health condition is not disclosed without the patient's consent. *Id.*

In one recent case on the components of certification, *Fischbach v. City of Toledo*, the court denied defendant's motion for summary judgment where plaintiff's certification included the dates, duration, and medical cause of incapacity.[172] The court held this certification to be presumptively valid and found that the employer offered no evidence that the certification was invalid or inauthentic. In contrast, in *Lewis v. United States,* a civilian Air Force employee failed to provide sufficient certification though her certification included her diagnosed condition and estimated leave time[173]. The court explained that the form lacked "appropriate medical facts" about why the plaintiff was unable to perform her work duties.[174]

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[169] DOL Form WH-380E, http://www.dol.gov/whd/fmla.

[170] DOL Form WH-380F, http://www.dol.gov/whd/fmla.

[171] 29 C.F.R. § 825.306(b).

[172] 798 F. Supp. 2d 888 (N.D. Ohio 2011).

[173] 641 F.3d 1174 (9th Cir. 2011).

[174] *Id.* at 1176-77.

A. Authentication and Clarification

Upon receiving complete and sufficient certification, an employer may not request additional information from the employee's health care provider, but may contact the provider for authentication and clarification.[175] Authentication involves the employer providing a copy of the certification to the health care provider to verify that the information contained on the form was authorized by the health care provider that signed the form.[176] Clarification means contacting a health care provider to better understand handwriting or the meaning of a response.[177] Again, this does not permit an employer to ask the provider for additional information beyond that requested in the form.[178]

The employee's supervisor is prohibited from contacting the health care provider themselves. Instead, the employer must use a health care provider, human resources administrator, or management official to obtain the authentication and or clarification.[179]

B. Second and Third Opinions

An employer who has reason to doubt the validity of a medical certification may require a second opinion at the employer's expense.[180] The employer may designate the health care provider but that provider must not be employed on a regular basis by the employer unless the employer is located in an area where access to health care is limited.[181]

If the opinions of the employee's and the employer's health care providers differ, the employer may require a third and final opinion.[182] The parties would jointly agree on the provider to consult and the opinion would be binding on both parties.[183]

CFRA Regulations
For the purposes of obtaining second opinions, the CFRA regulations distinguish between a certification of the employee's own serious health condition and a certification of the employee's family member's serious health condition. If the employer has reason to doubt the validity of the certification provided by an employee for his or her own condition, the employer may

[175] 29 C.F.R. § 825.307(a).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* § 825.307(a).

[180] *Id.* § 825.307(b).

[181] *Id.*

[182] *Id.* § 825.307(c).

[183] *Id.*

CFRA Regulations
require a second opinion at the employer's expense. The second health care provider may be designated or subject to approval by the employer. However, the provider cannot be employed on a regular basis by the employer. Cal. Code Regs. tit. 2, § 7297.4(b)(2). In any case where the second opinion differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider. The third provider is to be designated or approved jointly by both the employer and the employee. Cal. Code Regs. tit. 2, § 7297.4(b)(2)(B). The opinion of the third health care provider is final and binding on the employer and employee. Cal. Code Regs. tit. 2, § 7297.4(b)(2)(C). The employer is required to provide the employee with a copy of the second and third medical opinions without cost upon the request of the employee. Cal. Code Regs. tit. 2, § 7297.4(b)(2)(D). Though an employer may require a second and third opinion to verify an employee's own serious health condition, an employer must accept as sufficient a certification of a family member's serious health condition, as long as the certification satisfies the requirements of section 7297.0(a)(1). Cal. Code Regs. tit. 2, § 7297.4(b)(1).

PDLL Regulations
Under the PDLL regulations, if the medical certification satisfies the requirements of section 7291.2 (d), the employer must accept it as sufficient. Upon expiration of the time period which the health care provider originally estimated that the employee needed, the employer may require the employee to obtain recertification if additional time is requested if the employer has similar requirements for other similarly situated employees. Cal. Code Regs. tit. 2, § 7291.10(b).

The question has arisen in some cases, whether an employer waives the right to challenge a claim that an employee has a serious health condition if the employer never requested a second or third opinion. The Seventh Circuit addressed the issue of whether the process outlined in § 2613 is mandatory in *Darst v. Interstate Brands Corp.*[184] The Court held that it was not necessary to decide whether the employer was required to formally challenge an employee's certification because their failure to do so would only matter if the employee did in fact have a right to FMLA leave.[185] The employee claimed that during his three day absence, he was

[184] 512 F.3d 903, 911–12 (7th Cir. 2008).

[185] *Id.* at 911; *see also Novak v. MetroHealth Med. Ctr.,* 503 F. 3d 572, 579–80 (6th Cir. 2007). (finding that the procedures for challenging a certification in the FMLA are permissive because of the use of the word "may"

seeking treatment, however his physician was not treating him on the days in question and he was unable to offer another explanation for his absence.[186] The court found these absences were not FMLA protected.[187]

However, it is important to note that in some circumstances, a failure to get a second opinion may hurt an employer's ability to challenge a determination later. In *Thorson v. Gemini, Inc.,* an employer claiming that the FMLA did not protect an employee's illness was unable to refute the plaintiff's medical certification because the employer had not gathered more information by getting a second opinion.[188]

C. Recertification

Recertification is a verification that the condition requiring leave still exists at various points during the employee's leave.[189] By requesting a recertification, the employer asks for the same information that was contained in the original certification.[190] The employee has the same obligations to respond to requests for recertification as they did under the original request for certification.[191]

The general rule is that an employer may not request recertification more often than every thirty days.[192] However, the regulations place some exceptions on this rule. If an employee's minimum leave duration is more than thirty days, the employer must wait until that minimum amount of time expires before requesting recertification.[193] An employer may request recertification in less than thirty days if the employee requests an extension of leave, if circumstances in the original certification have changed, or if the employer has information which casts doubt on the employee's continuing need for leave.[194] However, with a recertification an employer cannot require second or third opinions.[195]

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in the statute); *Rhoads v. FDIC*, 257 F.3d 373, 385–86 (4th Cir. 2001); *Stekloff v. St. John's Mercy Health Sys*., 218 F.3d 858, 860 (8th Cir. 2000).

[186] *Id.* at 911–12.

[187] *Id.* at 912; *but cf. 5ttjuu7 v. Forest Preserve Dist. of Cook Cnty.*, No. 08 C 2200, 2010 WL 780331, at *6 (N.D. Ill. Mar. 3, 2010) (finding employee's certification sufficient where she provided an explanation of the seriousness of her condition, its likely duration, and information about her need for hospitalization).

[188] 205 F.3d 370, 381–82 (8th Cir. 2000).

[189] 29 C.F.R. § 825.308(e).

[190] *Id.*

[191] *Id.*

[192] *Id.* § 825.308(a).

[193] *Id.* § 825.308(b).

