


5-1-2009

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### Recommended Citation

John A. Pearce III & Dennis R. Kuhn, *Managers' Obligations to Employees with Eldercare Responsibilities*, 43 U. Rich. L. Rev. 1319 (2009).

Available at: <https://scholarship.richmond.edu/lawreview/vol43/iss4/6>

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# MANAGERS' OBLIGATIONS TO EMPLOYEES WITH ELDERCARE RESPONSIBILITIES

*John A. Pearce II \**

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## I. INTRODUCTION

While protecting parents' ability to take leave for pregnancy and child healthcare remains an important aspect of the Family and Medical Leave Act ("FMLA"), another issue has emerged that received little attention at the time of the law's enactment. The issue concerns the workers' right to take leave to care for parents with serious health conditions. The emergence of this issue is tied to the growing percentage of the American population comprised of the elderly. The trend of increasing numbers of health-compromised people over the age of sixty-five will place growing demands on America's workers to care for aging parents.

This article reports evidence that the aging of the large "baby boom generation" will place greater demands on employed U.S. citizens to provide eldercare. The article discusses how eldercare responsibilities affect the lives of employees and the ability of organizations to operate effectively and efficiently while accommodating employees needing to take leave. With this background, it identifies the protections afforded to employees under the FMLA

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\*\*\* The authors wish to thank John J. O'Brien, J.D. for his thoughtful comments on our manuscript.

by reviewing in detail the relevant case law. The article also discusses how accommodation of eldercare needs can adversely affect the operation of a business and create exposure to liability for those employers who fail to meet the FMLA requirements.

## II. LEGAL PRECEDENT FOR ELDERCARE

Employment practices in the United States have been significantly impacted by legislation in the last fifty years.<sup>1</sup> Practices historically accepted as being within the rights and discretion of employers became open to legal challenge where they adversely affected employment opportunities for members of a group protected by law.

Most notably, Title VII of the Civil Rights Act of 1964 limited an employer's discretion when it came to hiring, promoting, disciplining, or otherwise establishing employment standards where a person's race, gender, national origin, religion, or color appeared to be a factor that led one person to be treated differently than people in other groups.<sup>2</sup> Subsequently, Congress required that employers set policies that do not result in the unfair treatment of an employee or job applicant simply because the individual was forty years old or older<sup>3</sup> or because the individual suffered from a physical or mental disability.<sup>4</sup>

In 1993, Congress passed the FMLA.<sup>5</sup> Its most important provisions granted employees entitled to the FMLA's protections the right to twelve weeks of unpaid leave in any twelve-month period if the leave was due to (a) the birth of a child to the employee and the care of that child;<sup>6</sup> (b) the adoption of a child or placement of a foster child with the employee;<sup>7</sup> (c) providing care for the employee's spouse, son, daughter, or parent if that person had a se-

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1. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2000)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (2006)).

2. 42 U.S.C. § 2000e-2(a) (2000).

3. 29 U.S.C. § 631(a) (2006).

4. 42 U.S.C. § 12112(a) (2006).

5. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-2654 (2006)).

6. 29 U.S.C. § 2612(a)(1)(A) (2006).

7. *Id.* § 2612(a)(1)(B).

rious health condition,<sup>8</sup> or (d) the employee having a serious health condition that renders “the employee unable to perform the functions” of his or her position.<sup>9</sup>

Several factors led to the enactment of the FMLA. First, while the protections offered by the law are gender-neutral, Congress saw it as a measure designed to continue promoting the interests of women.<sup>10</sup> In the contemporary view of Congress, women remain primarily responsible for providing family care.<sup>11</sup> As a result, when circumstances arise involving the health of a family member requiring an employee to take leave from work, it “affects the working lives of women more than it affects the working lives of men.”<sup>12</sup>

The second motive behind the enactment was Congress’s desire to protect the interests of the family unit that included children. As stated in the findings of the FMLA, “it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of

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8. *Id.* § 2612(a)(1)(C).

9. *Id.* § 2612(a)(1)(D). While beyond the scope of this article, it should be noted that Congress amended the Act in 2008 to provide protection for family members required to take leave to care for a member of the Armed Forces, including members of the National Guard or Reserves. *See* 29 U.S.C. §§ 2611(16), 2612(a)(3) (2008). To qualify for protected leave, the servicemember must have suffered an injury or illness while on active duty so that he or she may be unfit to perform his or her duties. *Id.* § 2611(19).

There are several differences that distinguish the leave allowed to care for a servicemember versus other types of protected leave. First, the family member is allowed up to 26 weeks of leave within a twelve-month period. *Id.* § 2612(a)(3). However, unlike other types of protected leave, this type of leave is allowed during only one twelve-month period. *Compare id.* § 2612(a)(1), *with id.* § 2612(a)(3). The Department of Labor’s regulations interpret this to apply on a “per-covered-servicemember, per-injury basis,” so that if a covered employee ultimately has to care for multiple covered servicemembers or the same member due to a different illness or injury, the employee would be entitled to an additional twenty-six weeks provided that it did not cause the employee to exceed a total of twenty-six weeks in a single twelve-month period. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,084–85 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.127(c)(2)). Also, in addition to allowing the employee who is a spouse, parent, son or daughter of the servicemember to be eligible for protected leave, it also allows protection for the “next of kin” of the servicemember who is needed to provide care. 29 U.S.C.A. § 2612(a)(3) (2008). “Next of kin” is defined as being “the nearest blood relative” of the servicemember. *Id.* § 2611(18). The 2008 amendments also added a right to leave for up to 12 weeks for an employee due to an exigency arising out of a son, daughter or parent being on active duty or having been notified of an impending call or order to active duty. *Id.* § 2612(a)(1)(E).

10. *See id.* § 2601(b)(5) (stating that one of the purposes of the FMLA is “to promote . . . equal employment . . . for women and men”).

11. *See id.* § 2601(a)(5).

12. *Id.*

family members who have serious health conditions.”<sup>13</sup> The law was important in promoting the interest of employees with family-care responsibilities because of the demands on either single parents or dual-working parents,<sup>14</sup> combined with “the lack of employment policies to accommodate working parents [that] can force individuals to choose between job security and parenting.”<sup>15</sup>

### III. THE GRAYING OF AMERICA

Although protecting parents’ ability to take leave for pregnancy or child health care remains an important aspect of the FMLA, another issue has emerged that received little attention upon enactment. That issue concerns the workers’ right to take leave to care for parents with serious health conditions. The emergence of this issue is tied both to advancements in medical science that enable people with health problems to live longer, and to the growing percentage of the American population comprised of the elderly. In 1990, 31.2 million people in the United States were over the age of sixty-five.<sup>16</sup> By 2006, that number had grown to 37.3 million (an increase of 19.5% since 1990), or 12.4% of the total 2006 population.<sup>17</sup> By 2030, the number of U.S. citizens over the age of sixty-five is projected to be 71.5 million—an increase of over 90% from the 2006 level.<sup>18</sup> The projection is that persons age sixty-five and older will comprise roughly 20% of the total population, with some states having nearly a quarter of their population in this group.<sup>19</sup>

This trend of increasing numbers of health-compromised people over the age of sixty-five will place greater demands on America’s workers to care for aging parents:

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13. *Id.* § 2601(a)(2).

14. *See id.* § 2601(a)(1).

15. *Id.* § 2601(a)(3).

16. ADMIN. ON AGING, U.S. DEP’T OF HEALTH AND HUMAN SERVS., A STATISTICAL PROFILE OF OLDER AMERICANS AGED 65+ (2008), available at [http://www.aoa.gov/AoARoot/Aging\\_Statistics/Profile/2008/docs/2008profile.pdf](http://www.aoa.gov/AoARoot/Aging_Statistics/Profile/2008/docs/2008profile.pdf) (detailing demographics of U.S. elder population) [herein-after AOA STATISTICAL PROFILE].

17. *Id.*

18. *Id.*

19. *See* CTR. FOR DISEASE CONTROL AND PREVENTION & THE MERCK CO. FOUND., THE STATE OF AGING AND HEALTH IN AMERICA 2007 III (2007), available at [http://www.cdc.gov/aging/pdf/saha\\_2007.pdf](http://www.cdc.gov/aging/pdf/saha_2007.pdf); WAN HE ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS. & U.S. DEP’T OF COMMERCE, 65+ IN THE UNITED STATES 119–123 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

"Already, in many companies, we find that workers are more concerned with caring for a parent than a child," says Dan Cahn, Senior Vice President of Business Development for LTC Financial Partners. . . . "With 77 million Baby Boomers set to retire, an ever greater percentage of workers will be distracted by elder-care needs. . . . The childcare crisis was solved by day care centers, flextime and such. Now we need to face the long term healthcare crisis."<sup>20</sup>

What is likely to exacerbate the problem is that approximately 30% of those over the age of sixty-five who are not institutionalized live alone.<sup>21</sup> For these individuals, there is no spousal assistance when a health crisis arises, and many lack the financial resources that would enable them to hire others to provide assistance. In 2006, the median income of men and women in this group was \$23,500 and \$13,603, respectively.<sup>22</sup> The median income for households containing families headed by a person over age sixty-five was \$39,649.<sup>23</sup> In 2005, 37% of the aggregate income for those over sixty-five came from Social Security benefits.<sup>24</sup>

The comparatively declining health of this population is reflected in a survey reporting that only 39% of non-institutionalized respondents over the age of sixty-five rated their health as "excellent or very good," whereas 65% of those aged eighteen to sixty-four gave the high rating to their own health.<sup>25</sup>

This article reports on evidence that the aging of the large "baby boom generation" will place greater demands on employed U.S. citizens to provide eldercare. Eldercare responsibilities will affect the lives of employees and the ability of organizations to operate effectively and efficiently while accommodating employees needing to take leave. With this background, this article identifies the protections afforded to employees under the FMLA and the recently revised regulations of the Department of Labor by reviewing in detail the relevant case law. This article also discusses how accommodation of eldercare needs can adversely affect the opera-

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20. Press Release, LTC Financial Partners, Long Term Care Could Surpass Childcare as Challenge for American Business (Oct. 22, 2006), available at <http://www.send2press.com/newswire/2006-10-1022-001.shtml>.

21. See AOA STATISTICAL PROFILE, *supra* note 16, at 1.

22. *Id.* at 2.

23. *Id.*

24. *Id.*

25. *Id.*

tion of a business and create exposure to liability for those employers who fail to meet the FMLA requirements.

#### IV. THE NATURE OF CARE PROVIDED TO THE ELDERLY

Eldercare “requires a set of services to respond to a wide range of often unpredictable medical, emotional, physical, and financial possibilities.”<sup>26</sup> These services can be provided in a house shared by a caregiver and the elderly, or provided at a separate residence. Eldercare addresses such diverse needs as meal preparation, assistance with personal hygiene, giving medicine or medical care, providing transportation, shopping, housekeeping, making appointments, managing financial affairs, and offering companionship.

In 2005, the National Alliance for Caregiving (“NACG”) and the American Association of Retired Persons (“AARP”) reported that nearly one in every four households—about 22.9 million in the United States—is involved in geriatric caregiving,<sup>27</sup> and 73% of these caregivers are women (mothers, sisters, daughters, and granddaughters).<sup>28</sup> About 21% of the adult population, or 44.4 million Americans, provide unpaid care to an adult family member.<sup>29</sup> Statistically, the “typical” caregiver is a forty-six-year-old woman caring for her seventy-seven-year-old mother who lives nearby.<sup>30</sup>

Instead of utilizing long-term care facilities or in-house care professionals, family members provide 80% of the direct care for frail or chronically ill older adults.<sup>31</sup> Only 5% of U.S. elderly are institutionalized, with 90% of the disabled elderly not in nursing

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26. Karol Rose, *Elder Care: A Responsibility that Requires a Collaborative Effort*, 15 *WORLDATWORK J.* Second Quarter 2006, at 60, 62.

27. Janet Aschkenasy, *Eldercare Grows up*, *FINANCIAL PLANNING*, Sept. 1, 2005, available at <http://www.financial-planning.com/news/eldercare-grows-up-527132-1.html>.

28. ConnectingCaregivers.com, *Eldercare and the Sandwich Generation*, <http://www.connectingcaregivers.com/content4> (last visited Apr. 8, 2009).

29. Aschkenasy, *supra* note 27.

30. Robert E. O'Toole & James Ferry, *The Growing Importance of Eldercare Benefits for an Aging Workforce*, *COMPENSATION AND BENEFITS J.*, Winter 2002, at 40.

