

FAMILY AND MEDICAL LEAVE ACT DEVELOPMENTS

By
Steven Hymowitz*
Edward F. Harold

National Employment Law Institute
2000 Employment Law Briefing

Key West, Florida
March 20 – 27, 2000

*Steven Hymowitz is a senior partner in the law firm of McCalla, Thompson, Pyburn, Hymowitz & Shapiro, which specializes in representing management in the field of labor and employment law. He received his B.S. degree from Fordham University and graduated from Memphis State University School of Law in 1974, where he was an associate editor for the ~~Memphis State Law Review~~. Mr. Hymowitz is a former Management Co-chair of the Committee on Employee Rights and Responsibilities of the American Bar Association Labor and Employment Law Section.

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FMLA PROVISIONS	2
A. GENERALLY.....	2
B. FMLA PROHIBITIONS.....	2
C. EMPLOYEES ENTITLED TO FMLA LEAVE	2
1. Twelve Months of Service.....	2
2. 1,250 Hours In 12 Months Immediately Preceding Leave	3
3. Worksite With 50 Employees Within 75 Mile Radius	4
4. Employees Deemed Eligible For Leave	6
5. Eligibility For Protection From Retaliation For Exercise of FMLA Rights	8
D. TYPES OF EMPLOYERS AND EMPLOYMENT.....	9
1. Corporations as Single Employers	9
2. Joint Employment.....	9
3. Integrated Employment.....	10
4. Public and Federal Agencies.....	11
E. SUCCESSOR IN INTEREST.....	14
F. CIRCUMSTANCES TRIGGERING THE LEAVE REQUIREMENT	15
1. Birth of a Child.....	15
2. Placement of A Child for Adoption or Foster Care	15
3. Care for an Employee's Spouse, Child, or Parent With a Serious Health Condition.....	16
4. The Employee's Own Serious Health Condition.....	18
a) The Definition of Serious Health Condition.....	19

b) Period of Incapacity	21
c) Continuing Treatment	27
d) Chronic Conditions	30
e) Pregnancy Related Serious Health Conditions	31
G. SPOUSES EMPLOYED BY SAME EMPLOYER.....	33
H. DETERMINING THE TWELVE MONTH ELIGIBILITY PERIOD.....	33
I. INTERMITTENT OR REDUCED SCHEDULE LEAVE.....	35
1. Intermittent and Reduced Schedule Leave Defined.....	35
2. Determining the Amount of Leave Used.....	35
a) Part-Time Schedules	36
b) Variable Schedules.....	36
3. Transferring Employees During Intermittent Leave	36
4. Employee’s Responsibilities In Requesting Intermittent Leave	38
J. SUBSTITUTING PAID LEAVE FOR UNPAID LEAVE	39
1. Leave for Birth or Placement of a Child	40
2. Leave to Care for Family Member.....	40
3. Leave for Employee's Care	41
4. Relation To Workmen's Compensation.....	41
5. Procedural Requirements.....	41
6. Comp Time.....	43
K. TIME FOR DESIGNATING LEAVE AS FMLA LEAVE.....	43
L. NOTICE REQUIREMENTS	47
1. Employer Responsibilities	47
a) Posting Requirement.....	47
b) Employee Handbooks.....	48

c) Notice Requirements When Leave Is Requested.....	50
2. Employee Responsibilities.....	52
a) Notice to Employers -- Foreseeable Leave.....	52
b) Notice to Employer – Unforeseeable Leave.....	53
c) Practical Tips For Dealing With Notice Issues.....	63
3. Noncompliance With Notice Requirements.....	63
M. MEDICAL CERTIFICATION REQUIREMENTS	64
1. Certification Information.....	64
2. Requesting a Second Opinion.....	65
3. Requesting a Third Opinion.....	66
4. Recertification.....	66
5. Noncompliance with Certification Requirements.....	67
N. RETURNING TO WORK.....	68
1. Fitness-for-Duty Reports.....	68
O. EMPLOYMENT AND BENEFITS PROTECTION.....	69
1. Case Law Interpreting What Constitutes An Equivalent Positions	72
2. Accrual of Benefits.....	74
3. Health Insurance Premiums.....	75
4. Status of Benefits Upon Failure to Return to Work.....	75
5. Non Health Insurance Benefits.....	76
6. Limitations On The Right To Reinstatement	76
P. KEY PERSONNEL EXCEPTION	80
1. Key Personnel Determination	80
2. Granting Leave and Restoring Benefits to Key Personnel.....	80
III. PROCEDURAL ASPECTS OF LITIGATING AN FMLA LAWSUIT	82

A.	REMOVAL.....	82
B.	JURISDICTION	82
C.	WAIVER	82
D.	RIGHT TO JURY TRIAL	84
E.	JURY INSTRUCTIONS.....	85
F.	ARBITRATION OF FMLA CLAIMS.....	85
G.	EXCLUSIVITY	87
H.	PLEADING REQUIREMENTS.....	88
I.	STATUTE OF LIMITATIONS.....	90
J.	SUPERVISOR LIABILITY	91
K.	INTERFERENCE WITH PROTECTED RIGHTS	93
L.	FMLA RETALIATION AND THE PRIMA FACIE CASE.....	94
1.	Adverse Employment Action.....	95
2.	Causal Connection.....	96
M.	DAMAGES.....	99
1.	Equitable.....	99
2.	Punitive.....	100
3.	Liquidated.....	100
4.	Taxation of Amounts Awarded or Paid In Settlement	100
N.	ATTORNEY’S FEES	100
IV.	FMLA ENFORCEMENT.....	101
A.	GOVERNMENTAL INVESTIGATIVE AUTHORITY	101
V.	FMLA RECORD KEEPING REQUIREMENTS.....	102
VI.	SPECIAL RULES CONCERNING EDUCATIONAL AGENCIES.....	102
VII.	THE EFFECT OF STATE LAWS AND COLLECTIVE BARGAINING AGREEMENTS.....	104

A. STATE LAWS.....104

B. COLLECTIVE BARGAINING AGREEMENTS.....104

VIII. THE INTERPLAY OF THE AMERICANS WITH DISABILITIES ACT AND THE
FMLA.....104

A. LEAVES OF ABSENCE COVERED BY THE ADA.....105

B. THE DIFFERENCES BETWEEN THE ADA AND THE FMLA IN
EVALUATING EMPLOYEES RETURNING TO WORK109

IX. CONCLUSION.....114

I. INTRODUCTION

On February 5, 1993, President Clinton signed into law the Family and Medical Leave Act of 1993 ("FMLA" or the "Act"). The Department of Labor ("DOL") issued Final Regulations that became effective on April 6, 1995. The FMLA is intended to provide employees with the opportunity to better balance the demands of work and family. Congress justified the legislation by contending that family stability fostered by the Act's entitlements will increase productivity in the workplace. 29 C.F.R. § 825.101.¹ The Government Accounting Office estimate approximately 300,000 employers are subject to the Act, 44 million employees are eligible for the entitlements provided by the Act, and the annual cost will saddle employers with a bill of \$674 million dollars.

To date, FMLA litigation has touched on a variety of issues from posting notices to the availability of jury trials. The most often litigated issues appear to center on the sufficiency of notice of need for FMLA leave given by the employee to the employer, what constitutes a "serious health condition" and the validity of various DOL regulations. Some underlying factual settings are repeated often and seem to be a breeding ground for litigation. These include plaintiffs who had severe attendance problems prior to FMLA issues arising, snap decisions by employers unfamiliar with the terms of the Act, and a lack of communication between the employer and employee. While employers seem to be prevailing in a majority of the cases, employees are winning a fair number of suits and defeating summary judgment on a regular basis. This paper provides an overview of the Act, the regulations, and the case law interpreting the FMLA.

¹All citations to the FMLA or ADA regulations refer to Title 29 of the Code of Federal Regulations.

II. FMLA PROVISIONS

A. GENERALLY

The Act covers employers who employ 50 or more employees for a 20-week period during the preceding year. § 825.104; 105. Both male and female employees are eligible for up to 12 weeks of unpaid leave and other FMLA entitlements. § 825.100(a); § 825.112(b). These include the right to be restored to the same or an equivalent position upon returning from leave and the right to uninterrupted coverage for health benefits. § 825.100(b)(c).

B. FMLA PROHIBITIONS

An employer may not discriminate against any employee or interfere with, restrain, or deny the exercise or the attempt to exercise any right provided under the Act. An employer may not discriminate against any individual for opposing practices made illegal by the Act. § 825.220.

While FMLA leave is generally unpaid, except where the employer or employee substitute paid leave, the employer may not treat it differently than other forms of leave with respect to bonuses and commissions. § 825.215(c). Thus, employers may not refuse to pay commissions to employees on FMLA leave that it would pay to employees on other forms of unpaid leave. Estes v. Meridian One Corp., 77 F.Supp.2d 722 (E.D. Va. 1999).

C. EMPLOYEES ENTITLED TO FMLA LEAVE

1. Twelve Months of Service

To be entitled to FMLA leave an employee must have worked at least 12 months with their employer §825.110. Because of the FMLA's adoption of the Fair Labor Standards Act's liberal definition of employer and employee, one court has held that time an employee worked as a temporary employee before being permanently hired counted toward calculation of this one year period. Miller v. Defiance Metal Products, 989 F. Supp. 945 (N.D. Ohio 1997).