[194] *Id*. § 825.308(c)(1)-(3).

[195] *Id.* § 825.308(f).

CFRA Regulations

The CFRA regulations only permit the employer to require recertification when:

- the time period which the health care provider originally estimated that the employee needed (to take care of the employee's family member or for his/her own serious health condition) expires; and the employee requests additional leave.

Cal. Code Regs. tit. 2, § 7297.4(b)(1), (2).

PDLL Regulations

Under the PDLL regulations, an employer may require the employee to obtain recertification when:

- the time period which the health care provider originally estimated that the employee needed (for her transfer or leave) expires;
- the employee requests additional time; and
- the employer has similar requirements for other similarly situated employees.

Cal. Code Regs. tit. 2, § 7291.10(b).

D. Fitness for Duty

As a condition of restoring employment, an employer may have a uniformly applied practice or policy that requires an employee to obtain certification from a health care provider that the employee is able to resume work.[196] The employee has the same obligations to comply with the fitness-for-duty certification as in the initial certification process.[197] The employer may require the certification to address the employee's ability to perform the essential functions of the job, provided that the employee was advised of this requirement in the employer's Designation Notice.[198]

Though an employer is not entitled to a fitness to return to duty for every absence taken on intermittent leave, an employer is entitled to certifications up to once every 30 days if reasonable safety concerns exist.[199] Reasonable safety concerns mean a "reasonable belief of

[196] *Id.* § 825.312(a).

[197] *Id.*

[198] *Id.* § 825.312(b).

[199] 29 C.F.R. § 825.312(f).

significant risk of harm to the individual employee or others."[200] Employers should consider the nature and severity of the potential harm and its likelihood of occurring.[201]

VIII. FMLA LEAVE: DURATION, BENEFITS, SUBSTITUTION, AND REINSTATEMENT

The FMLA provides employees specific protections while on leave. This section will briefly discuss the duration of FMLA leave, benefits during leave, substitution of paid leave for FMLA leave, and reinstatement after leave. Though each of these topics can be very complex, this paper will only provide a short summary of the basic components of FMLA leave.

A. Duration of Leave

An eligible employee – other than a "flight attendant" or "flight crewmember"– is entitled to a total of 12 workweeks of leave in any 12 month period for all qualifying circumstances of leave except leave to care for a seriously injured or ill servicemember, in which case the eligible employee is entitled to 26 workweeks of leave during a single 12-month period.[202] During the single 12-month period in which the employee takes leave to care for a seriously injured or ill servicemember, the employee is entitled to a combined total of 26 weeks of leave.[203]

Except in the case of leave to care for a covered servicemember with a serious injury or illness, the FMLA allows employers to select one of four alternative methods of calculating the 12-month leave period (rolling, calendar, fixed, or from date of employee's first FMLA leave).[204] An employer, however, must select one method of calculating the 12-month leave year and apply that method uniformly to all of its employees, subject to the multi-state employer exception.[205] If the employer fails to select a leave year, the employee is entitled to calculate the leave year in the way that gives him or her the most beneficial outcome.[206] Thus, failure to select a method may result in employees getting greater amounts of leave than they otherwise would be entitled to take.

The four alternative methods for determining the 12-month period are:

- The calendar year;
- Any fixed 12-month "leave year" (such as a fiscal year, a year required by state law, or a year starting on an employee's "anniversary" date);

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[200] *Id.*

[201] *Id.*

[202] 29 U.S.C. § 2612(a)(1), (a)(3); 29 C.F.R. §§ 825.127(c), 825.200(a).

[203] 29 C.F.R. §§ 825.127(c)(3), 825.200(g).

[204] 29 C.F.R. § 200(b)(1)(4).

[205] 29 C.F.R. § 200(b), (d)(1).

[206] 29 C.F.R. § 825.200(e).

- The 12-month period measured forward from the date any employee's first FMLA leave begins; or

- A "rolling" 12-month period measured backwards from the date an employee uses any FMLA leave.[207]

The FMLA limits the amount of leave that a husband and wife employed by the same employer may take for: (1) the birth of a child or care for a child after birth[208]; (2) the placement of a child with the employee for adoption or foster care or to care for the child after placement[209]; and (3) the care for the employee's parent with a serious health condition.[210] The spouses may take a total of 12 weeks of leave combined in any 12-month period for these qualifying reasons.[211] However, if only one spouse is eligible for FMLA leave, that spouse is entitled to the full 12-week leave entitlement.[212]

CFRA Regulations
Pursuant to the CFRA regulations, the employer may limit leave to a combined total of 12 weeks if both parents work for the same employer and leave is for the birth, adoption or foster care placement of their child. Cal. Code Regs. tit. 2, § 7297.1(c). This limitation applies both to spouses and registered domestic partners. Cal. Fam. Code § 297.5. The CFRA regulations specifically state that the "employer may not limit [the parents'] entitlement to CFRA leave for any other qualifying purpose." 2 C.C.R. § 7297.1(c). The CFRA does not contain a limitation on spouses caring for parents.

PDLL Regulations
The PDLL regulations do not contain a limitation for spouses or domestic partners employed by the same employer.

B. Benefits During Leave

All covered employers, including public agencies, are required to maintain an employee's health coverage under a "group health plan," as it existed prior to leave, during the period of FMLA leave. That is, if an employee's group health plan (or a supplement to it) includes family

[207] 29 C.F.R. § 200(b)(1)-(4).

[208] 29 C.F.R. § 825.120(a)(3).

[209] 29 C.F.R. § 825.121(a)(3).

[210] 29 C.F.R. § 825.201(b).

[211] 29 C.F.R. §§ 825.120(a)(3), 825.121(a)(3), 825.201(b).

[212] 29 C.F.R. §§ 825.120(a)(3), 825.121(a)(3), 825.201(b).

member coverage or medical, surgical, hospital, or dental care, etc., that coverage must be maintained during the FMLA leave.[213]

Employees on qualified FMLA leave are entitled to benefit from any changes in health coverage that occur during their leave, to the same extent as if they were not on leave, regardless of whether that change was due to adoption of a new health plan or a change in benefits. Accordingly, employees on FMLA leave must be given notice of their ability to modify their coverage to coincide with the availability of a new plan or benefits.[214] Similarly, employees on qualified FMLA leave also are affected by any other plan changes (such as changes in coverage, premiums or deductibles) to the same extent as all employees in the employer's work force.[215]

CFRA Regulations
The CFRA regulations entitle the employee to participate in any employee benefit plans, including life, short-term or long-term disability or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other leave granted by the employer for any reason other than CFRA leave. Cal. Code Regs. tit. 2, § 7297.5(d). An employer must also continue providing any health benefits normally provided under a group health plan, during an employee's CFRA and/or FMLA leave. The employer must maintain and pay for the employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. Cal. Code Regs. tit. 2, § 7297.5(c), (c)(1).
PDLL Regulations
During the period of pregnancy disability leave, an eligible employee is entitled to accrual of seniority and to participate in health plans, employee benefit plans, including life, short-term and long-term disability or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability. Cal. Code Regs. tit. 2, § 7291.11(c). Employers must maintain any pre-existing health coverage during the period of disability leave (up to a maximum of four months over the course of a 12-month period). Cal. Gov't Code § 12945(a)(2).