31. See Age Venture, *Assisted Living Offers Cure for Elder Care Limbo*, <http://www.demko.com/m990510.htm> (last visited May 00, 2009).

homes but receiving unpaid informal care from relatives and friends.<sup>32</sup>

## V. CONSEQUENCES FOR THE ELDERCARE PROVIDER

Research on the caregiving effects on the non-professional caregiver suggests that the toll is high. One study found that 16% quit their jobs, 38% take time off from work for eldercare responsibilities, 30% rearrange their work schedule, and 21% work fewer hours.<sup>33</sup> A 1999 MetLife survey revealed that, "on average, an eldercare provider suffers a total wealth loss of \$659,139 over his or her lifetime."<sup>34</sup> In a study of managers at a national financial services firm, employees who took family or medical leaves of absence subsequently had lower salary increases and fewer promotions.<sup>35</sup> Furthermore, the MetLife study found that 75% of caregivers reported that caregiving duties had detrimentally affected their health.<sup>36</sup> The lowest-earning workers face the greatest challenges as caregivers to the elderly. These employees are under pressure from the job culture, work demands, and their own financial needs that prevent them from considering unpaid leave, despite having a legal right to it.<sup>37</sup>

## VI. FACTORS THAT MAY EXACERBATE THE ELDERCARE PROBLEM

The need for eldercare in the United States is growing dramatically because of the large percentage of the population that is approaching the age of sixty-five, and because of their long life expectancy, achieved through medical and pharmaceutical advances.<sup>38</sup> Consequently, more elderly citizens live with serious illnesses longer. For example, approximately 27% of people living with AIDS in the United States are fifty years old or older, and the proportion of total patients affected in this group is expected

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32. Sarah-Vaughan Brakman, *Adult Daughter Caregivers*, 24 HASTINGS CTR. REP., Sept.-Oct. 1994, at 26; see also Rose, *supra* note 26.

33. Peggie Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 370-71 (2004).

34. *Id.* at 372.

35. Chardie Baird & John Reynolds, *Employee Awareness of Family Leave Benefits: The Effects of Family, Work, and Gender*, 45 SOC. Q. 325, 328 (2004).

36. See Smith, *supra* note 33, at 372.

37. See Baird & Reynolds, *supra* note 35, at 328.

38. See Smith, *supra* note 33, at 355-56.



to increase.<sup>39</sup> The extended lives of the ill and disabled elderly will place ever-increasing pressures on their employed loved ones for assistance.<sup>40</sup>

One source of increasing demand for employee requests for work leave is to care for elderly family members who suffer from Alzheimer's disease. Alzheimer's causes varying degrees of dementia with intellectual impairment that is progressive and irreversible.<sup>41</sup> An estimated 5.2 million Americans age sixty-five and older had Alzheimer's disease in 2008, and since the incidence of the disease increases with the age of the population, the number of people with Alzheimer's is expected to grow proportionally as the population ages.<sup>42</sup> The Alzheimer's Association estimates that the number of Alzheimer's patients will grow to 7.7 million in 2030, and range from eleven million to sixteen million by 2050.<sup>43</sup>

Another factor that contributes to the increasing employee demands for work leave to care for elderly is the decline in Medicare home health care benefits.<sup>44</sup> Because Medicaid is the primary source of payments for nursing home care, the decreases in funding have contributed to the closing of many facilities.<sup>45</sup> The availability of fewer nursing homes leads to increased costs for professional nursing home care. This, in turn, increases the pressure on many families to provide personally for the care their loved ones require.<sup>46</sup>

In announcing hearings in 2007 on the need for FMLA revisions, the office of Senator Amy Klobuchar (D-MN) issued a press release reflecting on the growing need for eldercare and its consequences for individual providers:

As 77 million baby boomers approach retirement, more families will be caring for elderly relatives and more families will need help with the costs of that care.

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39. Christine Gorman, *The Graying of AIDS*, TIME, Aug. 14, 2006, at 54.

40. See Smith, *supra* note 33, at 356, 370.

41. See ALZHEIMER'S ASS'N, 2008 ALZHEIMER'S DISEASE FACTS AND FIGURES 7 (2008) (on file with author).

42. *Id.* at 9.

43. *Id.* at 12.

44. See Gina Reese & Joseph Hafkenschiel, *Hot Topics in Home Health Care*, 20 WHITTIER L. REV. 365, 368 (1998).

45. See Amy Goldstein, *States Cut Medicaid Coverage Further*, WASH. POST., Dec. 26, 2008, at A01.

46. See Barbara Kantrowitz & Karen Springen, *Confronting Alzheimer's*, NEWSWEEK, June 18, 2007, at 54.

Seventy percent of Americans between the ages of 45 and 55 have at least one living parent and adult children account for over half of the most common elder care providers. Many report taking time out of the workforce, cutting back hours, and losing or turning down opportunities for training and promotion because of their care giving responsibilities . . . .<sup>47</sup>

## VII. VALUE OF THE FMLA TO EMPLOYERS

When the FMLA was passed in 1993, employers presented little opposition.<sup>48</sup> One reason was that corporate America appreciated the need for employees to take leave to serve as caregivers to their elderly family members.<sup>49</sup> Surprisingly, “[t]he 1995 federal Commission on Leave reported to Congress that,” prior to the passage of the FMLA, “60[%] of firms with fifteen or more employees already offered workers unpaid sick leave.”<sup>50</sup>

Second, businesses likely supported the FMLA because it provides businesses with a legal, systematic process for handling employee requests for eldercare leave, and it places an essentially uniform burden on other employers.<sup>51</sup> Even though they may be sympathetic to the requests and may realize some savings in granting leave, executives understand the harm eldercare leave requests can cause in the workplace.<sup>52</sup> Therefore, executives seek mechanisms to minimize the cost to their operations while providing needy employees with as much flexibility as possible.<sup>53</sup>

## VIII. OVERVIEW OF THE FMLA

### A. Coverage

Employers covered by the FMLA include “any person engaged in commerce . . . who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the

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47. *Senator Klobuchar Calls for Congressional Hearing on Growing Cost of Caring for Elderly Parents*, U.S. FED. NEWS, May 11, 2007 (internal quotation omitted).

48. *See* Joseph A. Rotondi, *Family and Medical Leave Act*, REG., Spring 2007, at 4.

49. *Id.*

50. *Id.*

51. *See*, S. Rep. No. 103-3, at 12-14, 16-18, 23-25 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 14-18, 18-21, 25-27.

52. *See id.* at 12-14, 17, as reprinted in 1993 U.S.C.C.A.N. 3, 14-16, 19.

53. *See* Jodie Levin-Epstein, *Responsive Workplaces*, AM. PROSPECT, Mar. 2007, at A16, A17.

current or preceding calendar year.”<sup>54</sup> The FMLA also covers public agencies.<sup>55</sup> This includes all agencies of a state, and all of its political subdivisions.<sup>56</sup>

Not all employees of a covered employer are entitled to FMLA benefits. First, the employee must have been employed for at least twelve months<sup>57</sup> and must have 1,250 hours of service during the previous twelve months.<sup>58</sup> Second, the FMLA allows employers to exclude employees from eligibility when the employer has fewer than fifty workers within seventy-five miles of the site where the employee is assigned.<sup>59</sup> Finally, the law allows the employer to exclude “key employees” from being entitled to reinstatement to the position held before the leave was taken.<sup>60</sup> For the “key employee” exemption to apply, the employee must be in the top 10% of salaried employees within seventy-five miles of the employee’s job location,<sup>61</sup> and the denial must be “necessary to

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54. 29 U.S.C. § 2611(4)(A)(i) (2006).

55. *See id.* § 2611(4)(A)(iii).

56. *See* 29 U.S.C. § 203(x) (2006). In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court determined that while Congress had violated the 11th Amendment by attempting to apply the Age Discrimination in Employment Act (“ADEA”) and the Americans with Disabilities Act (“ADA”) to the states, it did not overstep its bounds with making the FMLA applicable to the state as an employer. 538 U.S. 721, 738–40 (2003). The Court concluded that an exception to the 11th Amendment exists where Congress makes its intention to regulate the states clear and Congress is acting to assure the provisions of the equal protection clause are being met by the states. *See id.* at 726, 735.

In *Hibbs*, both standards were met. First, the language of the statute made clear the intention of Congress to apply the law to the states. *Id.* at 726. Second, the statute was clearly aimed at gender-based discrimination that the states had a long history of permitting. *Id.* at 728–29. Gender discrimination by the states was subject to heightened scrutiny, beyond a rational basis test. *Id.* at 730. In addition, the statute was narrowly focused on one aspect of employment practices (leave policies) as opposed to the ADEA and ADA, which affected virtually all aspects of the relationship between the states and their employees. *Id.* at 739–40. The FMLA was both appropriate and proportional to the legitimate ends of Congress.

57. 29 U.S.C. § 2611(2)(A)(i) (2006).

58. *Id.* § 2611(2)(A)(ii). The newly revised Department of Labor regulations have clarified cases where an employee has satisfied the 1,250 hour requirement and was granted a leave, but had not yet been employed twelve months. Leave prior to the twelve-month anniversary is not leave protected by the FMLA; however, if the leave continues after that point, it is protected, assuming it was for a reason that qualifies under the FMLA. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,078 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.110(d)).

59. 29 U.S.C. § 2611(2)(B)(ii) (2006).

60. *See id.* § 2614(5)(b)(1).

61. *Id.* § 2614(b)(2).

prevent substantial and grievous economic injury to the operations of the employer."<sup>62</sup>

### B. *Employee Eligibility for Leave to Care for a Parent*

For an employee to be entitled to leave under the FMLA because of circumstances relating to the health of a parent, the law requires both that the parent has a serious health condition and that the employee is needed to care for the parent.<sup>63</sup> The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves: (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."<sup>64</sup>

Department of Labor regulations state that "[i]npatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in § 825.113(b), or any subsequent treatment in connection with such inpatient care."<sup>65</sup>

The Department's regulations are much more detailed and complicated when dealing with establishing a serious health condition through evidence of "continuing treatment by a health care provider."<sup>66</sup> In summary, this can be accomplished by demonstrat-

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62. *Id.* § 2614(b)(1)(A).

63. *See id.* § 2612(a)(1)(C).

64. *Id.* § 2611(11).

65. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,079 (Nov. 18, 2008) (to be codified at 29 C.F.R. § 825.114). The regulation defines incapacity as the "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." *Id.* (to be codified at 29 C.F.R. § 825.113(b)).

66. *Id.* (to be codified at 29 C.F.R. § 825.115). The regulation provides:

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) 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.

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- (3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.
- (4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.
- (5) The term extenuating "extenuating circumstances" in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.
- (b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. (citation omitted)
- (c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:
- (1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
  - (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
  - (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).
- (d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.
- (e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider for:
- (1) Restorative surgery after an accident or other injury; or
  - (2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).
- (f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

ing: (1) "A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition. . . ."<sup>67</sup> Unless there are extenuating circumstances, this requires either that the person have follow-up treatments at least twice within thirty days of the first incapacity,<sup>68</sup> or treatment at least once by a health care provider which "results in a regimen of continuing supervision by the provider";<sup>69</sup> (2) "[I]ncapacity due to pregnancy or for prenatal care";<sup>70</sup> (3) Any period of incapacity or treatment related to a chronic condition which may be episodic in nature. Whether it qualifies is determined by whether the condition exists over an extended period of time and requires periodic visits to a health care provider for treatment;<sup>71</sup> (4) Any period of incapacity that is permanent or long-term for which treatment may not be effective;<sup>72</sup> or, (5) "Any period of absence to receive multiple treatments" either for restorative surgery following an accident or other injury, or for a condition that is likely to lead to incapacity for three or more consecutive calendar days unless there is medical intervention.<sup>73</sup>

Cosmetic treatments such as plastic surgery are ordinarily excluded from coverage, unless inpatient care is needed, complications develop, the treatment occurs after an injury, or the treatment involves the removal of a cancerous growth.<sup>74</sup> Unless there are complications, "the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, [and] periodontal disease" are ex-

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*Id.* at 68,079–80 (to be codified at 29 C.F.R. § 825.115).

67. *Id.* at 68,079 (to be codified at 29 C.F.R. § 825.115(a)).

68. *Id.* (to be codified at 29 C.F.R. § 825.115(a)(1)).

69. See *id.* (to be codified at 29 C.F.R. § 825.115(a)(2)). Measures, such as an order to take over-the-counter medicine, that can be initiated without a visit to a health care provider are not sufficient to qualify as a regimen of continuing treatment. *Id.* (to be codified at 29 C.F.R. § 825.113(c)).

70. *Id.* at 68,079–80 (to be codified at 29 C.F.R. § 825.115(b)).

71. *Id.* (to be codified at 29 C.F.R. § 825.115(c)). Examples of episodic condition include conditions relating to such things as asthma, diabetes and epilepsy. *Id.* (to be codified at 29 C.F.R. § 825.115 (c)(3)).

72. *Id.* (to be codified at 29 C.F.R. § 825.115(d)).

73. *Id.* (to be codified at 29 C.F.R. § 825.115(e)).