2. 1,250 Hours In 12 Months Immediately Preceding Leave

Additionally, the employee must have worked at least 1,250 hours in the 12 months preceding the time leave is to begin. §825.110. An employee's hours worked are calculated by utilizing the definition of hours worked in the Fair Labor Standards Act. § 825.110(c); Kosakow v. New Rochelle Radiology Associates, -- F.Supp.2d --, 2000 WL 279816 (S.D. N.Y. 2000); Robinson-Scott v. Delta Airlines, Inc., 4 F.Supp.2d 1183 (N.D. Ga. 1998); Cantrell v. Delta Airlines, Inc., 2 F.Supp.2d 1460 (N.D. Ga. 1998). "Only hours actually worked qualify for credit toward this total." Rockwell v. Mack Trucks, Inc., 8 F.Supp.2d 499, 502 (D. Md. 1998). If an employee is exempt from the Fair Labor Standards Act "FLSA" coverage, such as professional, executive, or administrative employees, the employer has the burden of proving the employee has not worked sufficient hours to be entitled to leave. It is presumed the employee worked the minimum number of hours for FMLA eligibility. § 825.110(c). At least one court has utilized this presumption.

In Rich v. Delta Airlines, Inc., 921 F. Supp. 767 (N.D. Ga. 1996), the plaintiff, a flight attendant, was terminated for attendance problems. She brought suit claiming her absences were protected by the FMLA. The employer countered that she was not an eligible employee because she had not worked a sufficient number of hours. The court placed the burden on the employer to prove how many hours she worked. It established, through its records as well as the plaintiff's testimony, she had worked less than 1000 hours in the preceding twelve months. However, the plaintiff claimed the time she spent on layovers between flights should be included in the calculation of hours worked. This time would have put her over the 1250-hour threshold. The court resolved this issue of whether to count layover hours as hours worked by relying on case law developed under the Fair Labor Standards Act. The layovers were relatively long in duration and the employer placed very few restrictions on employees on layovers. Thus the plaintiff was free to utilize the layover time for her own purposes. As such, the court concluded layover hours would not be counted because they were not hours worked.

Likewise, in Robbins v. Bureau of Nat. Affairs, Inc., 896 F. Supp 18 (D. D.C. 1995) the court looked to FLSA case law to analyze whether an employee's paid and unpaid leaves of absences should be counted toward the 1250 hour requirement. Relying on FLSA cases holding time the employee did not actually perform work, such as sick days, were not considered hours worked, the court refused to count an employee's six month maternity leave in its calculations of hours worked. Without credit for the maternity leave, the employee had worked less than 1000 hours and was not entitled to leave. See also, Kosakow v. New Rochelle Radiology Associates, -- F.Supp.2d --, 2000 WL 279816 (S.D. N.Y. 2000) (time paid for holidays, vacation and leave does not qualify as hours worked); Caruthers v. Proctor & Gamble Manufacturing, 961 F. Supp. 1484 (D. Kan. 1997) (time on leave does not count toward the 1250 hour requirement).

3. Worksite With 50 Employees Within 75 Mile Radius

The employee must also work at a worksite with 50 or more employees within 75 miles of the worksite. §825.104; § 825.110; § 825.111.² Paleologos v. Rehab Consultants, Inc., 990 F. Supp.

² Employers may have to assess whether a particular individual is an "employee." The FMLA definition of an employee adopts the definition found in the Fair Labor Standards Act, 29 U.S.C. §203(e). See FMLA Section 101(3). However, neither the FMLA nor the FLSA set forth criteria the employer may assess to determine whether a hired individual is an employee or an independent contractor. One court has held that the "economic realities test should be used to determine if an employment relationship exists for purposes of the Family Medical Leave Act." Bonnetts v. Artic Express, Inc., 7 F. Supp.2d 977 (S.D. Ohio 1998). Under this test the court must consider: 1) permanency of relationship, 2) degree of skill required of particular job, 3) worker's capital investment, 4) opportunity for profit or loss, 5) employer's right to control, and 6) whether worker was integral part of the employer's business. *Id.*

In Nationwide Mut. Ins. Co. v. Darden, 112 S.Ct. 1344 (1992), the Court adopted the common law test for determining who qualifies as an "employee" under ERISA. After noting that ERISA's definition of employee is "circular and explains nothing," the Court set forth relevant factors to assist in the employer's determination: The hiring party's right to control the manner and means by which the product is accomplished; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the

1460 (N.D. Ga. 1998); *Muller v. Hotsy Corp.*, 917 F. Supp. 1389 (N.D. Iowa 1996). A worksite is a single location or a group of contiguous locations. § 825.111(a). Separate buildings within a single location are considered the same worksite if the buildings are reasonably close to each other, serve the same purpose, and use some of the same staff and equipment. § 825.111(a)(1). For employees who have no fixed worksite, their assigned home base is considered the employee's worksite. § 825.111(a)(2).

The 75-mile radius is based upon road miles. When determining whether the radius test is satisfied, an employer must consider the shortest route, using public streets, roads, highways, and waterways from the worksite where the employee requesting the leave is employed. § 825.111(b). The number of employees on the payroll determines the number of employees within the 75 miles. § 825.111(c).

Employers with salesmen who work out of their homes should be aware of how the regulations define worksite in these situations. They state: “An employee's personal residence is not a worksite in the case of employees who travel a sales territory and who generally leave to work and return from work to their personal residences.... Rather, their worksite is the office to which they report and from which assignments are made.” § 825.111. As explained in the Summary of Major Comments to the Final Regulations: “[S]alespersons who work out of their homes have as their single site of employment the site ‘from which their work is assigned or to which they report’ (for example, the corporate or regional office.) Their homes are not their ‘single site of employment’ in any case.” As a result, even though an employee may not actually perform his job within a 75-mile radius of 50 employees, he may still be eligible for FMLA leave.

provision of employee benefits; and the tax treatment of the hired party. *Id.* at 1348. *Darden* specifically noted that where Congress intends a definition other than the common law test to control, such as in the FMLA, Congress' intent in that regard would govern. Thus the classic common law test should not apply to the FMLA.

4. Employees Deemed Eligible For Leave

The regulations also provide a means for an employee who does not otherwise meet the eligibility requirements to be deemed eligible if, after requesting leave, the employer either fails to notify him of his eligibility within 48 hours of the request or incorrectly notifies him that he is eligible. § 825.110(d). Because the straightforward objective eligibility requirements do not leave much room for argument, most of the cases on eligibility emanate from this regulation. This regulation only protects employees who actually made a request for leave. Marsdem v. Review Bd. of Indiana Dept. of Workforce Development, 654 N.E.2d 907 (Ind. Ct. App. 1995). Although that request, like any other request for FMLA leave, need not expressly invoke the term FMLA. Jessie v. Carter Health Care Center, Inc., 926 F. Supp 613 (E.D. Ky. 1996). Moreover, the regulation is only concerned with the employee's eligibility. Even if an employer mistakenly advises an employee she has met the eligibility requirements, the employee is not entitled to leave if the employer is not a covered employer. Schlett v. Avco Financial Services, Inc., 950 F. Supp. 823 (N.D. Ohio 1996).

Several cases have held § 825.110 deeming employees eligible is invalid as outside the scope of the authority of the Department of Labor. In Wolke v. Dreadnought Marine, 954 F. Supp. 1133 (E.D. Va. 1997) the court considered a claim by an employee who had not worked for his employer for twelve months at the time his FMLA claim arose. The plaintiff argued his employer had failed to notify him of his ineligibility within two days of his notification of his need for leave and was therefore estopped from arguing he was ineligible. The court rejected this claim holding the regulation "impermissibly contradict[ed] the clear intent of Congress to restrict the class of employees eligible for the FMLA." *Id.* at 1135. The court explained:

The Department of Labor regulation, 29 CFR § 825.110, purports to transform employees who are ineligible under the FMLA statute into eligible employees. Under a literal application of the regulation, an employee could work for one day, then inform her employer that she is sick and leaving. If the employer fails to tell the employee she is

ineligible for FMLA leave, the regulation at issue would ostensibly “deem her eligible,” even though she has worked for merely one day. Any regulatory exceptions which purport to shorten the twelve-month eligibility period are impermissible creations of the Department of Labor.

Id. at 1137. The court went on to note the regulation usurped the judicial concept of estoppel, a concept only the courts were in a position to grant as equitable relief. Particularly, the regulation did not consider whether or not the employee had actually relied in the employer’s failure. In the case at hand, this was particularly important because the plaintiff admitted he had not even heard of the FMLA prior to speaking to an attorney following his termination. Therefore, there was no basis for estoppel. The court concluded by stating §825.110 is “blatantly unconstitutional.” See also McQuain v. Ebner Furnaces, Inc., 55 F.Supp.2d 763 (N.D. Ohio 1999) (regulation whereby employee is deemed eligible is invalid); Rich v. Delta Airlines, Inc., 921 F. Supp. 767 (N.D. Ga. 1996) (rejecting an argument that a Department of Labor regulation created a cause of action not explicit in the statute); Thoele v. U.S. Postal Service, 996 F. Supp. 818 (N.D. Ill. 1998) (concluding lack of notification of ineligibility requirement in interim regulations precluded claim based on employer’s failure to notify employee he was ineligible for FMLA leave). But see, Miller v. Defiance Metal Products, 989 F. Supp. 945 (N.D. Ohio 1997) (concluding regulation deeming employee eligible was appropriate interpretation of notice requirements).