[213] 29 C.F.R. § 825.209(a), (b).

[214] 29 C.F.R. § 825.209(d).

[215] 29 C.F.R. § 825.209(c).

Because health benefits are maintained during the leave period, the employee on FMLA leave has the duty to pay premiums to the same extent he or she paid them prior to taking leave. This duty includes the payment of new premium rates if the rates are increased or decreased during the leave period. In addition, the employee on FMLA leave has the sole responsibility for maintaining health insurance policies that do not qualify as part of the employer's "group health plan."[216]

CFRA Regulations

Under the CFRA regulations an employer may require the employee to pay premiums at the group rate during any unpaid portion of the leave, as a condition of continued coverage of group medical benefits or other health and welfare employee benefit plans. Cal. Code Regs. tit. 2, § 7297.5(e)(1).

If the employee elects not to pay premiums to continue these benefits, this nonpayment of premiums cannot constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement or any employee benefit plan requiring the payment of premiums. Cal. Code Regs. tit. 2, § 7297.5(e)(1)(A).

Generally, if an employee does not "return to work" (meaning, return for at least 30 calendar days or transfer directly from leave to retirement within the first 30 days after returning to work) at the expiration or exhaustion of FMLA leave, the employer can recoup the health plan premium payments it made during the unpaid leave period to maintain the employee's coverage. Although the employer's responsibility for coverage (and, under a self-insurance plan, payment of claims incurred during the leave period) does not change as a result of the employee's "debt," it may collect on the "debt" by deducting from the employee's unpaid wages, vacation pay, profit sharing, or other earned sums to the extent permitted by state law. An employer also retains the right to collect the money owed through legal action.[217]

The employer may recoup the payments unless the employee did not "return to work" for one of the following reasons: (1) the continuation, recurrence or onset of a serious health condition as defined by the FMLA or of the serious injury or illness of a covered servicemember; or (2) other circumstances beyond the employee's control.[218]

[216] 29 C.F.R. § 825.210(a).

[217] 29 C.F.R. § 825.213(a), (c), (f).

[218] 29 C.F.R. § 825.213(a)(1), (a)(2).

CFRA Regulations

An employer may recover the premium that the employer paid for maintaining group health care coverage during any unpaid part of the CFRA leave, if both of the following two conditions applies:

- the employee fails to return from leave after the period of leave expires – including if s/he works less than 30 days after returning from leave; and
- the employee's failure to return from leave is for a reason other than the continuation, recurrent, or onset of a serious health condition, or other circumstances beyond the employee's control.

Cal. Code Regs. tit. 2, § 7297.5(c)(5).

PDLL Regulations

An employer may recover the premium that the employer paid for maintaining group health care coverage during any unpaid part of the PDLL leave, if both of the following two conditions occur:

- the employee fails to return from leave after the period of leave to which the employee is entitled has expired; and
- the employee's failure to return from leave is for a reason other than one of the following:
- The employee taking leave pursuant to the CFRA
- The continuation, recurrence, or onset of a health condition that entitles the employee to leave under the PDLL or other circumstance beyond the control of the employee.

Cal. Gov't Code § 12945(a)(2).

C. Substitution of Paid Leave for FMLA Leave

Under certain circumstances, an eligible employee may choose or an employer may require that earned or accrued paid leave be used for all or part of an FMLA leave.[219] If no paid leave is substituted for unpaid FMLA leave, the employee maintains his or her entitlement to that

[219] 29 U.S.C. § 2612(d)(2); 29 C.F.R. § 825.207(a); see also U.S. Department of Labor Opinion: "Substitution of Paid Sick or Medical Leave," October 4, 2004; http://www.dol.gov/esa/whd/opinion/FMLA/2004_10_04_3A_FMLA.htm (Although an employer may not limit an employee's choice to substitute paid vacation or personal leave for unpaid leave, it may limit the substitution of paid sick leave to those situations that meet its other – e.g., non-FMLA – requirements for using paid sick leave.).

accrued paid leave.[220] Similarly, mere use of paid leave under circumstances not covered by the FMLA will not decrease an employee's 12-week FMLA leave entitlement under the Act.[221]

CFRA Regulations
Under the CFRA regulations, substitutions are permitted under certain conditions. For substitution of sick leave, an employer may require the employee to use, or the employee may elect to use, any accrued sick leave that the employee is otherwise eligible to take during the otherwise unpaid portion of a CFRA leave for: the employee's own serious health condition, or any other reason if mutually agreed to between the employer and the employee. Cal. Code Regs. tit. 2, § 7297.5(b)(1), (3). For substitution of vacation, an employee may elect to use any accrued vacation time or other paid accrued time, and the employer may require the employee to use accrued vacation time or other accrued time off only if the employee asks for what would be a CFRA-qualifying event. Cal. Code Regs. tit. 2, § 7297.5(b)(1), (2). If the employee requests vacation or PTO without reference to a qualifying purpose, the employer may not ask whether the employee is taking the time off for a CFRA-qualifying reason. Cal. Code Regs. tit. 2, § 7297.5(b)(2)(A). Additionally, an employer and employee may negotiate for the employee's use of any additional paid or unpaid time off to substitute for the CFRA leave. Cal. Code Regs. tit. 2, § 7297.5(b)(4).
PDLL Regulations
The PDLL regulations permit substitutions of sick leave and vacation. For substitution of sick leave, an employer may require an employee to use, or an employee may elect to use, any accrued sick leave during the otherwise unpaid portion of her pregnancy disability leave. Cal. Code Regs. tit. 2, § 7291.11(b)(1). For substitution of vacation, an employee may elect, at her option, to use any vacation time or other accrued personal time off (including undifferentiated paid time off (PTO) for which the employee is eligible during the otherwise unpaid portion of the pregnancy disability leave. Cal. Code Regs. tit. 2, § 7291.11(b)(2).

[220] 29 C.F.R. § 825.207(b).

[221] 29 C.F.R. § 825.207(c).