74. *Id.* at 68,079 (to be codified at 29 C.F.R. § 825.113(d)).

cluded as well.<sup>75</sup> Mental illness or allergies can qualify if the affliction meets the definition of being a serious health condition.<sup>76</sup>

If a person has several diagnoses that individually do not rise to the level of a serious health condition, he or she may still qualify if the diagnoses cumulatively constitute a serious health condition. In *Price v. City of Fort Wayne*, the Seventh Circuit dealt with that very issue.<sup>77</sup> In that case, the plaintiff, Ms. Price, received an ultrasound scan and a later scan of her thyroid, an excision of a benign infected cyst, a needle biopsy on her thyroid, and a CT scan on her brain, brain stem, and sinuses within approximately one month.<sup>78</sup> Her physician stated in an affidavit that when Price came to his office, she was in "an alarming condition" and "was on the edge of a break-down, both physically and mentally."<sup>79</sup> The physician's statement indicated that Ms. Price could not work and that continuing to work "would be seriously detrimental to her health."<sup>80</sup>

In reversing the lower court's grant of summary judgment for the defendant on the plaintiff's FMLA claim, the court pointed out that the statute was passed to help people ensure balance between their working and personal lives.<sup>81</sup> "Whether these medical reasons take the form of one discrete illness, such as cancer, or the form of several different and seemingly unrelated illnesses all afflicting a single individual at the same time, such as in Price's case, is of no moment to the purposes of the FMLA."<sup>82</sup> The court suggested that a person's ability to work could be impaired by multiple illnesses.<sup>83</sup> This was deemed true, even if the set of illnesses were not individually recognized as serious health conditions, and did not impair the worker's ability in the same way as a single serious health condition.<sup>84</sup>

Beyond establishing that a serious health condition exists for the parent, the employee must also show that he or she is needed

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75. *Id.*

76. *Id.*

77. 117 F.3d 1022, 1023 (7th Cir. 1997).

78. *Id.* at 1024.

79. *Id.* at 1025.

80. *Id.*

81. *Id.* at 1024.

82. *Id.* at 1024-25.

83. *Id.* at 1025.

84. *See id.* at 1025.

to care for the parent's serious health condition.<sup>85</sup> Care goes beyond providing physical assistance; Department of Labor regulations provide that leave "may also be taken to provide care or psychological comfort to a covered family member with a serious health condition."<sup>86</sup> In *Brunelle v. Cytec Plastics, Inc.*, the district court adopted the magistrate judge's finding that the employee's bedside assistance in medical decision making for his critically burned father qualified for FMLA leave.<sup>87</sup> The facts in *Brunelle* demonstrated that, during the father's hospitalization for a number of months, the plaintiff was constantly present to make decisions regarding his father's care.<sup>88</sup> On the day in question, the plaintiff "undertook a daylong vigil" and assisted the doctors with medical decision making.<sup>89</sup>

*Brunelle* contrasts with *Fioto v. Manhattan Woods Golf Enterprises*, where the plaintiff was fired after missing work on the day of his mother's emergency brain surgery.<sup>90</sup> The jury in *Fioto* returned a verdict for the plaintiff on the FMLA claim.<sup>91</sup> The court, which had reserved judgment on the defendant's motion to dismiss, granted the dismissal, overturning the jury verdict.<sup>92</sup> The court concluded that, although *Fioto* was at the hospital that day, the record lacked evidence that *Fioto* interacted with either his mother or her physicians.<sup>93</sup> The only evidence presented was that *Fioto's* mother had brain surgery, that her doctors told *Fioto* it was serious and she might not survive, and that *Fioto* did not see his mother after the surgery.<sup>94</sup> The court found that being at a parent's bedside to offer comfort and reassurance qualifies as "caring for" the parent.<sup>95</sup> The court assumed that helping to make

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85. See 29 U.S.C. § 2612(a)(1)(C) (2006).

86. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,087 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.202(b)).

87. See 225 F. Supp. 2d 67, 69, 71 (D. Me. 2002).

88. *Id.* at 71.

89. *Id.* at 77.

90. See 270 F. Supp. 2d 401, 402 (S.D.N.Y. 2003).

91. *Id.* at 402.

92. See *id.* at 403. The jury had also found in the plaintiff's favor on a breach of contract claim the plaintiff had filed. *Id.* at 402. The claim was predicated on an agreement that provided plaintiff could only be terminated for "reasonable cause." See *id.* at 407. The defendant's motion for judgment as a matter of law was denied by the court, and the jury's verdict was allowed to stand. *Id.* at 406–07.

93. See *id.* at 404.

94. *Id.*

95. *Id.* at 405.



medical decisions would also qualify.<sup>96</sup> In this case, Fioto had offered no evidence that he provided physical or psychological care.<sup>97</sup> The court concluded that merely visiting a sick parent with a serious health condition did not qualify as providing care.<sup>98</sup> For the plaintiff to prevail on a FMLA claim, he must show that he participated in some form of on-going care.<sup>99</sup>

Regarding an employee's entitlement to FMLA leave for bereavement after the death of a parent, courts have read the protections of the statute literally. In *Brown v. J.C. Penney Corp.*, the plaintiff took FMLA leave to care for his terminally ill father.<sup>100</sup> When his father died almost two months later, the employee did not notify his employer and waited almost another month before reporting to work.<sup>101</sup> When he did report, he was told that he had been reassigned to a different position at the same pay rate.<sup>102</sup> The plaintiff's refusal to accept the reassignment resulted in his termination.<sup>103</sup> The *Brown* court concluded that the statutory language and legislative history allowing leave for a serious health condition was limited to health conditions that affect living persons.<sup>104</sup> The plaintiff provided no authority for the argument that a parent's "serious health condition" continued after the parent was dead.<sup>105</sup> "Put simply, if Congress wanted to ensure that employees on FMLA leave could take additional time off after a family member died from a serious health condition, it easily could have said so in the statute."<sup>106</sup>

In *Lange v. Showbiz Pizza Time, Inc.*, the court dealt with a similar issue.<sup>107</sup> The plaintiff in *Lange* took FMLA leave to care for his mother, who was suffering from pancreatic cancer.<sup>108</sup> Although his mother died one week after his leave began, Lange did

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96. *Id.*

97. *Id.*

98. *Id.* at 404.

99. *Id.*

100. 924 F. Supp. 1158, 1159 (S.D. Fla. 1996).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1162.

105. *Id.*

106. *Id.*

107. See 12 F. Supp. 2d 1150, 1152-53 (D. Kan. 1998).

108. *Id.* at 1152.

not immediately return to work.<sup>109</sup> One week after his mother's death, the employer notified Lange that he needed to return to work or he would be terminated.<sup>110</sup> Despite his request for additional time to console relatives, personally grieve, and deal with funeral arrangements, Lange was terminated when he failed to return to work.<sup>111</sup> Following the rationale of *Brown*, the court found that the FMLA is intended to provide protected leave to care for the living who suffered from a serious health condition.<sup>112</sup>

One difference between *Lange* and *Brown* is that Lange also argued that he should be entitled to leave under the FMLA because of the "grief and despair" that he suffered due to his mother's death.<sup>113</sup> In other words, Lange contended that his condition following her death created a "serious health condition" of his own.<sup>114</sup> Although the court acknowledged the possibility that this was a plausible argument, it found that Lange had failed to allege any facts supporting that claim.<sup>115</sup>

### C. *Protections Afforded by the FMLA*

In the event that an eligible worker qualifies to take leave to care for a parent, the FMLA provides a number of rights for the employee, including the right to twelve weeks of unpaid leave in any twelve-month period.<sup>116</sup> At the conclusion of the leave, the employee is entitled to be restored either to the position held prior to the leave<sup>117</sup> or to an equivalent position with equivalent pay and benefits.<sup>118</sup>

The right to reinstatement is dependent on a variety of factors. First, the employee must be able to return to work after twelve

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109. See *id.* at 1152–53.

110. *Id.*

111. *Id.* at 1153.

112. *Id.* at 1154.

113. *Id.*

114. See *id.*

115. See *id.* The court did grant the plaintiff leave to amend the complaint to add factual statements that would support this claim. *Id.*

116. 29 U.S.C. § 2612(a)(1)(C) (2006). As discussed earlier, the time expands to 26 weeks for the employee if the family member is a servicemember who suffered an injury or illness in the line of duty. See Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,084–85 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.127(c)(2)).

117. 29 U.S.C. § 2614(a)(1)(A) (2006).

118. See *id.* § 2614(a)(1)(B).

weeks of FMLA leave.<sup>119</sup> In *Talkin v. Deluxe Corp.*, the employee used his twelve weeks of FMLA leave by early September 2004.<sup>120</sup> However, he was not able to return to work until November 1, 2004.<sup>121</sup> Talkin alleged that he was entitled to additional time off between those dates because he had been approved for leave beyond twelve weeks, a point that was disputed by the employer.<sup>122</sup> The court concluded that the issue of additional approved leave was immaterial to the FMLA claim because he did not return to work within the twelve-week period protected by the statute.<sup>123</sup> Even if the employer had agreed to allow him additional time off, it was not protected leave.<sup>124</sup> When he sought to return to work in November, he was not returning from FMLA leave, and, thus, had no entitlement to return to his former position.<sup>125</sup>

Second, the court found that the plaintiff had not provided medical certification that he was able to return to work at the time his FMLA leave concluded.<sup>126</sup> At the time, the Department of Labor regulations provided that when the employee sought reinstatement, the employer had the right to request medical certification of the employee's ability to return to work.<sup>127</sup> Talkin had

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119. See Family and Medical Leave Act of 1993, 73 Fed. Reg. at 68,086 (to be codified at 29 C.F.R. § 825.200(a)).

120. No. 05-2305-CM, 2007 U.S. Dist. LEXIS 36975, at \*4 (D. Kan. May 18, 2007).

121. *Id.*

122. See *id.* at \*13 n.5.

123. See *id.* at \*13-14 (citing *Farina v. Compuware Corp.*, 256 F. Supp. 2d 1033, 1054 (D. Ariz. 2003); *Hanson v. Sports Auth.*, 256 F. Supp. 2d 927, 936 (W.D. Wis. 2003); *Summers v. Middleton & Reutinger*, 214 F. Supp. 2d 751, 757-58 (W.D. Ky. 2002)).

124. See *id.* at \*15.

125. See *id.* at \*15-16 (internal citations omitted).

126. See *id.* at \*13-14 (citing *Mondaine v. Am. Drug Stores, Inc.*, 408 F. Supp. 2d 1169, 1205-06 (D. Kan. 2006)).

127. See *id.* Section 825.311(c) of Title 29 of the Code of Federal Regulations provided:

When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work . . . .

29 C.F.R. § 825.311(c) (1995).

The new regulations provide more detail as to the requirement of certification and allow the employer to contact the employee's health care provider. 29 C.F.R. § 825.312 now provides in part:

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take

failed to provide this certification when his FMLA leave expired.<sup>128</sup>

Finally, the court concluded that Talkin was not entitled to return to his former position because he had failed to show that he was able to perform that job when his FMLA leave expired in September.<sup>129</sup> The court cited Department of Labor regulations stating that if the employee is unable to perform an essential function of the position because of a physical or mental condition, the employee has no right under the FMLA to be restored to his

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leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification as in the initial certification process. (citation omitted).

(b) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken . . . .

Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,105 (Nov. 17, 2008) (to be codified at 27 C.F.R § 825.312(a)–(b)).

128. *Talkin*, 2007 U.S. Dist. LEXIS 36975, at \*14.

129. *Id.* at \*15–16.

position.<sup>130</sup> The court concluded that this meant Talkin was also not entitled to placement in an equivalent position.<sup>131</sup>

In *Tardie v. Rehabilitation Hospital of Rhode Island*, the court reached a result similar to the result in *Talkin*.<sup>132</sup> Tardie was the hospital's Director of Human Resources and worked between fifty and seventy hours a week before she developed a variety of symptoms, including chest pains, numbness in her arms and dizziness, that forced her to take FMLA leave for multiple weeks.<sup>133</sup> When she sought to return to her position, she informed her employer that she would start back part-time and would gradually work up to forty hours a week but that she could no longer work beyond that.<sup>134</sup> Her doctor later advised her that her symptoms were related to job-created stress and that although she could return to work on a full-time basis, she should avoid stress and should not work sixty to seventy hours a week.<sup>135</sup>

The employer determined that the director position required more of a time commitment than the plaintiff could provide and told her that she would not be able to return to that position.<sup>136</sup> While she initially agreed to accept a severance package, she later filed a charge of discrimination based on disability with the Rhode Island Human Rights Commission.<sup>137</sup> Her lawsuit included a count alleging a violation of the FMLA because of the employer's refusal to reinstate her.<sup>138</sup>

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130. *Id.* (citing 29 C.F.R. § 825.214(b) (1995)).

The new regulations now provide:

§ 825.216 Limitations on an employee's right to reinstatement.

.....  
(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended (citations omitted).

Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,094 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.216(c)).

131. See *Talkin*, 2007 U.S. Dist. LEXIS 36975, at \*15-16.

132. See 6 F. Supp. 2d 125, 132 (D.R.I. 1998).

133. *Id.* at 127-28.

134. *Id.* at 128.

135. *Id.* at 128-29.

136. *Id.* at 128.

137. *Id.* at 129.