5. Eligibility For Protection From Retaliation For Exercise of FMLA Rights

An employee does not have to be eligible to take FMLA to continue to be protected against discrimination/retaliation for utilizing FMLA leave. Thus, the fact that an employee would not be eligible for FMLA leave at the time of termination does not render him unprotected if the employer takes protected leaves into account when making the termination decision. Butler v. Owens-Brockway Plastic Products, 199 F.3d 314 (6th Cir. 1999).

Likewise, applicants for employment are protected from discrimination for utilizing FMLA rights. In *Duckworth v. Pratt & Whitney*, 152 F.3d 1 (1st Cir. 1998), the plaintiff brought suit when he was turned down for a job by his former employer because of a poor attendance record while he previously worked there. He sued alleging that many of his absences during the previous stint were protected by the FMLA and that the employer's consideration of those absences against him violated the FMLA's anti-retaliation provisions. The district court dismissed the case holding that the FMLA's protections did not apply to applicants for employment. The First Circuit reversed. It held that an employer who considers an applicant's prior FMLA protected absences in making hiring decisions violates the FMLA. Employers need to be cognizant of this decision and take particular care in gathering information regarding applicant attendance records with former employers.

D. TYPES OF EMPLOYERS AND EMPLOYMENT

1. Corporations as Single Employers

The legal entity that employs the employee is considered a single employer. A corporation, rather than its division or separate establishments, is the single employer. § 825.104(c).

2. Joint Employment

Joint employment occurs when two or more businesses exercise control over the same worker. A common example is when an employer engages temporary help or engages employees through leasing agencies. Relevant factors to consider when determining whether employers are participating in joint employment are:

- an agreement to share an employee's services or interchange employees;
- where an employer acts directly or indirectly in the interest of the other employer in relation to the employee; and,
- where two employers share control of an employee because one of the employers controls the other employer.

§ 825.106(a).

The determinative factors based on the common law concept of employment in the interim regulations were removed in favor of the much broader Fair Labor Standards Act definition delineated in § 825.105. Employees that are jointly employed must be counted as employees of both employers for purposes of the FMLA. § 825.106(d). Only the primary employer is required to comply with FMLA notice provisions. § 825.106(c). While job restoration is primarily the responsibility of the primary employer, a secondary employer may be required to accept an employee returning from FMLA leave. § 825.106(d). The secondary employer remains responsible for complying with the provisions of the Act that prohibit discrimination against employees who attempt to assert FMLA rights. § 825.106.

3. Integrated Employment

Under the regulations, different entities are considered the same employer if the entities are integrated. Under these circumstances, the employees of all entities are considered employees of the integrated employer. Relevant factors to determine whether entities are integrated include:

- The existence of common management;
- The type of relationship between operations;
- The amount of centralized control of employee relations; and,
- The degree of common ownership or common financial control.

§ 825.104(c)(2). The only court to analyze whether distinct corporate entities were an integrated employer under this test concluded they were not. Hukill v. Auto Care, Inc., 192 F.3d 437 (4th Cir. 1999). The critical issue in its analysis was the fact the entities at issue each controlled their own labor relations on a day-to-day basis. Because it concluded the entities were not integrated employers, the court refused to address whether the regulation adopting the integrated employer analysis into the FMLA is invalid.

One court has concluded, without addressing the regulation stating otherwise, that the concept of integrated employers is not applicable to the FMLA. Diangi v. Valex, Inc., 56 F.Supp.2d 1023 (N.D. Ill. 1999).

4. Public and Federal Agencies

All entities classified as public agencies by the Fair Labor Standards Act fall within FMLA coverage. These include: the United States government; state governments; political subdivisions of states; an interstate governmental agency; and any entity with taxing authority or if the chief administrative officer or board is elected by voters or appointed on approval of an elected official. § 825.108. Federal employees covered by Title II of the FMLA do not have a private right of action and are limited to the internal agency remedies. Russell v. U.S. Department of the Army, 191 F.3d 1016 (9th Cir. 1999); Mann v. Heign, 120 F.3d 34 (4th Cir. 1997); Keen v. Brown, 958 F. Supp. 70 (D. Conn. 1997).

A state or political subdivision of a state is a single public agency and, therefore, a single employer. A public employer is automatically covered by the FMLA -- it does not have to satisfy the 50-employee/20 week test. However, employees of a public employer are not eligible for FMLA entitlements unless the public employer has 50 employees at a worksite or within a 75-mile radius of that worksite. Accordingly, a public employer subject to the Act may not have any FMLA-eligible employees. § 825.108(d). In determining a public body's status as a distinct employer, separate from other state agencies, state law is initially consulted for the answer. If any question remains, the U.S. Bureau of Census, "Census of Governments" will resolve the question. Rollins v. Wilson County Government, 154 F.3d 626 (6th Cir. 1998).

Some courts have held Congress intended to abrogate states sovereign immunity when it passed the FMLA. Jolliffe v. Mitchell, 986 F. Supp. 339 (W.D. Va. 1997); Biddlecome v. Univ. of Texas, 1997 WL 124220 (S.D. Tex. 1997). These conclusions are under heavy attack.

The recent Supreme Court ruling in Kimel v. Florida Board of Regents, 120 S.Ct. 631 (2000) declaring Congress did not have the authority to apply the Age Discrimination in Employment Act to the states buttresses the argument that the FMLA was not a valid exercise of Congress' § 5 power. In Kimel, Justice O'Connor reiterated the Court's conclusion in Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.Ct. 1114 (1996) that Congress does not have authority under its Article I Commerce Clause power to abrogate the states' sovereign immunity. Rather, the only constitutional provision empowering Congress to abrogate sovereign immunity is the Equal Protection clause of the Fourteenth Amendment. Whether legislation is an appropriate exercise of this power is judged by the "congruence and proportionality" test, i.e., "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Kimel, 120 S.Ct. at 644. The ADEA failed this test because, "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that could conceivably be targeted by the Act." Id. at 645. Justice O'Connor noted that in three earlier cases challenging mandatory retirement ages, the Court had concluded these age-based classifications did not violate the equal protection clause. Age was simply not a suspect classification. Rather, at a constitutional level, age based classifications needed only to be rationally related to a legitimate purpose, the lowest level of constitutional scrutiny. She went on to note the total lack of evidence in the Congressional record of the ADEA that states were engaging in unconstitutional age based discrimination. As such, she concluded,

Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.

Id. at 650.

Several appellate and district courts have concluded that Congress did not have the authority under § 5 to apply the FMLA to the states. Using the “congruence and proportionality test,” one court explained its decision:

The creation by statute of an affirmative entitlement to leave distinguishes the FMLA from other statutory provisions designed to combat discrimination. In effect, Congress, insofar as it purports to rely on the Fourteenth Amendment as the basis of the FMLA, is attempting to dictate that the Equal Protection Clause of the Fourteenth Amendment requires that employees be furnished twelve weeks of leave per year for the reasons set forth in the act. This is patently the sort of substantive legislation that exceeds the proper scope of Congress’ authority under § 5. As earlier noted, there must be a “congruence and proportionality” between the injury to be prevented and the means adopted to that end. City of Boerne, --- U.S. at ----, 117 S.Ct. at 2164. The means employed in the FMLA are not congruous or proportional to the goal of achieving equal treatment, regardless of gender, in the workplace.

Thomson v. Ohio State University Hosp., 5 F.Supp.2d 574, 579-580 (S.D. Ohio 1998). See also Cohen v. State Dept. of Admin. Svcs., --- F.Supp.2d ----, 2000 WL 149634 (D. Neb. 2000) (Congress did not have the authority to apply the FMLA to the states); Darby v. Hinds County Dept. of Human Svcs., -- F.Supp.2d --, 1999 WL 1426105 (S.D. Miss. 1999) (“This is patently the sort of substantive legislation that exceeds the proper scope of Congress’ authority under § 5.”); Kilvitis v. County of Luzerne, 52 F.Supp.2d 403, 409 (M.D. Pa. 1999); Sims v. University of Cincinnati, 46 F.Supp.2d 736 (S.D. Ohio 1999); Post v. State, 1998 WL 928677 (D. Kan. Dec. 10, 1998); Driesse v. Florida Board of Regents, 26 F.Supp.2d 1328 (M.D. Fla. 1998); McGregor v. Goord, 18 F.Supp.2d 204 (N.D. N.Y. 1998).

The Eleventh Circuit has concluded that Congress did not have the authority to abrogate the states’ sovereign immunity with respect to leave for serious health conditions, although it left the issue of the validity of parental, pregnancy and maternity leave for another day. Garrett v. University of Alabama at Birmingham Bd. of Trustees, 193 F.3d 1214 (11th Cir. 1999).