D. Reinstatement

At the end of an FMLA leave entitlement, an employer is required to reinstate the employee to the same position or to a position equivalent to that which the employee held when leave commenced, with equivalent pay, benefits, and other terms and conditions of employment, even if the employee has been replaced or his position has been restructured to accommodate his absence.[222] Although an employer may satisfy its FMLA obligations by offering the employee an equivalent full-time position, this may run afoul of the ADAAA, which requires that the employee be returned to his or her original position, subject to certain restrictions. If the employee were unable to perform the same or equivalent position (even with reasonable accommodation) because of a disability, the ADAAA could require the employer to make a reasonable accommodation at that time (e.g., by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship).[223]

IX. INTERMITTENT LEAVE

The FMLA allows employees to take certain types of leave intermittently or on a reduced leave schedule.[224] Intermittent leave is taken in separate blocks of time for a specific reason while a reduced leave schedule simply reduces an employee's usual number of working hours per week.[225] Though employees are entitled to take leave intermittently, the regulations also provide that where the need for leave is for a planned or scheduled event, the employee must make reasonable effort not to unduly disrupt the employer's operations.[226]

Intermittent or reduced leave schedule is available for employees taking leave for their own serious health condition, the health condition of a family member, to care for an injured servicemember, or for a qualifying exigency provided that where foreseeable the employee provides notice.[227] The employer must agree to intermittent or reduced schedule leave for the birth of a child or the placement of an adopted or foster child with the employee.[228]

A. Managing Intermittent Leave

There must be a medical need for intermittent leave or leave on a reduced schedule for all reasons except qualified exigency.[229] In this sense, the medical need must be best accommodated by an intermittent or reduced leave schedule.[230] Thus, an employer may require

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[222] 29 C.F.R. § 825.214.

[223] 29 C.F.R. § 825.702(c)(4).

[224] 29 U.S.C. § 2612(b)(1).

[225] 29 C.F.R. § 825.202(a).

[226] *Id.* § 825.203.

[227] 29 U.S.C. § 2612(b)(1).

[228] *Id.*

[229] 29 C.F.R. § 825.202(b).

[230] *Id.*

that the need for intermittent leave be set out in an employee's certification for leave.[231] An employer may also require certification of fitness to return to duty for intermittent absences up to once every 30 days if reasonable safety concerns exist.[232]

If an initial medical certification indicates that the anticipated duration of the medical condition will exceed 30 days, an employer must wait until the specified duration expires before requesting a recertification.[233] However, regardless of the duration of the medical condition specified in medical certification, an employer may request recertification in less than 30 days if the employee requests an extension of leave or if there has been a significant change in the circumstances described by the previous certification, such as the duration or frequency of the absence, the nature or severity of the illness, or new complications.[234] Additionally, an employer may be able to request recertification if the employer receives information that casts doubt upon the employee's stated reason for the absence for the remaining duration of the current certification.[235]

Careful attention must be paid to FMLA's regulations limiting how often and with what notice an employer may demand recertification, for those regulations may impact the application of seemingly neutral attendance policies. By way of example, many employers require an employee to submit notes from a physician or other treating health care professional to validate medical-related absences from work. However, in *Jackson v. Jernberg Industries, Inc.*, a federal district court found that FMLA regulations support a limit on medical verifications for certification and recertification.[236] In that case, Jernberg Industries' attendance policy required its employees to produce a doctor's note following each absence regardless of whether the absence was covered by FMLA. The employee's physician had previously provided a certification supporting the need for intermittent FMLA leave for one year. The Jackson court ruled that the continued requests for a doctor's note under the company's policy constituted an improper recertification of each intermittent leave of absence. The court concluded the FMLA regulations allow an employer that doubts whether its employee's absence is actually related to his FMLA-certified condition to request recertification but they do not provide for any other form of medical verifications. Similarly, the court in *Police Benevolent Association Local No. 249 v. County of Burlington* found the County of Burlington interfered with Officer West's FMLA rights by requiring proof of illness every time he was absent on his approved intermittent leave.[237]

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[231] *Id.*

[232] *Id.* § 825.312(f).

[233] *Id*. § 825.308(e).

[234] *Id*. § 825.308(c)(1)-(3).

[235] *Id.*

[236] 677 F. Supp. 2d 1042 (N.D. Ill. 2010).

[237] 2013 WL 173793 (N.J. Super. Ct. App. Div. Jan. 17, 2013).

B. Alternative Position

Where intermittent leave or a reduced leave schedule is requested, an employer may require that the employee temporarily transfer to another position provided that the pay is equivalent and the position is better suited to periods of absence.[238]

While an alternative position must have equivalent pay and benefits, it does not have to have the equivalent duties.[239] An employer may increase the salary of an existing position to make it equivalent for a particular employee or simply reduce the person's existing position to a part-time schedule.[240] An employer may not reduce benefits that are not typically provided to part time employees, but benefits that are keyed to hours worked may be reduced based on the reduced schedule, for example vacation days.[241]

Employers are limited in the motivations for transferring employees taking intermittent leave. An employer cannot transfer an employee as a means of discouraging them from taking leave or otherwise create a hardship for the employee.[242] The regulations give examples of actions that would likely be prohibited such as requiring a white collar employee to perform the work of a laborer or reassigning someone from day shift to the graveyard shift.[243]

And, of course, when an employee taking intermittent or reduced schedule leave is able to return to work full time, they must be reinstated to a position that is the same or equivalent to what they had before taking leave.[244]

C. Curbing Intermittent Leave Abuse

An employer's judicious use of certification/recertification options is the most common method to prevent FMLA abuse. However, courts have upheld more serious options. For example, in *Callison v. City of Philadelphia*,[245] the Third Circuit tacitly approved the following policies of the employer: (1) requiring employees absent on sick leave to stay at home during working hours unless they leave home for a reason related to the cause of absence; and (2) neutrally-applied statement that employees may be subject to calls or visits by the employer. In upholding these policies, the court noted that FMLA entitlements do not generally prevent an employer from instituting policies to prevent the abuse of FMLA leave, so long as these policies do not conflict with or diminish the rights provided by the FMLA.[246]

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[238] 29 U.S.C. § 2612(b)(2).

[239] 29 C.F.R. § 825.204(c).

[240] *Id.*

[241] *Id.*

[242] *Id.* § 825.204(d).

[243] *Id.*

[244] *Id*. § 825.204(e).

[245] 430 F.3d 117 (3d Cir. 2005).

[246] *See also Jaszczyszyn v. Advantage Health Physician Network*, 504 F. App'x 440 (6th Cir 2012) (Employer confronted employee with Facebook pictures from a festival. Court upheld termination.)