138. *Id.* at 127.

The *Tardie* court granted the defendant's motion for summary judgment on the FMLA claim.<sup>139</sup> The court found that the responsibilities of the director position required the director to be at work at various times during the workweek to interact with employees working the three shifts of the hospital.<sup>140</sup> Working extended hours was essential, and the court concluded that the plaintiff could not meet the position's obligations by working only forty hours a week and, thus, had no right to reinstatement.<sup>141</sup>

The employee's right to reinstatement may also be affected by structural changes or layoff decisions that occur during his or her FMLA leave. So long as an employer is not taking retaliatory action against the employee for taking leave, legitimate restructuring of an organization or layoffs by an employer that lead to termination of a worker on FMLA leave are permissible.<sup>142</sup>

In *Yashenko v. Harrah's NC Casino Co.*, the employer decided to eliminate two positions at a casino it managed for an Indian tribe.<sup>143</sup> The plaintiff, who was on FMLA leave at the time, pre-

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139. *Id.* at 132.

140. *Id.*

141. *Id.*

142. The relevant regulations provide:

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has not continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,094 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.216(a)(1)–(2)).

143. 352 F. Supp. 2d 653, 655–56 (W.D.N.C. 2005).

viously held one of the two eliminated positions.<sup>144</sup> Although the plaintiff was invited to apply for a new position, he failed to do so.<sup>145</sup> When he attempted to return from leave, he was terminated, which led him to sue his employer on the claim that the employer's conduct constituted both interference with his FMLA rights and retaliation against him for taking leave.<sup>146</sup>

The *Yashenko* court found that the right to reinstatement to the pre-FMLA leave position at the conclusion of leave is not absolute.<sup>147</sup> The court cited to the statute, which provides that the employer is not required to grant an employee on FMLA leave "any right, benefit, or position of employment other than the right, benefit, or position to which the employee would have been entitled to had [he] never taken leave."<sup>148</sup> The Department of Labor regulations make it clear that the employee on leave has no greater right to reinstatement than he would have had with continuous employment.<sup>149</sup>

A result similar to *Yashenko* was reached in *Bearley v. Friendly Ice Cream Corp.*<sup>150</sup> Prior to the plaintiff taking FMLA leave, the company began discussing changes in its bookkeeping operations that would lead to a reduction in employee work hours, including the plaintiff's hours.<sup>151</sup> When the plaintiff attempted to return to work, she was told that her responsibilities would change.<sup>152</sup> Under the new organization, she would no longer perform forty hours of bookkeeping duties.<sup>153</sup> Instead, the hours for those responsibilities would be nearly cut in half, and the remainder of her weekly hours would include food preparation and serving at one of the company's restaurants.<sup>154</sup>

Similar to *Yashenko*, the *Bearley* court found that the FMLA gave the employer the right to take action that would adversely affect an employee's restoration rights if the same action would

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144. *Id.* at 656.

145. *Id.*

146. *Id.*

147. *Id.* at 657.

148. *Id.* (citing 29 U.S.C. § 2614(a)(3)(B) (2000)).

149. *See id.* at 657-58.

150. *See* 322 F. Supp. 2d 563, 571 (M.D. Pa. 2004).

151. *Id.* at 568.

152. *See id.* at 569.

153. *See id.*

154. *Id.*

have been taken without request for or actual taking of FMLA leave.<sup>155</sup> In *Bearley*, the record showed that even before Bearley took her leave, the company considered reducing bookkeeper responsibilities while expanding the role of the restaurant's general managers to include bookkeeping duties.<sup>156</sup> The evidence demonstrated that the plaintiff's bookkeeping hours would have been reduced regardless of her FMLA leave.<sup>157</sup>

As to the issue of restoring the person returning from FMLA leave to an equivalent position, the statute provides that an equivalent position is one with "equivalent employment benefits, pay, and other terms and conditions of employment."<sup>158</sup> According to Department of Labor regulations "[a]n equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities which must entail substantially equivalent skill, effort, responsibility, and authority."<sup>159</sup>

Simply providing an employee equivalent pay and benefits is not enough. Courts look at several factors, including the level of training and education required for the new position versus that of the former one.<sup>160</sup> For example, consider *Nocella v. Basement Experts of America*, where an employee returning from leave had been an office manager with oversight responsibilities for other employees.<sup>161</sup> Upon her return, she was assigned to a position where she answered to a different superior and was only responsible for reviewing the company's I-9 forms for federal compliance.<sup>162</sup> The *Nocella* court rejected the employer's argument that this assignment was equivalent because both positions were

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155. *Id.* at 571-72.

156. *See id.* at 572.

157. *Id.*

158. 29 U.S.C. § 2614(a)(1)(B) (2006).

159. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,093 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.215(a)).

160. *See, e.g., Donahoo v. Master Data Center*, 282 F. Supp. 2d 540, 552 (E.D. Mich. 2003). In *Donahoo*, the court found that assigning an employee who was working as a computer analyst before FMLA leave to a data-entry position was not equivalent, even though the employee was paid the same and had the same benefits as prior to leave. *Id.*

161. 499 F. Supp. 2d 935, 938 (N.D. Ohio 2007).

162. *Id.*



administrative/clerical and the employee enjoyed the same pay and benefits.<sup>163</sup>

The law does not require that the employer provide for paid leave.<sup>164</sup> Further, if the employer allows paid leave for less than twelve weeks, the employer is allowed to use the period of paid leave in computing when twelve weeks of FMLA leave expires.<sup>165</sup> In addition, the employer may require, or the employee may elect, that the employee take accrued paid vacation time or personal-leave as part of the twelve-week leave.<sup>166</sup> For an employee to be able to substitute accrued paid leave, the request must be consistent with the employer's normal leave policy.<sup>167</sup> In other words, if the employer has blackout periods where paid leave is not permitted, the employee can take FMLA leave for a qualifying event but cannot expect to be compensated.

The employee is also entitled to protection of benefits accrued prior to taking FMLA leave.<sup>168</sup> While this protects the employee's seniority and benefits earned prior to the leave, it does not entitle the employee to accrue additional seniority or benefits while on leave.<sup>169</sup> However, the employee cannot be denied any right, benefit, or position that he would have been entitled to if he or she had not taken the leave.<sup>170</sup> Thus, if a benefit plan is changed while the employee is on protected leave, the employee is entitled to participate in the change upon the employee's return unless the benefit is tied to seniority or accrual.<sup>171</sup>

Another important attribute of the FMLA is that if the employer offers a group health insurance plan to its employees, an employee covered by the health plan who takes approved leave is en-

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163. *Id.* at 941-42. The *Nocella* court concluded that, in effect, the change in positions meant that "[s]he was moved from the middle of a chain of command to the bottom of another." *Id.* at 942.

164. 29 U.S.C. § 2612(c) (2006).

165. *Id.* § 2612(d)(1).

166. *Id.* § 2612(d)(2)(B).

167. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,979 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.207(a)).

168. 29 U.S.C. § 2614(a)(2).

169. *Id.* § 2614(a)(3)(A).

170. *Id.* § 2614(a)(3)(B).

171. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,093 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.215(d)(5)). For example, if the change in a benefit plan is tied to hours worked and the employee does not have the required hours because of FMLA leave, he or she is not entitled to the benefit. *Id.*

titled to remain covered during the leave.<sup>172</sup> The law provides that if the employee has been paying a portion of the premium cost, the employer can continue to require the employee to pay that portion during the leave.<sup>173</sup>

## IX. LEAVES OF ABSENCE—A VEXING PROBLEM FOR EMPLOYERS

### A. *The Impact of Leaves of Absence on Employers*

In creating a law designed to provide legal protection to a worker taking a leave of absence, Congress tried to strike a balance between the interests of the worker and the family on one side, and the employer on the other.

Without the law's protection, an employee facing either his or her own serious health condition or that of a family member may be forced to take a leave that results in loss of employment, causing him to lose his job and the health care benefits that come with it. For that individual, and the other family members who are covered by the employee's health plan, a major crisis that generates high, uncovered hospital and medical expenses might be an event from which they can never financially recover.

From a social standpoint, the potential for financial ruin justifies the existence of a law that provides protected leave for serious health conditions. However, the employer's needs must be considered as well. Eldercare has been called the "silent productivity killer."<sup>174</sup> A 2006 study by the MetLife Mature Market Institute found that American companies lose a total of \$33.6 billion per year because of demands on employees who must care for an aging parent or other incapacitated loved one.<sup>175</sup> In an earlier

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172. 29 U.S.C. § 2614(c)(1) (2006).

173. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 68,091 (to be codified at 29 C.F.R. § 825.210(a)). The regulations further provide that if the premiums are raised or lowered, the employee's payment should be adjusted during the leave accordingly. *Id.* In addition, if the employee is more than 30 days late in making the payments, the employer has the right to terminate coverage so long as it has mailed notice of the termination to the employee 15 days before coverage is to cease. *Id.* at 68,091–92 (to be codified at 29 C.F.R. § 825.212(a)(1)).

174. Society for Human Resource Management, *Elder Care by Employees is "Silent Productivity Killer"*, Dec. 9, 2003, available at <http://seniorjournal.com/NEWS/Eldercare/3-12-09workers.htm> (last visited Apr. 8, 2009).

175. See LTC Financial Partners, *supra* note 20; see also Robert E. O'Toole, *Integrating Contributory Elder-Care Benefits with Voluntary Long-Term Care Insurance Programs*, 27 EMPLOYEE BENEFITS J. 13, 13–17 (2002).

study, MetLife found that eldercare costs employers \$1,141 per employee per year in absenteeism, turnover, and lost productivity.<sup>176</sup> A factor that adds significantly to these costs is that approximately 20% of the FMLA leave is for periods of one day or less, which adds considerable administrative costs relative to the duration of employee leave.<sup>177</sup>

The costs of caregiving that are borne by the employer fall into five major categories: (1) replacement costs for employees who leave due to care-giving responsibilities; (2) absenteeism costs; (3) costs due to partial absenteeism; (4) costs due to workday interruptions; and (5) workers retiring sooner than they planned.<sup>178</sup> Replacing employees who change jobs because of eldercare issues is particularly costly for a company. The results of one study show that it costs 150% of a salaried worker's pay for a company to find, hire, and train a new person.<sup>179</sup> For hourly workers, turnover costs amount to 50% to 75% of annual pay.<sup>180</sup>

Furthermore, flexibility in work schedules and the availability of leave are associated with lower employee turnover, with 73% of employees with high flexibility jobs—versus 54% of those with low flexibility jobs—remaining at their jobs the following year.<sup>181</sup>

### B. *The FMLA and the Uncertainty Created for Employers*

The success of a business may be tied to the employer's ability to make predictions and minimize the risks that come with uncertainty. The FMLA's provisions on leaves of absence added a level of uncertainty to the employer's ability to forecast how leaves will affect operations.<sup>182</sup> A business may recognize the options available to it to when it comes to having the absent employee's work assigned to another employee. However, the rights provided to workers under the FMLA frequently make it difficult for the employer to know which alternative would best serve its interests

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176. See Rose, *supra* note 26, at 62.

177. See Rotondi, *supra* note 48, at 5.

178. See O'Toole & Ferry, *supra* note 30, at 41 (listing a sixth cost that is not one commonly borne by employers: costs associated with supervising employed caregivers).

179. See Levin-Epstein, *supra* note 53, at A17.

180. See *id.*

181. *Id.*

182. See *infra* Part IV.C.

and, regardless of the option chosen, whether the employee's absence will ultimately harm the company.<sup>183</sup>

In part, this uncertainty results from the fact that the length of time that a worker needs to be absent may be unpredictable. Health conditions vary. Sometimes a patient recovers more quickly than expected. Sometimes recovery is hampered by complications. A parent may have a serious health condition that the treating physician believes will ultimately claim his or her life, but the survival period is often uncertain. Perhaps the illness is debilitating but not life threatening. Maybe the parent will periodically need treatment at a health care facility and is dependent on the employed adult child for transportation. The eldercare need is highly variable; it can persist for months or even years.

The unpredictability of the leave makes it difficult for employers to plan. In some cases, the employer may be able to accommodate the leave with schedule adjustments or by providing overtime for other employees. In other instances, the employer may find it necessary to implement a more costly and complicated solution that raises a number of issues. Should the employer hire a temporary replacement? If the employer needs a highly skilled worker, is such an employee even available? Should the employer reassign the work done by the employee to others? What effect will the reassignment have on other workers' ability to do their jobs?

The FMLA standards help bring clarity to employers—at least on some issues. The statute and regulations provide both a definition for what qualifies as a serious health condition<sup>184</sup> and a mechanism for resolving disputes between the employer and the employee over whether the particular health condition meets that definition.<sup>185</sup> The FMLA also established a requirement that, where the leave is foreseeable, the employee must provide thirty days' notice of his or her need for leave or, if that is not possible, the employee must provide notice as soon as practicable.<sup>186</sup>

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183. See *infra* Part X.B.