5. SUCCESSOR IN INTEREST

The term “employer” includes “any successor in interest of an employer.” 29 U.S.C. § 2611(4)(a)(ii)(II). The regulations set out eight factors suggesting successor in interest status: (1) substantial continuity of business operations; (2) use of same plant; (3) continuity of work force; (4) similarity of jobs and working conditions; (5) similarity of supervisory personnel; (6) similarity in machinery equipment and production methods; (7) similarity of products or services; (8) the ability of the predecessor to provide relief. § 825.107(a). The failure to meet one factor is not dispositive; the factors must be viewed in their totality. Rhoads v. EDIC, 956 F. Supp. 1239 (D. Md. 1997). If a corporation is a successor in interest, an employee may count time worked for both the predecessor and the successor for purposes of his eligibility. Vanderhoof v. Life Extension Institute, 988 F. Supp. 507 (D. N.J. 1997). See also, Ioliffe v. Mitchell, 971 F. Supp. 1039 (W.D. Va. 1997) (holding newly elected sheriff was successor in interest).

E. CIRCUMSTANCES TRIGGERING THE LEAVE REQUIREMENT

Eligible employees are entitled to a total of 12 weeks of leave during a given 12-month period for any of four reasons:

- Child birth and subsequent care of the newborn § 825.112(a)(1);
- Placement of a child for adoption or foster care § 825.112(a)(2);
- Care of the employee's spouse, the employee's child, or parent of the employee who has a serious health condition § 825.112(a)(3);
- The employee's own serious health condition that makes it impossible for the employee to perform the functions of the job. § 825.112(a)(4).

1. Birth of a Child

Both male and female employees are eligible for FMLA leave upon the birth of a child. § 825.112(b). The mother may take leave for prenatal care *if she is unable to perform her job functions because of her condition*. § 825.112(c). Employees may not take leave for the birth or

adoption of a child more than 12 months after the date of the birth or adoption. § 825.201; Bolcalbos National Western Life Insurance, Co., 162 F.3d 379 (5th Cir. 1998) (employee not entitled to FMLA leave at the time when children who were formally adopted several years prior to the request for leave were moving into the U.S. and into the employee's home for the first time).

2. Placement of A Child for Adoption or Foster Care

Male and female employees may take leave for the adoption or placement of a child in foster care. If needed, the employee may take the leave before the adoption or the placement in foster care. The adopted child must either be under 18 year old or incapable of self-care for the employee to be eligible for leave. § 825.101(12) and Comment to § 825.112(d).

In Kelly v. Crosfield Catalysts, 135 F.3d 1202 (7th Cir. 1998), the plaintiff took leave for the purpose of seeking custody of a child of whom he was alleged to be the father. He was not listed as the father on the child's birth certificate. His employer terminated him for taking four days of leave related to the custody proceeding. The district court dismissed concluding the FMLA did not cover leave to obtain custody of one's own children. The Seventh Circuit reversed. It concluded that obtaining custody of one's own children when the parent actually had no parental rights could result in an FMLA adoption contemplated by the Act.

3. Care for an Employee's Spouse, Child, or Parent With a Serious Health Condition

The FMLA allows leave for the care of a spouse, child or parent with a serious health condition. A spouse is a husband or wife as recognized by state law. § 825.113(a). A "common law" spouse is eligible for leave in states where such a common law marriage would be recognized as legally valid. Willard v. Ingram Const. Co., 194 F.3d 1315 (table); 1999 WL 801580(text) (6th Cir. 1999). On the other hand, same-sex companions are probably not eligible for FMLA spouse-care entitlements. The Act provides for leave if the employee's biological parent suffers a serious health condition. An

employee may also be entitled to leave if an individual standing *in loco parentis* to the employee is suffering a serious health condition. § 825.113(b).

An individual is a qualifying child if the child is under the age of 18 and is a biological or adopted child, a step-child, foster child, a legal ward of an employee, or if the individual is a child of an employee standing *in loco parentis*. § 825.113(c). An employee stands *in loco parentis* if the employee is responsible for the day-to-day care and financial support of a child. § 825.113(c)(3). An employee may take leave to care for a child over 18 if the child is unable to provide for his or her own daily self-care, or if the child is physically or mentally disabled. Employees may not generally take leave for the serious health condition of a mother-in-law or father-in-law. Leave is also not available for care of grandparents, regardless of their dependency. Krohn v. Forsting, 11 F.Supp.2d 1082 (E.D. Mo. 1998). An employer may require of the employee documentary confirmation of the family relationship, such as a birth certificate, when the employee requests leave. § 825.113(d).

To be entitled to take FMLA leave because of the serious health condition of a family member, the serious health condition must necessitate the need for the employee's presence to care for the condition. § 825.112; 116; 305; 306. The need for care must be supported by a doctor's opinion. In one case addressing whether an employee was entitled to take medical leave to care for the serious health condition of her adult child, the court held the employee failed to prove her entitlement to leave because she failed to show her daughter was "incapable of self-care." 29 U.S.C. § 2611(12)(b). The court concluded, "A plaintiff's assertion that her adult daughter needed to stay in bed, without more, is not sufficient evidence from which a jury could infer that the daughter was incapable of self-care." Sakellarion v. Judge and Dolph Ltd., 893 F. Supp 800 (N.D. Ill. 1995). Likewise, certification was insufficient where the doctor, after checking yes to the question on the certification form asking whether a child needed care, wrote, "as all children do." Dillon v. Caulton, 977 F. Supp. 1155 (M.D. Fla. 1997). See also Marchisheck v. SanMateo County, 199 F.3d 1068, 5 Wage & Hour Cas.2d (BNA)

1345 (9th Cir. 1999) (taking leave to move child to Philippines for purposes of protecting him from assaults by other children, not to seek medical care, was not leave to care for a child).

This care may be either physical or psychological §825.116(a). Physical necessity includes items from taking care of the family member's daily hygiene to transporting the family member to the doctor. Psychological care means the presence of the employee would be beneficial to the psychological well being of the family member. Therefore, an employee may be entitled to leave in order to provide moral support to a child, parent, or spouse with a serious health condition. § 825.116(a). The necessity will also exist where the employee is needed to substitute for those normally caring for the family member. § 825.116(b). The employee may be entitled to intermittent leave in these situations. § 825.116(c). The employer may require the employee to provide medical certification that the patient requires assistance for basic physical needs or the presence of the employee would be psychologically beneficial. § 825.306(b)(5)(i).

4. The Employee's Own Serious Health Condition

The FMLA provides an employee with leave for a serious health condition that makes the employee "unable to perform the functions of the position of such employee." With respect to an employee's own serious health condition, the phrase "unable to perform the functions" of the employee's job is construed literally and is not limited to physical or mental incapacitation. An employee is unable to perform the functions of his position when he is either completely unable to work or simply unable to perform one or more essential functions of his job. § 825.115. The phrase encompasses the need to be absent from time to time in order to receive treatment, examination, and monitoring. § 825.115.

a) The Definition of Serious Health Condition

Originally, the FMLA was not intended to cover the common cold and other minor conditions for which treatment and recovery periods were brief. The Department of Labor, Wage and Hour Division, in fact, initially issued an opinion letter stating that even if these conditions met the definition of

serious health conditions, they were not qualifying conditions. DOL FMLA Opinion No. 57, April 7, 1995. This view has changed and the DOL later rescinded its opinion. See DOL FMLA Opinion No. 86, December 12, 1996.

The regulations also provide examples of conditions that do not meet the definition of serious health condition. These include, unless complications arise, colds, the flu, earaches, upset stomachs, headaches, other than migraine, minor ulcers and routine dental problems. However, courts have routinely noted that this list does not take the place of the application of the regulations defining serious health condition and that each case must be judged on a case by case basis. It is now clear that the nature of the underlying condition has no bearing on the issue of whether or not it constitutes a serious health condition. Rather, the only question is whether the condition meets the technical requirements of the statute.

A good example of this is Thorson v. Gemini, Inc., 123 F.3d 1140 (8th Cir. 1997). There, the district court had dismissed the plaintiff's claim on the ground that his condition, a minor ulcer, was not intended to be protected by the FMLA, without considering whether it met the definitions in the regulations. The court of appeals disagreed and accepted the Department of Labor's opinion that the conditions listed in the regulations such as colds and minor ulcers can be serious health conditions if they otherwise meet the criteria. The court reversed and remanded for further proceedings. On remand, the district court concluded that the plaintiff's incapacity and treatment caused by her condition did satisfy the definition of serious health condition despite the fact the condition was a minor hiatal hernia. Thorson v. Gemini, Inc., 998 F. Supp. 1034 (N.D. Iowa 1998). On appeal after remand, the Eight Circuit affirmed. It rejected the defendant's contention, supported by several amici, that the objective regulatory definition of serious health condition violated congressional intent.

[T]he DOL's objective test for "serious health condition," which avoids the need for employers--and ultimately courts--to make subjective decisions about statutory "serious health conditions," clearly is a

permissible construction of the statute. Under the DOL's definition, it is possible that some absences for minor illnesses that Congress did not intend to be classified as “serious health conditions” may qualify for FMLA protection. But the DOL reasonably decided that such would be a legitimate trade-off for having a definition of “serious health condition” that sets out an objective test that all employers can apply uniformly.

Thorson v. Gemini, 2000 WL 236404, -- F.3d – (8th Cir. 2000). See also Miller v. AT&T, 60 F.Supp.2d 574 (S.D. W.Va. 1999) (granting employee summary judgment concluding that employee’s flu met the definition of serious health condition despite its apparent exclusion by the regulation).