X. INTERFERENCE AND RETALIATION

A plaintiff may bring two types of claims under the FMLA: 1) interference with rights; and 2) discrimination/retaliation.[247] Interference claims occur when an employer interferes with an employee's attempt to take advantage of FMLA benefits.[248] Retaliation claims arise where an employer discriminates against an employee for filing a claim, participating in an investigation, or otherwise opposing an unlawful act under the FMLA.[249] Although this paper will discuss interference and retaliation separately, the two are closely connected. For example, the Third Circuit in *Erdman v. Nationwide Insurance*, ruled "[F]iring an employee for a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee."[250]

A. Interference

To establish a prima facie claim for interference, an employee must show that, "(1) she was an eligible employee; (2) her employer was covered by the statute; (3) she was entitled to leave under the FMLA; (4) she gave her employer adequate notice of her intention to take leave; and (5) the employer denied her FMLA benefits to which she was entitled."[251] Though the typical interference claim involves refusal to authorize the FMLA leave, interference can also occur when the employer discourages an employee from taking the leave.[252]

With an interference claim, an employee need not demonstrate intentional conduct by the employer. In *Strickland v. Water Works and Sewer Board of the City of Birmingham,* the court explained that "to state a claim of interference with a substantive right, an employee need only demonstrate by a preponderance of the evidence that he was entitled to the benefit denied."[253] The employer's motives in an interference claim are inconsequential.[254] However, plaintiff must be able to demonstrate that interference resulted in some harm or prejudice.

1. Call-In Procedures

Employees often allege that an employer's call-in procedures interfere with their entitlement to FMLA leave. However, a number of recent FMLA court decisions reaffirm an employer's right to discipline or discharge an employee for failing to follow the employer's call out procedures. For instance, in *Twigg v. Howler Beechcraft Corp.*, the company had an absence notification policy that required employees to call in before their shift, every day of their absence,

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[247] *See* 29 U.S.C. § 2615(a).

[248] *Id.* § 2615(a)(1).

[249] *See id.* § 2615(a)(2), (b).

[250] 582 F.3d 500, 509 (3d Cir. 2009).

[251] *Rodriguez v. Smithfield Packing Co.*, 545 F. Supp. 2d 508, 516 (D. Md. 2008).

[252] 29 C.F.R. § 825.220(b). *See also Alred v. Eli Lilly & Co.*, 771 F. Supp. 2d 356 (D. Del. 2011).

[253] 239 F.3d 1199, 1206–07 (11th Cir. 2001).

[254] *Id.* at 1208 ("He does not have to allege that his employer intended to deny the right; the employer's motives are irrelevant."); *see also Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238 (6th Cir. 2004) (finding employer liability for delay in restoring employee's job despite no showing of bad faith).

until they were notified their FMLA leave was approved.[255] The company also had a policy that three consecutive days of failing to report was a violation for which termination was appropriate. Due to a variety of circumstances, an employee's leave initially was approved for only a week, and then was extended for several weeks. The employee, however, believed that her leave had been approved for a longer period of time. When the employee failed to report or call in to work after the extension, the company terminated her employment. The employee asserted a variety of claims, including FMLA retaliation and interference claims. The district court dismissed both claims on summary judgment, and the court of appeals affirmed, finding that her violation of an absence notification policy is a legitimate basis for termination, even if the absences that the employee failed to report were protected by the FMLA.

Similarly, in *Lovland v. Employers Mutual Casualty Co.*, an employee was terminated for failing to call her employer two days in a row after the death of her father, as was required by the company's policies.[256] The employee argued that the corrective action was based in part on absences that were FMLA protected and thus that the termination was unlawful. However, the Eighth Circuit disagreed, ruling that the violation of the company's policy was a valid independent reason justifying termination.

Several other decisions are in accord. For instance, in *Righi v. SMC Corporation of America*, the employee was away from work and failed to make any effort to contact his supervisor for more than a week, in violation of his employer's call out procedure. This call out procedure provided that the failure to report to work for two consecutive days without notifying his supervisor was grounds for termination of employment.[257] In *Thompson v. CenturyTel of Central Arkansas, LLC*, the employee violated her employer's call out policy when she failed to regularly call her supervisor (and either speak directly with her supervisor or leave a voicemail message) if she was going to be absent.[258] Likewise, in *Brown v. Automotive Components Holdings LLC*, the employee violated notice procedures set forth in a collective bargaining agreement when she failed to show up for work or explain her absence in person or by phone within 5 days of receiving a quit notice from her employer.[259] In each of these cases, the former employee brought a claim for interference under the FMLA after being terminated for violation of the employer's call out procedures. In response, the employer defended the decision to terminate, citing that, under the FMLA, an employer has the right to insist that its employees comply with its "usual and customary notice and procedural" requirements related to taking leave.[260] The courts in each of these decisions agreed with the employers and denied the employee's claims for interference under FMLA, finding that an employer may insist that its employees comply with its call out procedures.

On the other hand, in a recent decision from the Second Circuit, the court ruled that a notice of absence policy that is stricter than what the FMLA permits will support a jury verdict

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[255] 659 F.3d 987 (10th Cir. 2011).

[256] 674 F.3d 806 (8th Cir. 2012).

[257] 632 F.3d 404 (7th Cir. 2011).

[258] 403 F. App'x 114 (8th Cir. 2010).

[259] 622 F.3d 685 (7th Cir. 2010).

[260] *Id.* at 690.

of FMLA interference. In *Millea v. Metro-North Railroad Co.*, a storeroom clerk, who was a Gulf War veteran with posttraumatic stress disorder, needed unforeseen leave for a panic attack after an argument with his supervisor.[261] He asked a co-worker to inform the supervisor rather than telling the supervisor himself. However, the company's internal leave policy required employees to communicate directly with their supervisors, and a notice of discipline was placed in his file for the absences. The employee filed a claim for FMLA interference and retaliation, and jury ruled in his favor. The Second Circuit affirmed, finding that the FMLA specifically permits employees to have other people provide notice on their behalf. The court explained that, although the FMLA permits companies to implement absence notification policies, those policies cannot be more strict than what the FMLA permits.

2. Working While On Leave

Another typical interference case arises when an employer requests that an employee perform work while on leave. For instance, in *Zahler v. Empire Merchants, LLC*, the employee's supervisor repeatedly demanded that she use her home computer to complete and submit reports.[262] He continued to make these demands despite her explanation that she could not perform the task because she was engaged in the reason for her leave — caring for her father at the hospital. The employer ultimately threatened her with losing the account if she failed to comply with his demands for work. Based on those facts, the court denied dismissal of the interference claim.

Similarly, in *Franks v. Indian Rivers Mental Health Center*, the employer lost its summary judgment motion because it called an employee on FMLA leave about a work related crisis, the location of files, and the work the employee needed to complete.[263] The court agreed with the employer that the phone calls alone did not constitute interference, but found there was a genuine issue of material fact when looking at the facts in the light most favorable to the employee.

On the other hand, in *Reilly v. Revlon, Inc*., an employee alleged interference with her approved FMLA leave under the following circumstances:

- she had been called by her temporary replacement a few times and asked about where things were located;
- she did not recall how long the conversations took and admitted she did not need to do any follow-up work;
- she did not produce any work product while on leave and was not required to complete any assignments; and
- she did not go to her office and did not use the computer she had at home to produce any work.

[261] 658 F.3d 154 (2d Cir. 2011).

[262] No. 11-CV-3163, 2012 WL 273698 (E.D.N.Y. Jan. 31, 2012).