184. See 29 U.S.C. § 2611(11) (2006).

185. See *id.* § 2613.

186. See *id.* § 2612(e)(2)(B).

However, the FMLA also created the potential that the different types of leave allowed by the law could create disruptions that employers may not have envisioned when the law was enacted. Essentially, there are three types of leave that the Act permits: (1) leave for a single block of time; (2) intermittent leave; and (3) leave on a reduced-schedule basis.<sup>187</sup>

Where the employee needs a single block of time to attend to the needs of a parent, there is likely to be a higher level of predictability as to the length and timing of the leave. For example, the parent facing surgery may have a period that follows where significant time is needed from the employee to provide care. However, the health care provider has an ability to predict that the employee is likely to be needed for a specific period before the parent will be able to care for him or herself. The employer then may have a reasonable idea of the time that other employees or a temporary replacement will likely be needed to take over work for the absent employee.

Instead of a single block of time, the employee may need intermittent leave or leave on a reduced-schedule basis.<sup>188</sup> Intermittent leave is "taken in separate blocks of time due to a single qualifying reason."<sup>189</sup> This would include cases where a parent needs follow-up treatment that requires the time of the employee, or where the treatment has debilitating side effects that prevent the patient from temporarily caring for him or herself. It could also include a chronic condition that periodically and unpredictably flares up, rendering the parent in need of the care of the employee and causing the employee to miss work unexpectedly. It can be taken in periods as short as one hour or as long as several weeks.<sup>190</sup>

Leave that is taken on a reduced-schedule basis involves changing the work schedule of the employee, meaning reducing the hours of the employee's workweek which could cause the employee to be reduced from full-time to part-time status.<sup>191</sup> For example, it could cover cases where the employee must leave work

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187. See *id.* § 2612(a)-(b).

188. See *id.* § 2612(b)(1).

189. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,087 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.202).

190. *Id.* at 68,087 (to be codified at 29 C.F.R. § 825.202(b)(1)).

191. *Id.* at 68,087 (to be codified at 29 C.F.R. § 825.202(a)).

to administer a treatment to his or her parent during the workday. It could also cover the instance where one day every week, the parent needs to receive treatment outside the home (e.g., dialysis) and the parent is dependent on the son or daughter for transportation.

### *C. Intermittent and Reduced-Schedule Leaves*

So long as the intermittent leave or leave on a reduced-schedule basis does not exceed twelve total weeks in a twelve-month period, the statute imposes no limit on the number of times an employee can take these types of leave.<sup>192</sup> For example, an employee who can establish a qualifying need for leave could conceivably request one day of leave every week of the year, or one hour a day for every workday to provide care to a parent and still be within the limits of the statute.<sup>193</sup>

If an employee is going to operate under a schedule where he or she frequently, and perhaps unpredictably, misses work to care for a family member, the employer will have to consider how it can get the absent employee's work covered during those times. Will the work have to be shifted to other workers, adversely affecting their ability to do their jobs? Is it realistic to bring in a replacement worker to work only sporadically? If the absences are affecting the company's productivity—and perhaps its profitability—does the employer have the right to terminate a worker even though he or she does not meet the standards of being a “key employee?”

An eligible employee's right to leave under the FMLA places a much greater burden on the employer than the reasonable accommodation requirements of Title VII<sup>194</sup> or the Americans with Disabilities Act (“ADA”).<sup>195</sup> Under Title VII an employer is required to provide an accommodation to employees whose religious beliefs conflict with company policies unless the accommodation will cause the employer an undue hardship.<sup>196</sup> This has been in-

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192. See *id.* at 68,086 (to be codified at 29 C.F.R. § 825.200(a)–(e)).

193. See *id.*

194. See 42 U.S.C. § 2000e(j) (2000).

195. See *id.* §12112(b)(5).

196. *Id.* § 2000e(j). Section 2000e(j) of Title 42 of the United States Code provides: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an em-

terpreted to include conflicts that arise between the work schedule followed by a company and the need of workers to take time off for religious reasons.<sup>197</sup> Because of Supreme Court precedent, however, the reasonable accommodation requirement does not place a large burden on employers. In *Ansonia Board of Education v. Philbrook*, which related to conflict created by the employee's religious beliefs and the days he was expected to work, the Court concluded that once the employer offers a reasonable accommodation, it has met its duty under the law.<sup>198</sup> This is true even if a different accommodation offered by the employee would also be reasonable.<sup>199</sup>

In addition, the Supreme Court has set a low threshold for what constitutes an undue hardship on the employer. In *Trans World Airlines, Inc. v. Hardison*, the employee needed a scheduling change because of his religious practices.<sup>200</sup> Hardison offered several alternatives, each of which was rejected by the employer.<sup>201</sup> The Court found that if an accommodation creates more than a *de minimis* burden on the employer, it is free to reject the option.<sup>202</sup>

The ADA requires that an employer provide reasonable accommodations to a disabled person who is otherwise qualified for a job unless the accommodations would cause the employer an undue hardship.<sup>203</sup> The ADA recognizes that among the types of accommodations that an employer may have to offer is the possibility of "part-time or modified work schedules."<sup>204</sup>

The courts have recognized that attendance is typically a necessary element of jobs.<sup>205</sup> Under the terms of the statute, if a disabled employee misses an excessive number of workdays, he or

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ployee's or prospective employee's religious observance or practices without undue hardship on the conduct of the employer's business." *Id.*

197. See *Trans World Airlines v. Hardison*, 432 U.S. 63, 84-85 (1977); *EEOC v. Universal Mfg. Corp.*, 914 F.2d 71, 74 (5th Cir. 1990); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987).

198. 479 U.S. 60, 68 (1986).

199. *Id.* at 68-69.

200. See 432 U.S. 63, 66-68 (1977).

201. *Id.* at 68-69.

202. See *id.* at 84.

203. See 42 U.S.C. § 12112(b)(5)(A) (2000).

204. *Id.* § 12111(9)(B).

205. *E.g.*, *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998).

she will be considered unable to perform the essential functions of the job and, therefore, not qualified for the position.<sup>206</sup>

The FMLA does not provide the employer with the same type of authority to terminate workers who are eligible for leave.<sup>207</sup> This is true even where their absence may cause an "undue hardship" on the employer.<sup>208</sup> The "key employee" exception does afford some level of protection to the employer. The Department of Labor regulations indicate that the "substantial and grievous economic injury" test should be used to determine if a key employee's employment restoration may be denied.<sup>209</sup> The regulations state that this test is more stringent than the "undue hardship" test under the ADA.<sup>210</sup>

Two criteria are used to determine whether an employee is a "key employee." First, is the worker among the highest 10% of salaried workers<sup>211</sup> within seventy-five miles of his or her site of employment?<sup>212</sup> Second, is the denial of reinstatement necessary to "prevent substantial and grievous injury to the operations of the employer?"<sup>213</sup>

Upon finding that the employee's restoration will create substantial and grievous injury, the employer must notify the employee that, based on this determination, the employer plans to deny the employee reinstatement rights.<sup>214</sup> The notice gives the employee a chance to consider whether it is possible for other arrangements to be made for the care of the family member.

In determining whether an employee's absence will cause substantial and grievous injury, the employer can consider whether it is possible to get a temporary replacement for the employee.<sup>215</sup>

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206. See, e.g., *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 850 (8th Cir. 2002); *Pickens v. Soo Line R.R.*, 264 F.3d 773, 777-78 (8th Cir. 2001).

207. See Family and Medical Leave Act of 1993, 73 Fed. Reg. at 67,934, 68,086 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.220(a)(1)-(2)).

208. See *id.* at 68,110 (to be codified at 29 C.F.R. § 825.702(a)-(b)).

209. *Id.* at 68,094 (to be codified at 29 C.F.R. § 825.218(a)).

210. *Id.* at 68,095 (to be codified at 29 C.F.R. § 825.218(d)).

211. The new regulations did not change the definition of salaried employee. A salaried employee is one "paid on a salary basis" as defined by the regulations adopted by the Department of Labor in the regulations promulgated under the Fair Labor Standards Act. *Id.* at 68,094 (to be codified at 29 C.F.R. § 825.217(b)).

212. See 29 U.S.C. § 2614(b)(2) (2000).

213. *Id.* § 2614(b)(1)(A).

214. *Id.* § 2614(b)(1)(B).

215. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 68,094 (to be codified at 29



If it is determined that a permanent replacement must be hired, the employer can consider whether it will cause substantial and grievous economic injury if it restores the key employee.<sup>216</sup> The Department of Labor regulations further recognize that a precise test on the level of injury that the employee's absence would create cannot be articulated.<sup>217</sup> If reinstatement would threaten the "economic viability of the firm" or if the absence would cause a "substantial, long-term economic injury," that would be sufficient to justify refusal to reinstate.<sup>218</sup> Minor inconveniences and minor costs, however, would not constitute serious and grievous economic injury.<sup>219</sup>

The substantial and grievous economic injury exception is important for employers. If an organization is going to be seriously injured by an employee's absence, it needs the ability to proactively plan for worker replacement. However, many employees do not qualify as "key employees," and yet their absence may significantly undermine both the operations of the business and its profitability.

For example, suppose Kimberly is an outside sales representative assigned by her employer to a specific territory. Her compensation is the commissions she earns on sales. Kimberly has serviced the territory for a number of years and has effectively developed relationships with her customers. When her mother suffers a heart attack and needs bypass surgery in a distant city, Kimberly is needed to care for her mother. Kimberly, therefore, requests six weeks of leave.

Kimberly's absence from work may pose significant problems for her employer. Who is going to cover Kimberly's territory during her absence? Hiring a temporary replacement who is unfamiliar with the company's product line and customers is not a realistic solution. The employer has the option of temporarily dividing the territory among other sales representatives who serve adjacent geographic areas. However, they are strangers to the customers in Kimberly's territory. The sales staff will also continue to be responsible for servicing the customers in their

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C.F.R. § 825.218(b)).

216. *Id.*

217. *Id.* at 68,094-95 (to be codified at 29 C.F.R. § 825.218(c)).

218. *Id.*

219. *Id.*

own territories who are likely to be much more important to them in terms of their future earnings. These situations may have an adverse effect on sales. Additionally, if Kimberly's mother does not recuperate quickly and Kimberly asks to extend her leave, the employer's hardship is further complicated.

Despite the problems this absence may pose, the company has little choice but to allow leave for the sales representative. The heart attack and the bypass surgery requiring hospitalization would satisfy the requirements of a serious health condition. If the mother's healthcare provider certifies that Kimberly is needed to care for her mother, the company must grant the leave and allow Kimberly the same or an equivalent position upon return. Even if Kimberly ordinarily earns commissions that place her in the top 10% of compensation out of all company workers, the company cannot refuse to reinstate her at the end of the leave. The "key employee" exemption does not apply since she does not receive a salary.<sup>220</sup>

There are many salaried employees who are critical to the operation of a business but do not meet the salary requirements necessary for the employer to consider them "key employees." For example, suppose Fred is a salaried maintenance supervisor and possesses important responsibilities related to plant maintenance and building project oversight. Fred's father suffers from Alzheimer's disease and cannot stay alone for extended periods. Currently, his father is living with Fred's sister, who provides most of the care and attention for the father. Fred's sister works part-time for a local retailer. While most of her work hours are scheduled for weekends when Fred can care for the father, she is also required to work one weekday. Fred and his sister have agreed that on that day, Fred will take leave from work. The father's health care provider is willing to certify that Fred is needed to care for the father on that one day per week.

The same type of problem could be raised for employees who are compensated on an hourly basis. Suppose Jim works in a manufacturing plant and is charged with the final inspection of products prior to customer shipment. Jim's mother suffers from a chronic and serious health condition. The condition manifests itself in unpredictable episodes. When they occur, Jim must pro-

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220. See 29 U.S.C. § 2614(b)(2) (2006).

vide her care. On any given workday, it is possible that Jim will not be at work because his mother is in need of care. Because of her condition, Jim missed fourteen days in the last four months, six of which were in the current month. Other inspectors have been required to work overtime because of Jim's absence. The extra hours have created stress and resentment and may have caused one of the inspectors to miss several defects in goods shipped to a now unhappy customer. As long as Jim is needed to care for his mother's serious health condition, he is entitled to intermittent leave under the FMLA despite the impact on the other workers.

#### X. RIGHTS OF EMPLOYERS DEALING WITH LEAVE REQUESTS TO CARE FOR PARENTS

The FMLA makes it illegal for an employer to interfere with, restrain, or deny an eligible employee's right to take leave to care for a parent suffering from a serious health condition.<sup>221</sup> While the purpose of the statute is designed to protect workers' interests, Congress attempted to balance those interests with the interests of the employer.<sup>222</sup> The FMLA established a number of requirements that the employee must meet to establish that the leave falls within the confines of the statute.