The FMLA defines “serious health condition” as an illness, injury, impairment and other mental or physical condition requiring minimum specified amounts of medical care. The two types of medical care elevating these maladies to the level of a serious health condition are, (1) inpatient care in a hospital, hospice or other medical facility or (2) continuing treatment by a health care provider. The inpatient care concept is relatively simple. If an employee is hospitalized for an overnight stay for an injury or illness, he has a serious health condition.

The regulations set out five factual scenarios constituting “continuing treatment.” Each of these scenarios is based on a combination of three factors: (1) incapacity: defined as the inability to work, to attend school, or to perform regular daily activities due to the condition or treatment therefor; (2) treatment: defined as examinations for the purpose of evaluating the condition other than routine physicals and the like; and (3) chronic health condition: defined as a condition that requires periodic treatment, continues over an extended period of time and may cause episodic incapacity. These include ailments such as asthma, diabetes and epilepsy. Absences for chronic health conditions may be FMLA leave even though a doctor's care is not sought. § 825.114(a)(2)(iii); (e).

The five scenarios are:

- (1) Incapacity for **more than three** consecutive calendar days + (two or more treatments by a health care provider or one treatment by a health care provider resulting in a continuing regimen of care).

- (2) Any period of incapacity caused by a pregnancy or for prenatal care.
- (3) Any period of incapacity due to a chronic serious health condition.
- (4) A long-term period of incapacity due to an untreatable condition (i.e. cancer) + continuing supervision of a health care provider.
- (5) Any period of absence to receive treatment for a condition that, if not treated, would likely result in an incapacity of more than three consecutive calendar days.

§ 825.114(a).

Substance abuse may be a serious health condition, but FMLA leave may only be taken for treatment of the condition, not for absences caused by the abuse. § 825.114(d). In Jeremy v. Northwest Ohio Development Center, 33 F.Supp.2d 635 (N.D. Ohio 1999), the plaintiff sought FMLA leave for the length of his DUI jail term on grounds that leave was necessary to care for his alcoholism. The court denied leave, holding that while alcoholism may qualify as a serious health condition FMLA leave may only be taken for treatment for substance abuse. Therefore, absences because of the employee's use of the substance, rather than for treatment of the substance abuse, do not qualify as FMLA leave. See also Sloop v. ABTCO, Inc., 178 F.3d 1285 (table), 1999 WL 280281 (text) (4th Cir. 1999) (absence of one day caused by binge drinking immediately prior to beginning treatment for substance abuse not protected).

b) Period of Incapacity

Courts have required strict adherence to the period of incapacity aspect of the definition. An employee must prove the existence of a condition causing an inability to work for more than three days. See Martyszenko v. Safeway, Inc., 120 F.3d 120 (8th Cir. 1997) (collecting cases on period of incapacity). See also Carter v. Rental Uniform Service, 977 F. Supp. 753 (W.D. Va. 1997). This includes a period of time an employee is seeking treatment for a condition although he might actually be able to work. Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998).

Recently two courts construed “incapacity” as requiring more than an employee’s inability to perform the functions of his own job. In Haefling v. United Parcel Service, 169 F.3d 494, (7th Cir. 1999), the employee’s period of incapacity of five days included two days when he was not scheduled to work. The court concluded that because the employee testified he was able to care for himself on the days he was not scheduled to work, he was not incapacitated on those days. As a result, he could not prove a period of incapacity of more than three days. Haefling was later expanded by a district court that cited it for the following proposition: “‘Incapacity’ means more than an inability to work: Bell must show that the illness or impairment resulted in his inability to perform routine daily activities on those days he was absent or unable to work..” Bell v. Jewel Food Store, --- F.Supp.2d ----, 2000 WL 207485, *7 (N.D. Ill. 2000). This statement in Bell does not appear to be supported by the regulations. The definition of incapacity is written in the disjunctive, ‘i.e., the inability to work, attend school *or* perform other regular daily activities due to a serious health condition, treatment therefor, *or* recovery therefrom.” § 825.215(a)(2)(i). Requiring a plaintiff to prove both that he cannot work *and* that he cannot perform daily activities is more than the regulation requires.

For a plaintiff to prove incapacity, he must submit evidence that a ‘health care provider’ has determined that, in his or her professional medical judgment, the employee cannot work (or could not have worked) because of the illness.” Olsen v. Ohio Edison Co., 979 F. Supp. 1159 (N.D. Ohio 1997). See also Frazier v. Iowa Beef Processors, Inc., 2000 WL 49085, -- F.3d --, 5 Wage & Hour Cas.2d (BNA) 1445 (8th Cir. 2000) (where both doctors employee saw never advised employee he was unable to work or restricted him from working, employee was not incapacitated); Ioslin v. Rockwell Intern. Corp., 8 F.Supp.2d 1158 (N.D. Iowa 1998); Thorson v. Gemini, Inc., 998 F. Supp. 1034 (N.D. Iowa 1998). But see, Marchisheck v. SanMateo County, 199 F.3d 1068, 5 Wage & Hour Cas.2d (BNA) 1345 (9th Cir. 1999) (employee’s son’s affidavit stating he was unable to “do anything for four or five days” subsequent to suffering a beating was enough evidence to defeat

summary judgment on the issue of incapacity); Roberts v. Human Development Ass'n, 4 F.Supp.2d 154 (E.D. N.Y. 1998) (plaintiff, a 64 year old woman's testimony that she was unable to work the day after undergoing a minor surgical procedure was sufficient to establish her incapacity on that day).

One court looked to evidence of the plaintiff's conduct during the leave period to determine that he was not incapacitated. In Fisher v. State Farm Mut. Auto. Ins. Co., 999 F. Supp. 866, 869 (E.D. Tex. 1998), the plaintiff testified "that, during his two weeks of approved leave, he was active in discharging his duties as executor of his father's estate." The court held, in light of this testimony, the plaintiff could not prove he was incapacitated. See also Cole v. Sisters of Charity of the Incarnate Word, -- F.Supp.2d --, 1999 WL 1334821 (E.D. Tex. 1999) (plaintiff's testimony that she was able to perform all the functions of living and her job prevented her from proving a period of incapacity).

The Fifth Circuit rejected an opinion given by a doctor based on an examination two years after the absences in question occurred. While it refrained from holding that after the fact opinions were per se invalid, it noted that the opinion conclusorily stated that the plaintiff was "unable to perform his job." The court concluded this expert testimony, with no underlying explanation of the conclusion, was insufficient to support a claim of incapacity. Boyd v. State Farm Insurance Companies, 158 F.3d 326 (5th Cir. 1998).

The Eighth Circuit took a similarly skeptical view of after the fact medical evidence proffered on the issue of the employee's incapacity. In Thorson v. Gemini, Inc., 2000 WL 236404, -- F.3d -- (8th Cir. 2000), at the time of the leave, the employee had submitted doctor's notes indicating she could not work. The employer attempted to rebut this evidence of incapacity with examinations of the plaintiff performed several months after the period when she was absent from work. The Eighth Circuit concluded that these after the fact examinations were insufficient to create a dispute of material fact when weighed against the plaintiff's contemporaneous notes. The court took the employer to task for

failing to exercise its rights to obtain more information through the FMLA certification process at the time the employee was absent, although it did not expressly base its holding on this failure.

In Bauer v. Dayton-Walther Corp., 118 F.3d 1109 (6th Cir. 1997), the plaintiff was terminated for violation of the employer's no-fault attendance policy. Rectal bleeding caused at least one of plaintiff's absences and two early departures from work. He claimed his termination violated the FMLA because the employer counted these absences against him. The district court examined whether the condition was a serious health condition because it was a "chronic condition." The court held the rectal bleeding's symptoms, which had caused the plaintiff to miss work on only three separate occasions, twice for less than a day, were not sufficiently severe to constitute a chronic condition. On appeal, the Fifth Circuit affirmed. However, the court did not examine whether the condition was a chronic condition. Instead, the court focused on the fact the employee had not been incapacitated for three days in concluding the plaintiff did not have a serious health condition.

In Murray v. Red Kap Industries, Inc., 124 F.3d 695 (5th Cir. 1997), the plaintiff was out of work from a Monday-Friday as a result of an upper respiratory tract infection. On the Friday, she presented her employer with a note from her doctor indicating she was released to return the following Monday. She did not return to work on Monday because she was not feeling well. She did not notify her employer of this and did not return to the doctor. On Thursday, after she had missed three consecutive days of work, the employer terminated her. The Court held that, in light of the doctor's note releasing her to work on Monday, her protestation that she was unable to work was insufficient to show she was incapacitated.

In Oswalt v. Sara Lee Corp., 74 F.3d 91 (5th Cir. 1996), the Fifth Circuit considered whether a bout with food poisoning constituted a "serious health condition." There, the court focused on three elements of the definition of "serious health condition": 1) the employee's inability to perform the functions of the position; 2) inpatient care in a medical facility; or 3) continuing treatment by a health

care provider. Without much explanation, the court held “The food poisoning required neither inpatient care nor continued medical treatment and was therefore not a ‘serious health condition’.”

In Cabrera v. Enesco Corp., 4 WH Cas.2d 1596 (N.D. Ill. 1998), Plaintiff’s request for FMLA leave was denied where it was made after his termination. Plaintiff contended that he was entitled to leave in order to recuperate from his “serious health condition” of bronchitis. However, assuming the FMLA applied after termination, the court found that Plaintiff’s condition did not qualify as a serious health condition where his physician indicated on his FMLA application that Plaintiff was perfectly capable of taking care of himself and no additional treatment would be required.