[263] No. 7:08-CV-1035-SLB, 2010 WL 4736444 (N.D. Ala. Sept. 30, 2012).

Based on those facts, the court determined that she failed to demonstrate interference.[264] Instead, the court held that such actions were a "professional courtesy" that do not interfere with FMLA rights, particularly where the subject matter is confined to topics such as "passing on institutional knowledge to new staff" or "providing closure on completed assignments."[265] Likewise, the court in *Grindstaff v. Sun Chemical Corp.* found no FMLA interference when an employer asked an employee on FMLA leave to lunch to discuss work performance.[266] The off-site lunch, where work and non-work matters were discussed, and was not an interference with the employee's FMLA leave because he still received the leave that he requested, did not work during his leave, and returned to the same position, pay, and benefits.

It is not entirely clear, however, if an employee must complain to an employer about having to do the work for the request to work to constitute interference. One court found that an employer has not interfered with an employee's FMLA leave right when the employee worked on leave without first telling his supervisor that he did not want to work or was too fatigued to work.[267] However, an employee concerned about job security may be reluctant to object to a request to work while on leave. Accordingly, out of caution, employers should consider defining what an employee can and cannot be asked to do while on leave.

B. Retaliation

To establish a *prima facie* case of retaliation under the FMLA, a plaintiff must prove, "(1) she 'engaged in protected activity;' (2) 'an adverse employment action was taken against her;' and (3) 'there was a causal link between the protected activity and the adverse employment action.'"[268]

In *Sisk v. Picture People, Inc.*, a decision addressing how to analyze the temporal proximity between the protected activity and the adverse action in an FMLA retaliation claim, the Eighth Circuit ruled that the timing analysis depends on when the employer was put on notice of the need for leave, not the date the employee returned to work.[269] There, an employee with hip pain needed a week off from work and was given FMLA leave. While she was gone, her condition worsened, requiring surgery. She missed eleven weeks of work. Three days after her return, she met with her supervisors. They commented that other employees said she could not perform all of her job duties, and that she should consider quitting, getting more care, and reapplying when she was healthier. She claimed that she was fired at the end of the meeting, but the employer claimed she quit. At trial, she asserted an FMLA retaliation claim. She argued that she established a prima facie case because she was fired only three days after her return, showing a temporal proximity between her protected activity (her leave) and the adverse action (her alleged termination). The district court dismissed her case, and the court of appeals affirmed,

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[264] 620 F. Supp. 2d 524 (S.D.N.Y. 2009).

[265] *Id.* at 537.

[266] No. 1:09-cv-450, 2010 WL 4878943 (S.D. Ohio Nov. 22, 2010).

[267] *Soehner v. Time Warner Cable, Inc.*, No. 1:08-cv-166, 2009 WL 3855176, at *4–5 (S.D. Ohio Nov. 16, 2009).

[268] *Wright v. Sw. Airlines,* 319 F. App'x 232, 233 (4th Cir. 2009) (citation omitted).

[269] 669 F.3d 896 (8th Cir. 2012).

finding that she had not established a prima facie case. Although her leave was protected, the temporal proximity analysis for purposes of her prima facie case began with her intention to take leave, which was several months before the date she returned. That delay precluded a prima facie case.

Typically, once an employee makes out a prima facie case of retaliation, the courts will apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, which allows the employer to put forward evidence to show that there was a legitimate, non-discriminatory reason for the employment action.[270] In *Thomsen v. Stantec,* the plaintiff claimed that his termination after returning from FMLA leave constituted retaliation.[271] The judge granted summary judgment on behalf of the employer, finding that the employer's justification – a "slow-down" in work and poor performance by the plaintiff – rebutted the presumption of retaliation.[272] In addition, the defendants were able to identify six other employees that took FMLA leave who suffered no adverse employment action.[273]

In *Bosse,* in contrast, the defendant was able to demonstrate a legitimate reason for not promoting the plaintiff based on deposition testimony from the plaintiff's supervisor that he lacked experience and knowledge for the position.[274] However, the judge ultimately denied summary judgment for the defendant finding that the plaintiff had adduced evidence which created a question of fact as to whether the employer's justification was pretextual (e.g., evidence that those who were promoted had better attendance than Plaintiff and that his unscheduled leave, which included FMLA leave, garnered attention and negative remarks on his performance evaluations, which were otherwise positive).[275]

CFRA Regulations

Under the CFRA, it is unlawful for an employer to retaliate against an employee for filing a claim, participating in an investigation, or otherwise opposing an unlawful act under the statute. Cal. Gov't Code §§ 12940(h), 12945.2(*l*); Cal. Code Regs. tit. 2, § 7297.7. Unlike the FMLA, there is no individual liability for retaliation for taking leave under the CFRA. *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 287 (2009).

To establish a prima facie case of retaliation under the CFRA, a plaintiff must prove that: (1) the defendant is an employer covered by the CFRA; (2)

[270] 411 U.S. 792 (1973). *See Thomsen v. Stantec, Inc.*, 785 F. Supp. 2d 20 (W.D.N.Y. 2011), *aff'd*, 483 F. App'x 620 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 931 (2013) (applying *McDonnell Douglas* to an FMLA retaliation claim); *see also Bosse,* 692 F. Supp. 2d at 588 (explaining that retaliation claims are treated as analogous to those under Title VII); *Wright,* 319 F. App'x at 233 (describing the application of the burden shifting framework to rebut a showing of prima facie retaliation).

[271] *Thomsen,* 785 F. Supp. 2d at 25.

[272] *Id.*

[273] *Id.*

[274] *Bosse,* 692 F. Supp. 2d at 590-91.

[275] *Id.*

CFRA Regulations
the plaintiff is an employee eligible to take CFRA leave; (3) the plaintiff exercised his or her right to take leave for a qualifying CFRA purpose; (4) the plaintiff suffered an adverse employment action (e.g., termination, fine or suspension) because of the exercise of that right. *Dudley v. Dep't of Transp.*, 90 Cal. App. 4th 255, 261 (2001) (relying on *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 161 (1st Cir. 1998) (defining elements for retaliation in violation of FMLA). Typically, once an employee makes out a prima facie case of retaliation the courts will apply the burden-shifting framework established in *McDonnell*.