##### A. *Employer's Right to Notice and Certification*

The onset of a serious health condition is not usually predictable. If an employee foresees the need to request leave based on planned medical treatment for a parent, however, the employee must provide the employer with thirty days' notice when possible.<sup>223</sup> If the leave is not foreseeable, Department of Labor regulations call for the employee to provide notice to the employer as soon as practicable.<sup>224</sup> This ordinarily is expected to be within the time prescribed by the policies of the employer which cover such leave.<sup>225</sup>

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221. See 29 U.S.C. § 2615(a)(1) (2006).

222. *Id.* § 2601(b)(1)–(3).

223. *Id.* § 2612(e)(2)(B).

224. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 67,934, 68,099 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.303(a)).

225. *Id.*

The law also requires that the employee "make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer."<sup>226</sup> This would suggest that, when possible, the employee should take his parent for a medical appointment related to a serious health condition at a time that would not interfere with the employee's work schedule.

The law also allows the employer the right to demand certification of the parent's serious health condition<sup>227</sup> and that the employee is needed to provide care for the parent.<sup>228</sup> The statute provides that a certification from the health care provider will be sufficient if it states: (1) "the date on which the serious health condition began"; (2) "the probable duration of the condition"; (3) the medical facts relating to the condition; (4) a statement that the requesting employee is needed to care for the parent and the length of time that this will likely require; and (5) if the employee seeks intermittent leave or leave on a reduced schedule due to medical treatments, the dates for the treatment and its duration along with a statement that the employee's intermittent leave or leave on a reduced schedule is necessary for the care of the parent.<sup>229</sup> It is also to include the expected duration and schedule of the employee's intermittent or reduced schedule leave.<sup>230</sup>

Of course, there is the possibility that the employer may have doubts about the validity of the certification. Is this truly a serious health condition that has afflicted the parent? Or is the employee simply looking for time off and has found a doctor willing to be lax in applying the guidelines of the certification? Recognizing the potential for abuse, as well as the possibility for legitimate debate over the parent's condition, the FMLA allows an employer to require, at the employer's expense, the opinion of a second health care provider designated or approved by the employer.<sup>231</sup>

In the event that there is a difference of opinion between the first and second health care providers, the employer may require, at the employer's expense, a third health care provider to supply

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226. 29 U.S.C. § 2612(e)(2)(A).

227. *Id.* § 2613(a).

228. *Id.* § 2613(b)(4)(A).

229. *Id.* § 2613(b).

230. *Id.*

231. *Id.* § 2613(c).

another opinion.<sup>232</sup> At that point, the FMLA requires that the employer and employee must jointly approve the third provider.<sup>233</sup> The opinion of this provider is final and binding on the parties.<sup>234</sup>

*B. Employer Rights Regarding Leave on an Intermittent or Reduced Schedule Basis*

If the employee needs intermittent leave or leave on a reduced schedule, the employer has the right temporarily to transfer the employee "to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position."<sup>235</sup>

The transfer must be in compliance with federal and state law and with any existing collective bargaining agreement.<sup>236</sup> Additionally, the job can be altered so that it better accommodates the scheduling needs of the employee.<sup>237</sup> In this case, the position does not have to involve equivalent duties, but must provide for equivalent pay and benefits.<sup>238</sup>

The regulations also permit the employer the discretion to "transfer the employee to a part-time job with the same hourly rate of pay and benefits."<sup>239</sup> However, this right is limited in that the employer cannot reduce the hours more than medical circumstances demand.<sup>240</sup> The employer's rights are further limited in that even if the part-time position ordinarily would not require benefits, the employer cannot eliminate benefits that existed prior to the transfer.<sup>241</sup> However, "an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked."<sup>242</sup>

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232. *Id.* § 2613(d)(1).

233. *Id.*

234. *Id.* § 2613(d)(2).

235. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,088 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.204(a)).

236. *Id.* (to be codified at 29 C.F.R. § 825.204(b)).

237. *Id.*

238. *Id.* (to be codified at 29 C.F.R. § 825.204(c)).

239. *Id.*

240. *See id.*

241. *Id.*

242. *Id.*

In addition, the employer cannot transfer an employee taking intermittent leave or leave on a reduced schedule to a position that would "discourage the employee from taking leave or otherwise work a hardship on the employee."<sup>243</sup> This would include transferring a white-collar worker to a blue-collar job, reassigning a day shift worker to the overnight shift, or forcing the employee to work at another facility that is a significant distance from where he or she currently works.<sup>244</sup> Of course, when the need for intermittent leave or leave on a reduced schedule ends, the employee must be returned to the position he or she held before the leave, or to a position that is equivalent.<sup>245</sup>

#### XI. EMPLOYER'S DUTIES RELATING TO INTERMITTENT OR REDUCED-SCHEDULED LEAVES

As discussed earlier, the employer is not always required to reinstate an employee returning from FMLA leave to the same or equivalent position if there are valid reasons for not doing so.<sup>246</sup> One such reason might arise if the business goes through a reorganization that has the effect of eliminating the position of an employee on periodic leave.<sup>247</sup> Another valid reason might exist if the employer can establish that the prior performance of an employee on periodic leave did not meet the standard expected by the employer.<sup>248</sup>

One question that has arisen concerns whether an employer has a right to terminate an employee on reduced schedule or intermittent leave because the leave is creating an undue hardship for the employer. Several courts have at least raised the possibility that an employer can terminate an employee where his or her absence means that the person is no longer qualified for the posi-

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243. *Id.* (to be codified at 29 C.F.R. § 825.204(d)).

244. *Id.*

245. *Id.* (to be codified at 29 C.F.R. § 825.204(e)).

246. For a further discussion of employer reinstatement requirements following employee return from FMLA leave, see *supra* notes 116 and accompanying text.

247. See *supra* notes 142–57 and accompanying text.

248. See, e.g., *Kohls v. Beverly Enters. Wis., Inc.*, 259 F.3d 799, 807 (7th Cir. 2001). In *Kohls*, the employer refused to reinstate the employee after her maternity leave because the employee failed to do an adequate job of checking account record keeping and the employer was dissatisfied with the way the employee ran the activities program for the residents of the employer's nursing home and rehabilitation facility. *Id.* at 801–03. The *Kohls* court concluded that—based on these problems—the plaintiff would have been subject to being discharged even if she was not on family leave. *Id.* at 805.

tion.<sup>249</sup> These cases have involved situations where the employee is the one suffering from the serious health condition;<sup>250</sup> however, it would seem that an employer could raise the same argument when it is a parent's serious health condition causing the employee to miss work.

In *Spangler v. Federal Home Loan Bank of Des Moines*, the employee was treated for depression for years, a fact known by her employer.<sup>251</sup> In a five-year period, Spangler missed over 110 days of work for medical or family reasons.<sup>252</sup> The year before she was terminated, Spangler was counseled on the need to reduce her absences.<sup>253</sup> She was also ordered to speak with someone rather than leave voicemail messages—her typical practice—when she called to advise her employer that she would miss work.<sup>254</sup> Months after the counseling, she missed several days consecutively, leaving a voicemail message each day.<sup>255</sup> As a result, she was placed on a six-month probation and warned that if she missed more than two additional days during that period, she could be terminated.<sup>256</sup>

Shortly after the probation ended, Spangler was placed back on probation because of several additional unscheduled absences.<sup>257</sup> Shortly thereafter, she missed three consecutive days of work.<sup>258</sup> The first day she called to advise the employer that her absence was due to transportation problems, while the second day was due to "depression again."<sup>259</sup> On the third day, she did not call or appear for work and was terminated.<sup>260</sup> Spangler challenged the termination under the ADA and the FMLA.<sup>261</sup>

Spangler's employment involved daily phone calls to customer-banks, providing customers with their daily cash needs, and per-

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249. See *infra* notes 251–79.

250. See *infra* notes 251–79.

251. 278 F.3d 847, 848 (8th Cir. 2002).

252. *Id.* at 849.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 849–50.

259. *Id.*

260. *Id.* at 850.

261. *Id.* at 848.

forming customer transactions in a timely manner.<sup>262</sup> On the many days she was absent, other employees took over her responsibilities, which interfered with their own jobs.<sup>263</sup> In addition, one of the customers assigned to Spangler had complained to her employer that her absences were interfering with the customer's business.<sup>264</sup>

On her ADA claim, the Eighth Circuit affirmed the lower court's grant of summary judgment on behalf of the employer.<sup>265</sup> While the court did not specifically address the issue of whether Spangler was disabled under the statute, it did find that her absences prevented her from performing her duties and that, as a result, she was not qualified for the position.<sup>266</sup> The court concluded that the reasonable accommodation provision of the ADA did not require an employer to reassign the essential functions of the job to accommodate her.<sup>267</sup>

The lower court also granted summary judgment to the employer on Spangler's FMLA claim.<sup>268</sup> Although the lower court found that Spangler created a material issue of fact regarding whether she had a "serious health condition," it concluded that there was no dispute that on the day she was terminated, she had not given notice to her employer of the need for leave under the FMLA.<sup>269</sup>

On the issue of adequacy of notice, the Court of Appeals disagreed and reversed the trial court's decision.<sup>270</sup> The court concluded that Spangler not "calling in" on the day she was terminated did not prevent a reasonable jury from concluding that the notice of the preceding day was sufficient to satisfy the FMLA's notice requirement.<sup>271</sup> In this instance, the employer was well aware of Spangler's long history of depression and should have recognized that a person suffering from depression may have great trouble performing the otherwise routine behavior of notify-

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262. *Id.* at 850.

263. *Id.*

264. *Id.* at 849.

265. *Id.* at 850.

266. *Id.*

267. *Id.*

268. *Id.* at 851.

269. *Id.*

270. *Id.*

271. *See id.* at 852-53.



ing an employer of an intended absence.<sup>272</sup> The court said that the employer would be allowed to introduce evidence at trial showing that the reason for the dismissal was not related to the FMLA.<sup>273</sup>

The appellate opinion contained interesting language relating to employees who repeatedly miss work because of their own health condition. The court stated in dicta that "the FMLA does not provide an employee suffering from depression with a right to 'unscheduled and unpredictable, but cumulatively substantial absences' or a right to 'take unscheduled leave at a moment's notice for the rest of her career.'"<sup>274</sup>

In *Collins v. NTN-Bower Corp.*, to which the *Spangler* court referred, the employee had also missed work frequently due to depression.<sup>275</sup> The Seventh Circuit pointed out that the evidence indicated Collins suffered from a condition that would not improve with time off.<sup>276</sup> This meant that the plaintiff was asserting a right to take unscheduled, intermittent leave because of her depression for the rest of her career with her employer.<sup>277</sup> The court ultimately resolved the case on the fact that Collins had not provided adequate notice to the employer of the reason she had called in sick.<sup>278</sup> In dicta, however, the court went on to say that an employee's health condition that was not going to improve and would cause her to continue to miss work "implies that she is not qualified for a position where reliable attendance is a *bona fide* requirement, and a person not protected by the ADA may be discharged."<sup>279</sup>

The dicta in *Spangler* and *Collins* suggests that some courts may be willing to set a limit on the length of time over which intermittent or reduced-schedule leave may be taken by the employee for his or her own serious health condition. By extension, the same thinking could apply where the employee is taking leave to care for the serious health condition of a parent.

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272. See *id.* at 853.

273. *Id.*

274. *Id.* (quoting *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1007 (7th Cir. 2001)).

275. See 272 F.3d. at 1007.

276. *Id.*

277. *Id.*

278. *Id.* at 1008-09.

279. *Id.* at 1007-08.

## XII. EMPLOYER VIOLATIONS OF THE FMLA

To protect the rights of employees, the FMLA names a number of prohibited acts to control the conduct of employers. Specifically, an employer cannot “[I]nterfere with, restrain, or deny” an employee rights afforded under the statute.<sup>280</sup> Nor can an employer terminate or otherwise discriminate against an individual who opposes an act that is unlawful under the statute.<sup>281</sup> This would cover not only the employee denied a right under the Act but also any individual, including people who are not employees, who object to a practice they believe to be in violation of the Act.<sup>282</sup> The FMLA also declares that it is unlawful to:

discharge or [otherwise] discriminate against any individual because such individual—

(1) has filed any charge, or has instituted . . . any proceeding under [the FMLA],

(2) has given . . . information . . . [regarding an] inquiry or proceeding relating to any right provided under [the FMLA]; or

(3) has testified, or [plans] to testify, in any inquiry or proceeding relating to any right provided [for] under [the FMLA].<sup>283</sup>

Interference includes refusing to authorize an employee's leave where he or she is entitled to it, discouraging an employee from taking eligible leave, and manipulating an employee to avoid the employer's responsibilities under the FMLA.<sup>284</sup> Manipulation could include transferring workers to keep a workplace below fifty employees within a seventy-five mile radius so as to deny workers' eligibility for leave; changing the essential functions of the job; efforts by the employer to classify an employee as a “key employee” who has less protection under the FMLA; and reducing an employee's hours to render the employee ineligible for leave.<sup>285</sup>

In *Williams v. Illinois Department of Corrections*, the collective bargaining agreement that covered Williams allowed up to a one-year family responsibility leave.<sup>286</sup> Williams informed his supervi-

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280. 29 U.S.C. § 2615(a)(1) (2000).