In Hott v. VDO Yazaki Corp., 922 F. Supp 1114 (W.D. Va. 1996), Plaintiff was in the final disciplinary phase of her employer’s attendance program. Under this phase, she would be terminated if she missed work for any reason other than a death in the family, jury duty or a shut down of the plant. A few days later, the plaintiff presented her employer with an FMLA Certification Form advising she had sinobronchitis, it was expected to last 7 to 10 days, and she was capable of performing the functions of her position. Because the form indicated the plaintiff was capable of performing her job, the sinobronchitis did not rise to the level of a serious health condition.

In Brannon v. Oshkosh B’Gosh, 897 F. Supp 1028 (M.D. Tenn. 1995), the plaintiff was fired for violation of the employer’s attendance policy. She brought suit alleging the last two absences counted against her were protected by the FMLA and should not have been counted against her. The first absence was for the plaintiff’s own illness; the second was to care for the plaintiff’s daughter’s illness. The plaintiff saw her doctor for nausea; diarrhea and flu like symptoms. She was prescribed three medications and missed four days of work. However, the plaintiff failed to present evidence she was unable to work because of her condition. Her doctor testified that he had no record of advising the plaintiff to stay home from work or that she was unable to perform her job. Most importantly, the court

held the plaintiff's own testimony "she was too sick to work" was insufficient to establish the incapacity necessary to meet the definition of a serious health condition.

In Sharpe v. MCI Telecommunications Corp., 19 F.Supp. 2d 483 (E.D. N.C. 1998), the court considered whether an employee's leave after her mother died was FMLA qualifying. It concluded it was not in spite of her doctor's testimony during his deposition that she was too emotionally distraught to work after her mother's death. The court focused on the medical certification provided at the time of leave and noted the physician did not certify that employee required inpatient hospitalization, was unable to perform work of any kind, was unable to perform the duties of her position, or was eligible for disability insurance benefits. As a result, it discounted plaintiff's claims of her inability to work and held her to the initial certification.

In Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997), the court noted that carpal tunnel syndrome could be a serious health condition, but was not on the facts of the case where the condition did not incapacitate the plaintiff.

In Bond v. Abbott Laboratories, 7 F.Supp.2d 967 (N.D. Ohio 1998), *aff'd.* 188 F.3d 506 (6th Cir. 1999), tendonitis was not considered to be a serious health condition where the employee received no instruction, recommendation, or authorization from a health care provider that she should refrain from work, but rather advised her that she could go to work and perform light duty. Likewise, the husband's tooth extraction that did not incapacitate him and was described by the dentist as a routine dental problem did not qualify as a serious health condition, although considered an emergency treatment because of the pain involved.

In Beal v. Rubbermaid Commercial Products, 972 F. Supp. 1216 (S.D. Iowa 1997), *aff'd.* 149 F.3d 1186 (8th Cir. 1998), a skin condition that never incapacitated plaintiff for more than one day and for which she saw a doctor only three times in five years did not constitute a serious health condition.

In Godwin v. Rheem Manufacturing Co., 15 F.Supp.2d 1197 (M.D. Ala. 1998), an employee was terminated for exceeding the absence limit allowed by his employer. He claimed his absences should not have been counted against him because his leave was protected by the FMLA for his “serious health condition” of poison ivy. The court rejected the plaintiff’s claim because the plaintiff received treatment for the poison ivy on only one occasion, no medication was prescribed for his condition, and nothing in the record indicated that plaintiff was incapacitated due to the poison ivy.

c) Continuing Treatment

Courts apply the “two visits to a doctor” definition of continuing treatment fairly literally. Thus an employee does not have to actually receive treatment for a follow up visit to count. Summerville v. Esco Co. Ltd. Partnership, 52 F.Supp.2d 804 (W.D. Mich. 1999). Additionally, “[t]he Regulations do not specify a time period during which the minimum two examinations must take place.” George v. Associated Stationers, 932 F. Supp. 1012, 1015 (N.D. Ohio 1996).

The regulations state that a course of prescription medication can constitute “continuing treatment.” § 825.114(b). All courts have not accepted this statement. In Beal v. Rubbermaid Commercial Products, 972 F. Supp. 1216 (S.D. Iowa 1997), the plaintiff was terminated for failure to comply with her employer’s attendance policy. The employee claimed an absence caused by bronchitis should have been exempted as FMLA leave. The court disagreed noting the plaintiff saw the doctor only once for the condition. Moreover, the court held that the plaintiff’s taking prescription medication for the condition was not “continuing treatment.”

Likewise, in Seidle v. Provident Mutual Life Ins. Co., 871 F. Supp. 238 (E.D. Pa. 1994), the employee was dismissed after being absent for four days to care for her four-year-old son. Both sides moved for summary judgment on whether the child’s illness, “right otitis media,” a common ear infection, was a “serious health condition” as defined by the FMLA.

The employee's son came down with a high fever and vomiting on Monday night. On Tuesday, the employee took a personal day off and took the child to the doctor, who diagnosed the ear infection. The doctor prescribed a 10-day regimen of amoxicillin, an antibiotic, advised the employee to keep the child at home for the next forty-eight hours and to bring him back in two weeks. By that night, the child's fever had disappeared, and he stopped vomiting. The employee kept the child at home on Wednesday and Thursday and did not report to work. On Friday, the employee did not bring the child to daycare because he had a runny nose and the daycare center would not allow a child with a runny nose to attend school. The following Monday, the employee reported to work and was informed she was terminated for excessive absences.

The court noted that an ear infection did not appear to be similar to the examples of “serious health condition” contained in the legislative history of the FMLA. Rather, it appeared to be a “minor illness lasting only a few days” that Congress intended to exempt.

The court next examined whether the condition fit the interim regulations’ definition of a serious health condition that required incapacity of more than three days plus continuing treatment. The court held the child's ear infection met neither prong. The child was incapacitated Tuesday through Thursday due to the doctor's orders. However, on Friday the child could have returned to his activities (i.e. daycare) but for the daycare center's refusal to accept a child with a runny nose. Thus, the court held the child's period of incapacity did not meet the “more than three day” test of regulation.

The court then examined the continuing treatment prong. It rejected the argument that a call to the doctor's office the night before the visit was treatment for purposes of the two-treatment prong. Further, it was undisputed the child never returned to the doctor for that condition. Thus, two treatments did not exist.

The court also rejected the argument that the 10-day regimen of antibiotic was continuing treatment. The court noted there was absolutely no supervision by the doctor concerning the

administration of the medication. Rather, it was administered under the supervision of the employee/parent.

Contra, in Brannon v. Oshkosh B'Gosh, 897 F. Supp. 1028 (M.D. Tenn. 1995), the plaintiff's daughter's had pharyngitis and an upper respiratory infection with a fever lasting several days. The daughter saw a doctor at the hospital on an outpatient basis, was prescribed a course of prescription antibiotics and was advised by the doctor to stay home for as long as the fever remained. This was for a period of more than three calendar days. The court concluded that the one visit to the doctor and a prescription for antibiotics satisfied the requirement of a continuing course of treatment. Thus, the employee was awarded summary judgment on liability.

In Sakellarios v. Judge and Dolph Ltd., 893 F. Supp 800 (N.D. Ill. 1995), the plaintiff, who had a long history of attendance problems, was terminated after taking time off to care for her adult daughter who had suffered an asthma attack and received outpatient care at the hospital. The employer claimed it terminated the plaintiff when she advised that, although she had taken an entire week off, she had only visited her daughter at her apartment one time during that period. The court held the daughter's asthma attack was not a serious health condition because the plaintiff presented no evidence she was under a continuing course of treatment after she was released from the hospital. As such, the absence to care for the daughter was not protected.

In George v. Associated Stationers, 932 F. Supp. 1012 (N.D. Ohio 1996), Plaintiff was placed on final warning under his employer's no-fault attendance policy, which meant that further absences would result in termination. Shortly thereafter, the plaintiff came down with chicken pox. He called his employer and advised that he would be absent from work because of the chicken pox. According to plaintiff's doctor, he was incapacitated from working for at least six days. During the course of the illness, plaintiff visited the emergency room and had a follow up visit with the doctor. The employer terminated plaintiff shortly after he informed the employer that he would miss work due to the chicken

pox. The court granted the employee summary judgment concluding the several days incapacity caused by the chicken pox and the treatment for it satisfied the definition of serious health condition entitling him to leave under the Act.

In Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997), the court was faced with the issue of whether a combination of temporally linked illnesses, none of which alone constituted a serious health condition, could together constitute a “serious health condition.” The plaintiff visited her doctor eight times over a two-month period for several tests, including a biopsy and the removal of a benign cyst. The district court dismissed the suit. The Seventh Circuit reversed. It concluded that there was no difference between a person unable to work because of several unrelated illnesses and a person unable to work on account of a single illness, because the FMLA was intended to provide time off for individuals unable to work on account of medical reasons.