1. Mixed Motive

Some of the most difficult cases to assess are those where an employment action was motivated by both a legitimate and discriminatory reason. In *Richardson v. Monitronics, International Inc.*, the Fifth Circuit applied a mixed motive framework to analyze an FMLA claim.[276] Under this approach a plaintiff has an opportunity to demonstrate that the employer's action was motivated by a discriminatory purpose, however the employer can overcome this charge by demonstrating that it would have acted the same way without the discriminatory factor.[277] In this particular case, the court found that while discriminatory purpose was a motivating factor in the employer's termination decision, the employee's repeated violation of the company's attendance policy would have resulted in her termination regardless.[278]

The Sixth Circuit also applied a burden shifting framework in analyzing the FMLA claim in *Hunter v. Valley View Local Schools*.[279] The school district placed a custodian on involuntary leave after several periods of intermittent FMLA leave. After the custodian presented evidence that the school district retaliated against her for exercising her FMLA rights, the burden shifted to the school district to prove that it would have placed her on involuntary leave regardless of her FMLA leave.[280] The school superintendent testified that there were mixed motives to placing the custodian on involuntary leave: her permanent medical restrictions and "excessive absenteeism" due to FMLA leave. The mixed motives indicated there were issues of fact as to the school district's employment decision, and thus, the Sixth Circuit reversed the grant of summary judgment awarded to the school district.

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[276] 434 F.3d 327 (5th Cir. 2005); *see also Crouch v. J.C. Penney Corp.,* No. 08-40325, 2009 WL 1885875 (5th Cir. July 1, 2009) (finding that employee's severe misconduct, rather than her FMLA leave, ultimately resulted in her termination); *Gibson v. City of Louisville,* 336 F.3d 511 (6th Cir. 2003) (finding jury instructions based on mixed motive theory permissible in an FMLA case).

[277] *Richardson,* 434 F.3d at 333.

[278] *Id.* at 336.

[279] 579 F.3d 688 (6th Cir. 2009).

[280] *Id.* at 692-93.

It remains to be seen whether courts will continue to apply the mixed-motive framework to FMLA retaliation claims in light of the U.S. Supreme Court's decision in *University of Texas Southwestern Medical Center v. Nassar*. In *Nassar* the court held that a plaintiff must prove retaliation under Title VII "according to traditional principles of but-for causation," and not the lessened "motivating factor" causation test that is applied to Title VII claims for discrimination based on membership in a protected class.[281] The difference between these two standards, and their application to federal discrimination statutes, was previously addressed in *Gross v. FBL Financial Services*, in which the Court held that a plaintiff claiming age discrimination under the Age Discrimination in Employment Act (ADEA) must prove "but-for causation", a higher standard than the "motivating factor" burden in Title VII discrimination claims.[282] Following *Gross*, it was unclear whether, and to what extent, courts would apply "but-for causation" to other discrimination statutes. *Nassar* then applied *Gross* to retaliation under Title VII, which results in a standard under which Title VII plaintiffs can prove discrimination under the motivating factor standard, but not retaliation. Instead, plaintiffs claiming retaliation under Title VII must now prove that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."[283] Since the *Nassar* decision, at least one court has applied the Title VII burden-shifting framework to an FMLA retaliation claim without discussing *Nassar* or its implications on the viability of the mixed-motive framework in the FMLA retaliation context.[284] This area will bear future attention, as courts grapple with the application of *Nassar* in other non-Title VII contexts, including FMLA retaliation.

2. Fraudulent Use of Leave and Employer's Honest Belief Defense

Courts have also recognized that an employer's honest, good faith belief of misconduct by an employee may be a defense to FMLA claims. The honest belief rule allows an employer's proffered reason to be considered honestly held if "the employer can establish it 'reasonably reli[ed] on particularized facts that were before it at the time the decision was made.'"[285] After the employer has met its burden, the plaintiff must demonstrate that the employer's belief was not held honestly, which requires more than simply asserting the employer's proffered reason has no basis in fact.[286]

The employer in *Seeger v. Cincinnati Bell Telephone Co., LLC* successfully relied on the honest belief doctrine when an employee raised an FMLA retaliation claim. There, the company placed an employee on paid disability leave, rather than light duty, for an FMLA-qualifying medical condition affecting his leg.[287] However, while he was on leave, employees saw him

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[281] 570 U.S. ___ (June 24, 2013).

[282] *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

[283] *Nassar*, 570 U.S. ___ (2013).

[284] *See Mercer v. The Arc of Prince Georges County, Inc.*, No. 13-1300 (4th Cir. July 11, 2013) ("we have previously recognized that because [FMLA retaliation] claims are analogous to Title VII retaliation claims, they can be analyzed under the burden-shifting framework of McDonnel Douglas Corp. v. Green").

[285] *Joostberns v. United Parcel Servs., Inc.*, 166 F. App'x 783, 791 (6th Cir. 2006) (citing *Smith v. Chryster Corp.*, 155 F.3d 799, 806-07 (6th Cir. 1998)).

[286] *Id.* (citing *Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001)).

[287] 681 F.3d 274 (6th Cir. 2012).

attending an Oktoberfest Festival, apparently walking without difficulty. The employer conducted an investigation, including an interview of the employee, and then concluded that he had engaged in disability fraud by over-reporting his symptoms to avoid light duty. The Sixth Circuit affirmed summary judgment against the employee because he could not show the employer's good faith belief was a pretext for FMLA retaliation. Specifically, the court found that the employer "made a 'reasonably informed and considered decision' before it terminated him, and Seeger has failed to show that [the employer's] decision-making process was unworthy of credence."

In another decision from the Seventh Circuit, *Scruggs v. Carrier Corp.*, an employer took a relatively unorthodox step to address an excessive absenteeism problem.[288] It hired a private investigator to follow 35 employees believed to be abusing the company's leave policies. One of the employees was authorized to take intermittent leave under the FMLA to take care of his mother in a nursing home. On one of the employee's intermittent FMLA days off to care for his mother, the private investigator determined that he had not in fact visited his mother. Based on that information, the employer terminated his employment. The employee sued, claiming the employer interfered with his FMLA rights and retaliated against him for using the FMLA. The trial court determined the employer had an "honest suspicion" the employee was abusing his FMLA entitlement and dismissed the case. The Court of Appeals agreed, explaining that the employer reasonably relied on the employee's pattern of prior absenteeism and the investigator's video surveillance of the employee's activities. Taken together, these facts were sufficient to establish the employer acted appropriately.

If, however, an employee is able to challenge the credibility of the employer's honest belief, the employer may face an adverse summary judgment ruling. For example, in *White v. Telcom Credit Union*, the employer argued it honestly believed the employee was disruptive in the call center and belligerent during the discipline meeting held later that day.[289] Based on the reasonably and honestly held belief that the employee was insubordinate, the employer moved to terminate the employee. When the burden shifted to the employee, she presented "evidence that create[d] a factual dispute whether the decision to terminate was reasonably informed and worthy of credence."[290] For example, she offered deposition testimony from six of her coworkers, only one of whom found her behavior in the call center disruptive. Thus, the employee successfully suggested the employer did not have an "honest belief" that she was insubordinate but instead anticipated her FMLA request and retaliated with termination. In viewing the evidence in the light most favorable to the employee, the court ruled against the employer's motion for summary judgment.