281. *Id.* § 2615(a)(2).

282. See Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,095–96 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.220(a)).

283. 29 U.S.C. § 2615(b).

284. Family and Medical Leave Act of 1993, 73 Fed. Reg. at 68,095 (to be codified at 29 C.F.R. § 825.220(b)).

285. *Id.* (to be codified at 29 C.F.R. § 825.220(b)(1)–(3)).

286. No. 05-cv-4227-JPG, 2007 U.S. Dist. LEXIS 17119, at \*3–4 (S.D. Ill. Mar. 9, 2007).

sor of a need to leave work to care for his mother, who was suffering from kidney failure, obesity, high blood pressure, and diabetes.<sup>287</sup> According to the mother's physician, she needed constant care.<sup>288</sup>

Williams's supervisor told him that he did not have enough leave time to take leave and that his only option was to resign.<sup>289</sup> Relying on the supervisor's appraisal, Williams resigned.<sup>290</sup> However, the day after submitting his written resignation, Williams requested the right to withdraw it and take leave under the FMLA.<sup>291</sup> He was told that it was too late because his paperwork had been sent to the central office.<sup>292</sup>

In his suit, Williams contended that the employer violated the law by "interfering with, restraining or denying the exercise of his rights under the act, and on discharging him in retaliation for exercising his rights under the act."<sup>293</sup> The employer responded by contending that Williams was not denied any substantive rights under the FMLA because Williams failed to follow proper procedures in requesting leave, which under the binding collective bargaining agreement required submitting a written request.<sup>294</sup> The employer also argued that Williams failed to give the employer enough information to constitute notice that he might need leave and that he did not provide thirty days notice as required by the FMLA.<sup>295</sup> In addition, in his letter of resignation, Williams did not include any reference to his mother's health condition as the reason behind his resignation.<sup>296</sup>

In denying the employer's motion for summary judgment, the court felt that the plaintiff's conversation with his supervisor, although not in conformance with the requirements of the bargaining agreement, was sufficient to put the employer on notice that the request might involve the FMLA.<sup>297</sup> Williams told the super-

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287. *Id.* at \*4-5.

288. *Id.* at \*4.

289. *Id.* at \*5.

290. *Id.*

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

292. *Id.* at \*6.

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

294. *See id.*

295. *See id.* at \*13-14.

296. *Id.* at \*13.

297. *Id.* at \*15.

visor that his mother was very ill and might need kidney dialysis.<sup>298</sup> There should have been no question in the supervisor's mind that dialysis qualified as a serious health condition and that Williams was clearly inquiring about the need for leave to care for his mother.<sup>299</sup>

The court found that the employer has a responsibility, once the employee meets the threshold of providing information that indicates the FMLA may provide him or her with some protection, to ascertain if the employee is requesting FMLA leave and to obtain additional information if the employer doubts the seriousness of the health condition.<sup>300</sup> In this case, the employer's representative did not carry out his responsibilities. Furthermore, he provided Williams with false information about his FMLA rights and omitted any reference to the possible availability of FMLA leave.<sup>301</sup> In denying summary judgment, the court concluded that, based on the facts, a reasonable jury could conclude that Williams's rights were interfered with due to the false information provided.<sup>302</sup>

In *Liu v. Amway Corp.*, the plaintiff took maternity leave.<sup>303</sup> As the date that Liu indicated she would return to work neared, her supervisor contacted her to tell her that she needed to return on that scheduled date because of the backed-up work resulting from her absence.<sup>304</sup> The plaintiff then indicated to the supervisor that she needed additional time because of physical problems from pregnancy after-effects.<sup>305</sup> Even though Liu was entitled to additional time, the employer immediately denied the request.<sup>306</sup> Ultimately, after Liu made another request for the additional leave that was initially rejected, the supervisor relented and extended the leave.<sup>307</sup> However, the supervisor treated the additional leave

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298. *Id.* at \*17.

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

300. *Id.* at \*11-12.

301. *Id.* at \*18.

302. *Id.* at \*20.

303. 347 F.3d 1125, 1130 (9th Cir. 2003). In *Liu*, state law permitted the employee up to four months of pregnancy disability leave. *Id.* at 1132. After that, she was entitled to an additional twelve weeks under the FMLA. *Id.*

304. *Id.* at 1130.

305. *Id.*

306. *Id.*

307. *Id.*

as "personal leave" rather than protected pregnancy leave.<sup>308</sup> When Liu subsequently asked for additional leave to bond with her baby and to go to China to care for her terminally ill father, the supervisor again initially refused to grant the request, but then granted Liu a one-week extension.<sup>309</sup> When she returned from China, her employment was terminated.<sup>310</sup>

In her suit under the FMLA and state law, Liu claimed that the supervisor's conduct constituted interference with her rights.<sup>311</sup> However, the lower court granted summary judgment to the employer on the interference claim.<sup>312</sup> The lower court's decision was based on its conclusion that the FMLA only provided for compensatory damages, and since Liu's employment was terminated before she returned from leave, she had not suffered damages.<sup>313</sup>

The Ninth Circuit reversed the lower court, finding triable issues of fact as to whether the supervisor interfered with the plaintiff's rights, both by denying her right to extend leave to which she was legally entitled and by pressuring her to return to work before her rightful leave expired.<sup>314</sup> Also, by treating her request for additional time off as "personal leave," Liu's supervisor was mischaracterizing it as not protected under the law and subject to refusal by the employer.<sup>315</sup> If there were questions about whether the FMLA protected the requested leave extensions, it was the employer's duty to investigate.<sup>316</sup> The court found that the FMLA protects employees against having to "plead and negotiate" with the employer to receive leave that is protected by the statute.<sup>317</sup>

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308. *Id.*

309. *Id.* at 1130-31.

310. *Id.* at 1131. Apparently, this was attributable both to a restructuring by the company and the fact that she had received the lowest performance evaluation of anyone in her department. *See id.*

311. *Id.* at 1129. The plaintiff also included a number of other counts including one that charged that the conduct of the company constituted sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964. *Id.*

312. *See id.* at 1131.

313. *Id.* at 1133 n.6.

314. *Id.* at 1134.

315. *Id.* at 1135.

316. *See id.*

317. *Id.*

In addition to interfering with an employee's FMLA rights, Department of Labor regulations recognize that employers can violate the statute by discriminating against an employee or prospective employee who has taken FMLA leave.<sup>318</sup> Such a violation includes an employer's use of the fact that a person has taken FMLA leave as a negative factor when the employer makes decisions regarding hiring, promotions, or disciplinary action.<sup>319</sup> Furthermore, the employer cannot count FMLA leave as an absence under the employer's "no-fault" attendance policy.<sup>320</sup>

In examining retaliation and discrimination claims, most circuits have employed the burden-shifting framework for Title VII cases set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>321</sup> This framework requires that the plaintiff establish a prima facie case by showing that: (1) the plaintiff engaged in conduct protected by the FMLA; (2) the plaintiff suffered an adverse employment action; and (3) there was a causal connection between the two.<sup>322</sup>

Once the employee meets that requirement, the employer must show that there was some legitimate, nondiscriminatory reason for the action.<sup>323</sup> If the defendant is able to provide a legitimate, nondiscriminatory reason, the employee must show that the employer's stated reason is a pretext, and that the employer's real reason was to retaliate for the plaintiff having taken FMLA leave.<sup>324</sup>

In *Liu v. Amway Corp.*, Liu alleged that her employer interfered with her rights, and that the employer retaliated against her for taking protected leave.<sup>325</sup> However, the Ninth Circuit did not use the burden-shifting standard of *McDonnell Douglas* when considering Liu's claim.<sup>326</sup> Instead, the court found that the law

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318. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,095 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.220(c)).

319. *Id.*

320. *Id.*

321. See 411 U.S. 792, 802 (1973).

322. *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 160–61 (1st Cir. 1998).

323. *Id.* at 160.

324. *Id.* at 161.

325. See 347 F.3d 1125, 1134 (9th Cir. 2003).

326. See *id.* at 1136. In *Liu v. Amway*, the court cited its earlier decision in *Bachelder v. American West Airlines*, where it indicated that it would not follow the burden-shifting framework of *McDonnell Douglas*. *Id.* (citing *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001)).

protected employees from employer interference with the right to take leave and from the employer's use of the leave as a basis for termination.<sup>327</sup> In other words, the court was not willing to find that either "discrimination" or "retaliation" were separate ways for bringing an action against the employer.<sup>328</sup> The court cited Seventh Circuit precedent in which the Seventh Circuit held that claims under the FMLA "do not depend on [proof of] discrimination" and do not require that the employee show that he was treated less favorably than another employee was, but rather, that his substantive legal rights were violated.<sup>329</sup>

In *Liu*, the employer attempted to argue that the plaintiff was dismissed as part of "a legitimate reduction in force."<sup>330</sup> However, the record indicated that she was selected for termination because of a negative performance evaluation that was administered during her leave.<sup>331</sup> The plaintiff's evidence showed that the central factor in her evaluation was the subjective evaluation of the supervisor.<sup>332</sup> This supervisor, who had earlier rejected requests to extend her leave, mischaracterized her leave as personal leave and pressured her to return to work.<sup>333</sup> These facts gave rise to the inference that the supervisor's evaluation was tainted by his displeasure with the fact that Liu tried to exercise her legal rights.<sup>334</sup> As a result, the court reversed the lower court's grant of summary judgment.<sup>335</sup>

In *Sharpe v. MCI Telecommunications Corp.*, the plaintiff alleged retaliation for taking FMLA-protected leave.<sup>336</sup> The record indicated that she took both periodic and intermittent leave for her own medical reasons, to take care of her terminally ill mother, and for a two-week period after her mother's death.<sup>337</sup> There was no dispute that the leave she took for her own medical issues

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327. *See id.* at 1132-36.

328. *See id.* at 1136.

329. *Id.* (quoting *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997)).

330. *Id.* at 1136 n.11.

331. *See id.* at 1136. The court in *Liu* noted that the plaintiff's score on the evaluation had dropped 19% from an evaluation score assigned by a different supervisor only six months prior. *Id.* at 1131, 1137.

332. *Id.* at 1136.

333. *See id.* at 1130, 1135.

334. *See id.* at 1137.

335. *Id.*

336. *See* 19 F. Supp. 2d 483, 486, 488 (E.D.N.C. 1998).

337. *See id.* at 485-86.

and the leave to take care of her terminally ill mother qualified under the FMLA.<sup>338</sup> The disputed issue was whether the leave she took after her mother's death was protected because her doctor gave her a "prescription" to take off time from work but did not certify that the leave was covered by the FMLA.<sup>339</sup>

Upon returning to work after her mother's death, the plaintiff found that her duties were reduced, all e-mails and files were removed from her computer, and her processing software did not operate.<sup>340</sup> At her performance evaluation, Sharpe was told that she needed to be more diligent in completing her work, that she needed a doctor's note when she was absent for medical reasons, and that she needed to disclose her whereabouts during the workday.<sup>341</sup> When she reminded the evaluators during the meeting that she had an upcoming appointment with her surgeon, she was told that "if she left the building during working hours she would be fired."<sup>342</sup> These events led Sharpe to resign.<sup>343</sup>

The court used the *McDonnell Douglas* standard to review Sharpe's claim that she was retaliated against for taking FMLA leave.<sup>344</sup> The court rejected her claim that the leave taken after her mother's death was protected since her physician had not certified that her condition met the criteria for FMLA leave.<sup>345</sup> However, the court found that Sharpe had established a prima facie case based on her initial FMLA absence.<sup>346</sup> First, she established that her earlier surgery, and perhaps her other medical problems, were evidence of a serious health condition. She also established that the leave to care for her mother was protected under the FMLA.<sup>347</sup> Sharpe also showed that upon her return to work after her mother's death, she suffered an adverse employment action and there existed a causal connection between the two.<sup>348</sup>

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338. *See id.* at 488–89. The plaintiff in *Sharpe* had surgery that required her to miss three weeks of work and had later absences attributable to chest pains and the onset of costochondritis. *Id.* at 485–86.

339. *Id.* at 486, 489.

340. *Id.* at 486.

341. *Id.*

342. *Id.*

343. *See id.*

344. *See id.* at 488, 490.

345. *See id.* at 489.

346. *See id.* at 490.

347. *See id.* at 488–89.

348. *See id.* at 489–90.