In Victorelli v. Shadyside Hospital, 128 F.3d 184 (3rd Cir. 1997), the Third Circuit concluded that seeing a doctor once for a peptic ulcer and taking medication prescribed in that visit constituted a “continuing course of treatment”, and that the incurable nature of the condition resulted in its being a serious health condition. As such, the employer’s termination of the employee for intermittent absences caused by the ulcer was unlawful.

d) Chronic Conditions

In Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D. Ind. 1995), Plaintiff was terminated for having absences in excess of the employer’s attendance policy. She claimed the absences were due to migraine headaches she suffered on a regular basis, and that counting absences on account of her migraines in reaching the decision to terminate her violated the FMLA. The court found that the plaintiff’s evidence that she frequently was unable to perform her job when suffering from a migraine, and that she had been to a doctor regarding the migraines “on more than two occasions” created an issue of fact concerning whether she suffered from a serious health condition. While not addressed by

the court, it appears migraines would fall under the “chronic condition” category of serious health conditions, as there were no periods of incapacity of more than three days.

In Johnson v. Primerica, 3 WH Cas. 2d 109 (S.D. N.Y. 1996), Plaintiff was terminated for, in part, absences caused by his need to care for his son, who suffered from asthma. In support of his contention that his son’s asthma was a serious health condition, plaintiff submitted evidence that the boy had been submitted to the hospital several times in the past for his asthma, was being treated with asthma medication, and had been acutely ill several times in the past. Despite this evidence, the court concluded that the employee’s son did not have a serious health condition as there was no evidence the son suffered from a chronic illness, no evidence the son had been ordered to stay home from nursery school by a doctor and, particularly, no evidence the son was acutely ill *during the time the employee was absent*.

e) Pregnancy Related Serious Health Conditions

In Pendarvis v. Xerox Corp., 3 F.Supp.2d 53 (D. D.C. 1998), the employee took time off of work for severe morning sickness associated with her pregnancy and was terminated. The employer moved to dismiss her claim on the ground that she had no contemporaneous medical evidence that her morning sickness incapacitated her. The court rejected this argument noting that incapacity caused by pregnancy is treated differently under the regulations.

“Any period of incapacity due to pregnancy, or prenatal care” constitutes a “serious health condition” entitling an employee to FMLA leave, 29 C.F.R. § 825.114(a)(2)(ii), and certain absences attributable to incapacity—specifically including those by a pregnant employee unable to report for work because of severe morning sickness—qualify for FMLA leave “even though the employee ... does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days.” 29 C.F.R. § 825.114(e).

It concluded:

Defendant's argument that medical evidence is necessary to establish that an employee is unable to perform the functions of her job has more substance, but the Court concludes that the statute and regulations, when read as a whole, do not require medical evidence in cases of pregnancy-related severe morning sickness. . . . Throughout the FMLA regulations, pregnancy is recognized as a special case that is treated differently from other serious health conditions. See, e.g., 29 C.F.R. § 825.114(a)(2)(ii) and (e). Absent an employer's request for medical certification under 29 C.F.R. § 825.305, see *infra* at 56-57, the regulations that specifically address pregnancy and pregnancy-related conditions cannot be reconciled with a requirement that a pregnant employee must always provide medical evidence that she was unable to work because of severe morning sickness.

Id. at 55.

In Gudenkauf v. Stauffer Communications, 922 F. Supp. 465 (D. Kan. 1996), the plaintiff brought suit claiming her employer violated the FMLA when it discharged her following her request to work a reduced schedule on account of complications she suffered during pregnancy. She complained of frequent nausea, back pain, headaches and swelling. The court recognized that a period of incapacity caused by complications from pregnancy is specifically recognized as a serious health condition by the regulations. However, it held plaintiff's testimony was not sufficient to support the conclusion that she was incapable of working. Particularly important to the court's conclusion was the testimony of the plaintiff's obstetrician that nothing indicated the symptoms of Plaintiff's pregnancy were unusual or severe, and he had never noted any condition during her pregnancy that would have impaired her ability to work. In light of this testimony, the court concluded that the plaintiff's pregnancy was not a serious health condition and she was not protected by the FMLA.

F. SPOUSES EMPLOYED BY SAME EMPLOYER

When a husband and wife work for the same employer, they are **each entitled** to a total of 12 weeks leave for their own serious health conditions, or for those of a sick child or spouse. § 825.202(c). Spouses are limited to a total of 12 weeks **combined between them** for leaves due to the birth or placement of a son or daughter or the serious health condition of a parent. § 825.202(a).

The provisions regarding spouses are intended to diffuse disincentives for employers to hire married couples. The Act contains no similar provisions for siblings employed by the same employer.

G. DETERMINING THE TWELVE MONTH ELIGIBILITY PERIOD

The employer can pick one of four methods for determining the 12 month period over which the employee is entitled to leave: (1) the calendar year; (2) any fixed year, such as a fiscal year or the year beginning with an employee's anniversary date; (3) the 12 month period measured forward from the first date a given employee takes FMLA leave; or (4) the 12 months immediately preceding the leave currently taken. § 825.200(b). An employer must apply the same method to all employees and must provide employees, 60 days notice prior to changing the method applied. § 825.200(d)(1).

A case illustrating the importance of an employer choosing the twelve-month period and clearly communicating it to employees is McKiernan v. Smith-Edwards-Dunlap Co., 3 WH Cas.2d 272 (E.D. Pa. 1995). In this case, the plaintiff was on leave for six months to care for his wife who was having serious complications with her pregnancy and then to care for his prematurely born son. He began a 90-day leave in November. In February, he requested and was granted a 90-day extension of leave. When that leave ended on May 2, he did not return to work. Two weeks later, his employer sent him a letter advising him he was terminated.

The employee brought suit alleging his termination violated the FMLA. The employer countered with a motion for summary judgment asserting the plaintiff was not on protected leave at the time of his termination because he had already used his full allotment. Although the first 90 days of leave were not FMLA leave because they were covered by a CBA in place when the FMLA became effective, the employer contended the plaintiff had used up his full twelve weeks from February 2 to May 2. Thus, when it terminated him on May 17, he was not protected. The court rejected the employer's contention because it could not determine the twelve-month period utilized by the employer for purposes of determining if an employee had used up his leave.

Additionally, Plaintiff may have been entitled to a new period of FMLA leave at some point between February 5 and May 2, 1994. The statute allows a 12 week unpaid leave of absence during any 12-month period. 29 USC § 2612(a)(1). The employer, as stated above, may designate the year as a calendar year, fiscal year, or employee anniversary date, so long as the policy is consistent and uniform. The complaint is silent on whether Smith-Edwards ever notified him how it would determine the 12-month period. In an uncontested affidavit, McKiernan swears that the company never advised him of any policy in this regard. **If Smith-Edwards had none or failed to communicate it, plaintiff should have the benefit of the most favorable calculation under the Act.** Accordingly, he would be eligible for a new 12-week leave period on his April 12, 1994 anniversary date.

Id. at 274-275. Thus, when advising employers regarding whether an employee has depleted his leave entitlement, it is critical to ascertain whether the employer has chosen a twelve-month period and communicated it to the employees. If not, the result under each calculation should be considered.

H. INTERMITTENT OR REDUCED SCHEDULE LEAVE

Employers may agree, but are not required, to allow employees to take leave for the birth or placement of a child on an intermittent or reduced schedule leave basis. § 825.203(a). Employers are required to allow employees to take intermittent or reduced schedule leave when medically necessary for the employee's own serious health condition or for that of a child, spouse, or parent including the serious health condition of a newborn or the mother as a result of giving birth. § 825.203(b)(c).

1. Intermittent and Reduced Schedule Leave Defined

Intermittent leave is leave taken in separate blocks of time for a single qualifying reason, rather than a continuous period of time. § 825.203(a). This may include leave for a period of hours or a period of days. A reduced leave schedule allows an employee to reduce his or her number of working hours per workweek or workday. § 825.203(a). There is no limit on the time period that may constitute an increment of leave provided it is one more or less. § 825.203(d). An employer may designate that an increment can be no less than the shortest period of time recognized by an employer's payroll system to account for absences or use of leave provided it is one hour or less. § 825.203(d).

2. Determining the Amount of Leave Used

Intermittent or reduced schedule leave can be deducted from the 12-week entitlement only to the extent leave is actually taken. In Parker v. Sony Pictures, 19 F.Supp.2d 141 (S.D. N.Y 1998), the plaintiff claimed that he had not used his full twelve week entitlement when his employer terminated him 16 weeks after his FMLA leave began. The basis for his claim was that he had worked at home during the time he was ostensibly on FMLA leave. The court concluded that any time the plaintiff was “suffered or permitted to work” at home during his leave could not be counted against his twelve week entitlement. The court did not address how the amount of leave the employee used was to be calculated, but concluded his claims he worked at home created a fact issue as to whether he was still on FMLA leave at the time he was terminated.

If an employee takes one hour of leave, only one hour of the 12 weeks has been used, not an entire day. § 825.205(a). An employee who seeks intermittent leave under the FMLA is only required to establish eligibility for the first absence related to that leave not each absence thereafter. Barron v. Runyon, 11 F.Supp.2d 676 (E.D. Va. 1998), *aff'd*, 2000 WL 227913 (4th Cir. 2000).

a) Part-Time Schedules

When an employee works a part-time schedule before taking FMLA leave, the actual leave taken is assessed against the 12 week entitlement based on a *pro rata* or proportional basis. The employee's leave schedule and his or her normal work schedule are compared, and time is assessed against the FMLA entitlement based on that comparison. For example, if an employee normally works a 5 hour day 5 days a week, and then commences an FMLA intermittent leave, working 5 hours a day only 3 days a week, the comparison equation would be 10/25. Therefore, each week, the employee would be assessed 2/5 of a week of FMLA leave. § 825.205(b).

b) Variable Schedules

If an employee works a variable schedule such that his or her hours worked change from week to week, the employer must determine the average number of hours the employee works per week. The employer should average the number of hours the employee worked each week for the 12 week time period before the employee began a FMLA leave. The weekly average during this 12-week period is used to calculate the employee's normal work schedule. The normal work schedule is used in the *pro rata* equation to determine the amount of FMLA leave the employee takes each week. § 825.205(d).