To bolster the honest belief defense, employers are increasingly relying on evidence from social media. For instance, the Sixth Circuit in *Jaszczyszyn v. Advantage Health Physician Network* upheld summary judgment for an employer who terminated an employee after seeing incriminating Facebook pictures of the employee who was on leave.[291] The employee was on

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[288] 688 F.3d 821 (7th Cir. 2012).

[289] 874 F. Supp. 2d 690 (E.D. Mich. 2012)

[290] *Id.* at 710.

[291] 504 F. App'x 440 (6th Cir 2012).

intermittent FMLA leave due to back pain when her coworkers saw 127 Facebook pictures of her drinking at an all-day local festival. The coworkers reported the photos to their supervisor, who had received a phone call from the employee during the weekend of the festival to request Monday off due to back pain. When the employee returned to work, human resources confronted her with the photos. The employee could not explain the discrepancy between her claims of back pain and the photos, so the employer terminated her employment. Because the employee did not refute the employer's honest belief of FMLA fraud, the court ruled in favor of the employer.

Similarly, in the recent decision *Lineberry v. Richards*, a district court dismissed a registered nurse's FMLA interference and retaliation claims based on evidence on her Facebook page showing that she had lied about a vacation she took during her medical absence.[292] In that case, the employee alleged she experienced "excruciating" lower back and leg pain after moving stretchers at work, and her doctor ordered her to refrain from working. After the employer approved her FMLA leave, the employee went on a prepaid, planned vacation to Mexico and posted photos of her trip on Facebook. The pictures showed the employee riding in a motorboat, lying on a bed and holding beer bottles, and carrying her more than 15-pound infant grandchildren in each arm while she stood. Coworkers who saw the Facebook posts complained to supervisors about what they viewed as her abuse of FMLA leave.

The employee was later terminated and brought suit for retaliation and interference under the FMLA. The district court dismissed her claim, explaining that the employer terminated the employee for her dishonesty, explaining that: "Based on such undisputed dishonesty, Defendants had a right to terminate Plaintiff, without regard to her leave status, because the FMLA does not afford an employee greater rights than she would have if she was not on FMLA leave."[293] In addition, the court ruled that the employee's Facebook posts, as well as her admissions about dishonesty, constituted "particularized facts" upon which the employer could support its termination decision based on an " honest belief" that she had misused her FMLA leave.

XI. LEGISLATIVE AND DOL DEVELOPMENTS

The FMLA receives a great deal of attention in the legislative arena. In 2009, the Airline Flight Crew Technical Corrections Act amended the FMLA to permit the DOL to promulgate regulations describing a method for calculating the entitlement to leave for "flight attendants" and "flight crewmembers," as those terms are defined by Federal Aviation Administration regulations.[294] The amendment provides that an airline flight attendant or flight crew member meets the hours of service requirement of the FMLA if, during the previous 12-month period, he or she (1) has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or its equivalent), and (2) has worked or been paid for not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.[295]

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[292] No. 11-13752, 2013 WL 438689 (E.D. Mich. Feb. 5, 2013).

[293] *Id.* at *5.

[294] 29 U.S.C. § 2612(a)(5).

[295] 29 C.F.R. §§ 825.801, 825.802.

In 2009, Congress also passed the National Defense Authorization Act for Fiscal Year 2010. As previously discussed, the NDAA included provisions to expand leave for military families.

There are currently new bills before the 113th Congress that propose significant amendments to the FMLA. The Part-Time Worker's Bill of Rights Act of 2013 (H.R. 675) proposes to eliminate the hours of service requirement for eligible employees under the FMLA. The bill would redefine an "eligible employee" as "an employee who has been employed, either as a full-time or part-time employee, for at least 12 months by the employer with respect to whom leave is requested under section 102." Representative Janice Schakowsky introduced this bill on February 13, 2013 and it was referred to a House Subcommittee on the same day.

The Healthy Families Act (H.R. 1286 and S. 631) would build on the FMLA and create a national standard for paid sick leave. Representative Rosa DeLauro and Senator Tom Harkin, the bill's sponsors, propose employees earn an hour of paid sick time for every thirty hours worked, with an annual limit of 56 hours of paid sick time unless the employer chooses to set a higher limit. The bill also identifies appropriate uses of the paid sick time, including time used for the worker's own illness, to care for a sick family member, or to recover from domestic violence. The Healthy Families Act is pending committee approval in both the House and Senate.

Congress is also considering the Family and Medical Leave Inclusion Act (H.R. 1751 and S. 846). On April 25, 2013, Representative Carolyn Maloney and Senator Dick Durbin introduced this bill, which would expand FMLA coverage to permit employees to take unpaid leave to care for a same sex partner, parent-in-law, grandparent, grandchild, sibling or adult child with a serious health condition. The Family and Medical Leave Inclusion Act has been referred to committee in the House and Senate.

In addition to statutory changes to the FMLA, the DOL has issued guidance on the FMLA definition of "son and daughter." First, the DOL explained that any employee who assumes the role of caring for a child receives parental rights to FMLA leave regardless of the legal or biological relationship.[296] The DOL utilized an example of a same sex parent with no legal connection to the couple's child to illustrate this notion of in loco parentis. An employee who shares equally in the raising of an adopted child with a same sex partner is "entitled to leave to bond with the child following placement, or to care for the child if the child has a serious health condition, because the employee stands in loco parentis to the child."[297]

Second and noted above, the recent DOL guidance from January 2013 indicates that the age of onset of a disability is irrelevant to the determination of whether an individual is considered a "son or daughter" under the FMLA.[298] The broadened definition of "son or daughter," along with the ADAAA's expanded definition of disability, will "increase the number of adult children with disabilities related to whom parents may take FMLA protected leave

[296] June 22, 2010 Administrator's Interpretation No. 2010-3.

[297] *Id.*

[298] *See* January 14, 2013 Administrator's Interpretation No. 2013-1.

provided the adult son or daughter is incapable of self-care because of the disability and in need of care due to a serious health condition."[299]

Lastly, some federal agencies and states are advocating leave protection for victims of domestic violence. For example, in the fall of 2012, the Equal Employment Opportunity Commission published guidance for those who employ victims of domestic violence, sexual assault, and stalking.[300] The EEOC explained that adverse employment actions against these individuals may violate the Americans with Disabilities Act or Title VII of the Civil Rights Act of 1964.[301] Though the EEOC did not refer to the FMLA, its guidance suggests employer liability for failure to accept domestic abuse as a serious health condition protected by the FMLA. The New York State Senate passed Senate Bill S2509, which like the FMLA, would provide ninety days of job protection to employees who are victims of domestic violence. Similarly, the California State Senate is considering S.B. 400 which would require reasonable accommodation for and prohibit discrimination or retaliation against an employee who has suffered domestic abuse. This trend among states may result in increasing or explicit FMLA protected leave for employees who are victims of domestic or sexual violence.

[299] *Id.*

[300] EEOC Publication, Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking.

[301] *Id.*