As the burden shifted to MCI to show that there was a legitimate reason for its conduct, the company argued that its action was tied to Sharpe's attendance problems.<sup>349</sup> The court pointed out that in using this argument about excessive leave, however, the company had impermissibly included leave that she was entitled to take under the FMLA.<sup>350</sup> The court found that while the adverse actions MCI took may have been for legitimate reasons, MCI failed to provide any evidence that offered a distinction in the evaluation process between Sharpe's FMLA leave and those days she missed that were not protected by the FMLA.<sup>351</sup> Consequently, the court found that the plaintiff was entitled to summary judgment on her FMLA claim.<sup>352</sup>

In the event that an employer violates an employee's FMLA rights, the FMLA permits the employee to sue for damages. For example, if an employee was terminated in violation of the FMLA, the law permits the employee to sue for lost wages or salary, as well as benefits and other compensation that was lost.<sup>353</sup> If the employee did not lose compensation or benefits, as might be the case where the employer refused to grant the leave and the employee continued to work, the employee can recover monetary losses up to twelve weeks of his or her wages or salary.<sup>354</sup> This proscription would include a situation where an employee, improperly denied a leave, incurred additional costs to have others provide care to his or her parent.

In addition, the FMLA provides for liquidated damages. The amount owed is equal to the damages that were awarded due to loss of salary, wages, and benefits.<sup>355</sup> If there was no loss of compensation and benefits, the sum awarded to the employee includes the additional expenses that he incurred due to the denial of the right to a leave.<sup>356</sup> An employer can defend a liquidated damages claim by showing that its conduct was based on a rea-

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349. *Id.* at 490.

350. *See id.* at 490-91.

351. *Id.* at 490.

352. *Id.* at 491.

353. *See* 29 U.S.C. § 2617(a)(1)(A)(i)(I) (2006).

354. *See id.* § 2617(a)(1)(A)(i)(II).

355. *See id.* § 2617(a)(1)(A)(iii).

356. *See id.* § 2617(a)(1)(A)(i)(II).

sonable belief that the employer was not violating the employee's rights.<sup>357</sup>

The FMLA also allows the court to provide appropriate equitable relief to the plaintiff. This could include an individual being hired where he or she was denied employment because of a record of prior leave under the FMLA.<sup>358</sup> It also allows the court to order reinstatement for a plaintiff who was improperly terminated and to award promotions to employees improperly denied the same.<sup>359</sup> A successful plaintiff is allowed to collect "a reasonable attorney's fee, reasonable expert witness fees, and other costs."<sup>360</sup>

### XIII. THE PLACE OF THE FMLA IN DEALING WITH ELDERCARE RESPONSIBILITIES

It is instructive that when the Department of Labor first published proposed changes to FMLA regulations, and after they were finalized, criticisms were voiced by both worker-interest groups and employer representatives. Sharyn Tejani of the National Partnership for Women and Families complained that the changes adversely affected worker interests.<sup>361</sup> Among the changes that sparked dissent was one that allows employers to, at least in some cases, have direct contact with the health care provider of workers, their parents, spouses or children.<sup>362</sup> While

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357. See *id.* § 2617(a)(1)(A)(iii).

358. See *id.* § 2617(a)(1)(B).

359. See *id.*

360. *Id.* § 2617(a)(3).

361. See Nora Lockwood Tooher, *New Family Leave Rules Draw Mixed Reaction*, LAWYERS USA, Nov. 24, 2008.

362. See Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,102 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.307(a)) (providing that "[i]f an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). . . . For purposes of these regulations, 'authentication' means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. 'Clarification' means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act ('HIPAA') . . . must be satisfied when individually-identifiable health information of an

the purpose of this change may have been to help employers find clarity in instances where the medical documentation supplied by the employee did not resolve the question of whether the circumstances behind an employee's request justified FMLA leave, critics argue that even though the employee's direct supervisor cannot make the contact,<sup>363</sup> it still leads to the invasion of the privacy of the employee or the employee's family member.<sup>364</sup> The change which prevents an employee from taking paid leave (such as vacation time or accrued paid leave) concurrent with FMLA leave where such a request would violate company policy regarding when such leave can be taken is also troubling to those supporting the rights of employees.<sup>365</sup> As Tajani pointed out, this change may make it impossible for employees who cannot afford to take unpaid leave to take FMLA leave even where circumstances would otherwise permit it.<sup>366</sup>

This criticism should not suggest that representatives of management are pleased with the new regulations. First, the new regulations did little to clarify the perplexing problem that employers face in determining whether the health condition is a serious one.<sup>367</sup> Second, the new regulations failed to fully address the issue of intermittent leave, which continues to be a major issue that affects employers.<sup>368</sup> Employers had hoped that the new

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employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. See § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.”).

363. *Id.* (providing that contact with the employee's health care provider must be through a health care provider, “a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.”).

364. See Tooher, *supra* note 361.

365. See Family and Medical Leave Act of 1993, 73 Fed. Reg. at 68,089 (to be codified at 29 C.F.R. § 825.207(a)). In pertinent part, this regulation provides: “An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.” *Id.*

366. See Tooher, *supra* note 361.

367. See *id.*

368. See *id.* The new regulations now require that the employee make a reasonable effort to schedule intermittent or reduced schedule leave so that it will not unduly disrupt the operations of the employer. See Family and Medical Leave Act of 1993, 73 Fed. Reg. at 68,088 (to be codified at 29 C.F.R. § 825.203). This is in contrast to the requirement under the earlier regulations that an employee needing intermittent or reduced schedule leave “must attempt” to schedule the leave so as not to unduly disrupt operations, 29 C.F.R. § 825.117 (2006).

regulations would require employees to take intermittent leave in longer increments.<sup>369</sup> As Will Hannum, a partner with a firm in Andover, Massachusetts, pointed out, "Employers wanted a way to control intermittent level [leave] so that they are less at the mercy of whatever [the employee's] circumstances are."<sup>370</sup> The new regulations, however, did not address that issue.<sup>371</sup>

There is a lesson in the criticisms leveled by both sides. The FMLA sets the general parameters of the rights and responsibilities of the employer and the worker. It does not and cannot provide ultimate solutions to the varied circumstances that arise when a health condition affects the employee or his parent, spouse or child.<sup>372</sup> Even the same disease can affect people differently. Some individuals survive ingesting a product contaminated with salmonella, while some people die. Some people suffer a minimal interruption in their lives because of surgery, while others, facing the same procedure, confront significant obstacles in returning to normalcy.

The FMLA was forged in a spirit of trying to balance the interests of employers and their workers.<sup>373</sup> It is a starting point. But in many cases, the satisfactory resolution of a dilemma that arises because an employee who must take time off to care for an elderly parent will be dependent on the motives of the parties and their desires to seek a reasonable solution for the potential problems FMLA leave creates for both parties.

The employer may need to seek creative solutions that demonstrate not only a desire to meet the letter of the law, but also its spirit.<sup>374</sup> Such an approach may serve to minimize the efficiency and productivity costs associated with workers taking leave.<sup>375</sup> It will also minimize costs associated with being forced to hire new employees because a current employee, facing what he or she sees

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369. See Tooher, *supra* note 361.

370. See *id.*

371. See *supra* note 368.

372. See Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 68,074 (Nov. 17, 2008) (to be codified at 29 C.F.R. § 825.101).

373. See 29 U.S.C. § 2601(b)(1)–(3) (2006).

374. See Levin-Epstein, *supra* note 53, at A16–A17.

375. *Id.* at A17.

as being a choice between caring for an elderly parent and keeping a job, chooses the former.<sup>376</sup>

Many corporations view their careful adherence to the FMLA as an appropriate and satisfactory way to meet their responsibilities to their employees who have eldercare responsibilities that occasionally call them away from their jobs.<sup>377</sup> Their adherence may, in part, be demonstrated by a survey commissioned by the Department of Labor that found that more than 80% of employers believe that compliance with the FMLA either had a positive or non-negative effect on employee productivity and 87.6% believe that compliance with the FMLA had no noticeable effect on company profitability.<sup>378</sup> Perhaps consequently, most employers go beyond the requirements of the law pertaining to employee leave. In 2007, approximately "80% of working parents had some paid leave" from their employers.<sup>379</sup>

A few companies have initiated innovative leave programs. For example, Deloitte & Touche provides "paid parental leave and a five-year sabbatical plan to extend time off for training and child rearing."<sup>380</sup> Because flexibility of work schedules is important to eldercare providers, online scheduling that "allows employees to request preferred work hours and swap shifts with colleagues" is provided by JetBlue and J.C. Penney, which are among firms using electronic "kiosk" scheduling.<sup>381</sup>

These programs may be harbingers of positive change; certainly, they go beyond the FMLA's minimum requirements. The supporters of the FMLA legislation should be credited with facilitating changes in the ways that employers think about caregiver leave. However, it is increasingly evident that it is in the self-interest of all parties to keep valuable workers aligned with employers who will accommodate their needs to assist in the eldercare of their relatives.<sup>382</sup>

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376. *See id.*

377. *See* Kevin Sweeney, *Studies Yield Conflicting Views on FMLA Success*, EMP. BENEFIT NEWS, Mar. 1, 2001; Vogel, Weir, Hunke & McCormick, Ltd., *Surprise, Surprise! FMLA Is a Hit*, N.D. EMP. L. LETTER, May 2001.

378. *See* Sweeney, *supra* note 53, at 60.

379. Levin-Epstein, *supra* note 179, at A16.

380. *Id.* at A17.

381. *Id.* at A16.

382. *See generally* Smith, *supra* note 33 (discussing how employers can help workers balance the competing demands between work and family responsibilities).

## XIV. CONCLUSION

The 1960s and 1970s marked a time when, due to social, economic, political, and legal changes, there was a surge of women entering the workforce.<sup>383</sup> Many of these women were of child-bearing years, and they came to their employers either having children at home or likely to have them soon.<sup>384</sup> Title VII of the Civil Rights Act of 1964 and the Equal Pay Act both addressed the interests of women workers; both require employers to reform employment practices to incorporate the needs of female employees.<sup>385</sup> In many instances, these changes led employers to create childcare benefit programs, flex scheduling, and job sharing to meet the needs of employees who were women and mothers.<sup>386</sup>

The addition of the FMLA bolsters the rights of parents, whether they are mothers or fathers.<sup>387</sup> Meeting the needs of parents to schedule leaves of absence to care for sick children remains a major issue for human resource departments.<sup>388</sup>

However, demographic shifts in the United States have created new employment conditions.<sup>389</sup> In the years ahead more FMLA leave will be generated by employees so that they can provide care to aging parents with failing health.<sup>390</sup> Evidence of this trend is provided by forecasters and surveys.<sup>391</sup> By 2020, 40% percent of the workforce expects to care for an elderly relative.<sup>392</sup> The Society for Human Resource Management's 2003 Elder Care Survey found that 47% of human resource professionals reported in-

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383. See Edwardo Porter, *Stretched to Limit, Women Stall March to Work*, N.Y. TIMES, Mar. 2, 2006, at A1.

384. See *id.*; Smith, *supra* note 33, at 352.

385. See Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral versus Gender-Equal*, 16 AM. U. J. GENDER SOC. POL'Y & L. 459, 464 (2008); Christina M. Royer, Comment, *Paradise Lost? State Employees' Rights in the Wake of "New Federalism,"* 34 AKRON L. REV. 637, 682 (2001).

386. See Smith, *supra* note 33, at 352.

387. See 29 U.S.C. § 2601(a)(2), (b)(4)–(5) (2006).

388. See Smith, *supra* note 33, at 352.

389. See *id.*

390. See *id.*

391. See *id.* at 352–53.

392. *Id.* at 353.

creases in the number of employees dealing with eldercare issues over the last several years.<sup>393</sup>

The *Wall Street Journal* reported in 2001 that, "almost two-thirds of employees younger than age 60 believ[e] they 'have elder-care responsibilities in the next 10 years.'"<sup>394</sup> By an estimate of the National Council on Aging, 30% to 40% of all employees will assist their elderly parents in 2020, compared with 12% in 2006.<sup>395</sup>

Eldercare leave requests create challenges for employers that are somewhat different than those faced when providing leave for child care.<sup>396</sup> The leave time that an employee needs to care for his or her child can ordinarily be expected to be episodic and of short duration.<sup>397</sup> Usually, the child recovers and the circumstances that caused the leave are rarely repeated.<sup>398</sup> However, when the care needs are of an aging parent, the expectations are different.<sup>399</sup> Often, the health condition is serious, not likely to improve, and, in fact, may worsen, necessitating an increase in employee leave requests to care for the parent.<sup>400</sup> The resulting ever-more-frequent demands for leave create performance difficulties for the employer and a physical and emotional burden for the care-giving employee.<sup>401</sup>

Employers face increasing challenges to remain in compliance with the FMLA as their employees demand unprecedented levels of leave to be able to meet the growing pressures that they experience for family eldercare.<sup>402</sup> For moral and economic reasons, employers are best served by establishing adaptive organizational policies and practices that facilitate the optimal productivity of employees whose work contributions may be compromised when their eldercare responsibilities interfere with the expectations of their employment.<sup>403</sup>

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393. See Society for Human Resource Management, *supra* note 174.

394. Rose, *supra* note 26, at 61.

395. *Id.*

396. See Smith, *supra* note 33, at 353-54, 365-70.

397. See *id.* at 365.

398. See *id.*

399. See *id.* at 365-66.

400. See *id.* at 366.

401. See *id.* at 354.

402. See *id.* at 382-83.

403. See *id.* at 379-82.