3. Transferring Employees During Intermittent Leave

Employers can require employees requesting *foreseeable* intermittent or reduced schedule leave to schedule their leave in a manner least likely to disrupt the employer's operations. The employers can transfer *temporarily* the employee requesting intermittent or reduced schedule leave to another position if the position has equivalent pay and benefits, and the new position better accommodates the intermittent periods of leave. The temporary position need not have the same job duties or responsibilities. § 825.204.

Despite the statutes explicit language allowing this type of transfer in cases of foreseeable leave that has been requested, one court approved a temporary transfer of an employee in a situation where the employee's need for intermittent leave was sporadic and unpredictable. In Summerville v. Esco Co. Ltd. Partnership, 52 F.Supp.2d 804 (W.D. Mich. 1999), the plaintiff missed work because of bone spurs. While the factory was undergoing modifications, he was reassigned for two months to a position with different responsibilities that the employer believed would better accommodate attendance problems caused by the bone spurs. At the time of the reassignment, the employee had not requested and was not taking any foreseeable FMLA leave. Rather, there was only a possibility he might miss work on an irregular and unpredictable basis. The court, citing the regulations, concluded this was a legitimate reassignment. What is interesting about the case is the Plaintiff brought it as a retaliation claim, not as a denial of substantive rights. The employer had a legitimate reason to reassign the employee

completely unrelated to his FMLA leave, the modification of the factory. Thus, there was really no need for the court to discuss the reassignment as allowed under the FMLA regulations. Nevertheless, the court's discussion suggests sympathy for the problems caused employers by employees with sporadic attendance records.

The employer may not transfer the employee to an alternative position to discourage taking leave. § 825.204(d). At the end of the leave, the employee must be returned to the same or an equivalent position as would be the case with normal leave. § 825.204(e).

One court recently found that when an employee's serious health condition leaves her with a permanent restriction requiring a reduced schedule, the employer may permanently transfer an employee to another position. In such a situation, the court reasoned, there would never be any right to reinstatement to the former job because the employee would never again be able to perform all the essential functions of her job. Covey v. Methodist Hosp. of Dyersburg, Inc., 56 F.Supp.2d 965 (W.D. Tenn. 1999).

4. Employee's Responsibilities In Requesting Intermittent Leave

Intermittent leave, by its nature, should be foreseeable. As such, the FMLA and the regulations obligate employees to cooperate with their employer when scheduling intermittent leave so as not to disrupt their operations. See 29 U.S.C. § 2612(b) and § 2612(e); § 825.117. In Kaylor v. Fannin Regional Hosp., Inc., 946 F. Supp. 988 (N.D. Ga. 1996), the court held an employee's failure to make any effort to coordinate his medical appointment for a chronic back condition with the employer's staffing needs defeated his claim of wrongful termination.

The employee informed his supervisor of his doctor's appointment only four days before its scheduled date. The supervisor asked him to reschedule the appointment and told him it would not approve his taking leave that day as the department was already understaffed. The employee called in sick the morning of the appointment reporting he had a stomach virus. He attended the doctor's

appointment for treatment of his back. The employer terminated him for “abuse of sick leave” as it believed he had lied about his illness.

The employee claimed the hospital had violated the FMLA when it refused him the day off to attend his doctor’s appointment. The court found there are three elements to a claim of entitlement to intermittent leave for treatment of a serious health condition: 1) the leave must be medically necessary for a serious health condition; 2) the employee must make a reasonable effort to schedule the treatment so as not to unduly interfere with the operations of the employer; and, 3) the employee must give at least 30 days notice to the employer. It then held the employee had made a no effort to reschedule his appointment despite the hospital’s advising him it would be understaffed were he absent. Because the employee failed in his obligations, the employer’s refusal to grant him leave was not a violation.

In *Hendry v. GTE North, Inc.*, 896 F. Supp. 816 (N.D. Ind. 1995), the plaintiff was terminated when she violated the employer’s attendance policy. Purportedly, all her absences were caused by migraine headaches for which she was under the continuing treatment of a doctor. For a time, she had a supervisor who accommodated her migraines and allowed her to take unscheduled vacation days and to make up time she missed because of migraines. When a new supervisor took over, this practice stopped and she was eventually terminated for violating the attendance policy. The employer defended the termination on the grounds it had terminated her for violating its attendance policy, not because she suffered from migraine headaches. The court summarily dismissed this defense. The facts showed that the employer was aware of the plaintiff’s headaches, that the headaches may have constituted a serious health condition. Thus, the employer had enough information to put it on notice that her absences may have been protected. This created an issue of fact as to whether the employee was entitled to intermittent leave for her headaches.

I. SUBSTITUTING PAID LEAVE FOR UNPAID LEAVE

The leave mandated by the FMLA is unpaid. § 825.207. Under certain circumstances, however, an employer may elect to require that the employee substitute paid leave for which he or she is eligible. § 825.207(a).

1. Leave for Birth or Placement of a Child

Employees may elect or employers may require employees to substitute paid accrued vacation, personal, or family leave for unpaid FMLA leave upon the birth or placement of a child. The substitution by the employer's paid family leave for FMLA leave is only permitted if the employer permits employees to use its family leave to care for a child. § 825.207(b). The Act does not permit employers to require an employee to use sick leave for the birth or placement of a child.

In Haggard v. Farmers Insurance Exchange, 3 WH Cas.2d (BNA) 339 (D. Or. 1996), an employee brought suit complaining about the employer's setting off her maternity leave against her vacation for the year instead of against her sick leave as she had requested. The employer paid her for her vacation time while she was on maternity leave. The plaintiff's arguments centered mainly on interpretations of the employer's particular vacation policy and FMLA policy. Those policies were based, in part, on Oregon's Family Leave Law that required an employee to use vacation pay prior to using sick pay while on a maternity leave. The court, with little explanation, rejected the plaintiff's contentions and held the employer had properly forced utilization of vacation time during the maternity leave. This appears to be in accord with the FMLA's pronouncement that it was not intended to preempt state laws. 29 U.S.C. § 2651.

2. Leave to Care for Family Member

Employees may elect and employers may require substitution of paid vacation, personal or family leave, or medical or sick leave for FMLA leave to care for a family member. Family leave and medical or sick leave may not be substituted if the employer's family leave or medical or sick leave plan does not permit leave under the employee's circumstances. For example, neither the employer nor the

employee may substitute medical leave for FMLA leave when the employee is requesting the leave to care for a sick parent when the employee's medical or sick leave plan does not provide for leave to care for a sick parent. § 825.207(c).

3. Leave for Employee's Care

Employees may elect and employers may require substitution of paid vacation, personal and medical or sick leave for FMLA leave for the employee's own serious health condition. § 825.207(c). In the absence of an employer's requirement for substitution, employees are responsible for electing whether they wish to take FMLA leave or paid sick leave. Employers are not responsible for reading the minds of their employees.

4. Relation To Workmen's Compensation

The regulations address the relation between an employee who is off duty due to a workplace injury receiving workmen's compensation and FMLA leave. An employer may not substitute any paid leave for FMLA leave while an employee is receiving workmen's compensation benefits. The employer or the employee may designate the time the worker is off work receiving workmen's compensation as FMLA leave. If an employee on workmen's compensation leave is certified to return to "light duty work" but cannot return to his former job, he can elect to continue leave using any FMLA leave remaining. At this time, the substitution of paid leave becomes applicable. § 825.207(d)(2). If an employee on concurrent FMLA leave and workers' compensation leave cannot return to work at the end of the FMLA leave period, the employee loses his FMLA rights. § 825.216(d). Note, however, the workmen's compensation laws or the Americans With Disabilities Act may govern the employees' return to work rights.

5. Procedural Requirements

According to the regulations, no substitution may occur if neither the employer nor employee designates paid leave is being substituted for FMLA leave. § 825.207(f). When an employer or

employee substitutes paid leave for unpaid FMLA leave, only the less stringent of the notice and other requirements of the employer's leave plan or the FMLA may be utilized. § 825.207(h). Employers must satisfy several requirements before forcing substitution:

- The employer must designate paid leave as FMLA leave or unpaid FMLA leave as paid leave. § 825.208(a);
- These designations can be based only on information provided by the employee or the employee's spokesperson § 825.208(a);
- When the employee has not provided enough information to make a designation, the employer should inquire further. The employer must be aware of the ADA restriction concerning inquiries into an employee's health § 825.208(a);
- The employer must notify the employee within two business days of learning of the FMLA qualifying reason for leave if paid leave is to be substituted § 825.208(b)(1);
- Any disputes should be resolved "through discussions between the employee and employer." § 825.208(2)(b).

Where paid leave is not substituted for unpaid leave, the employee remains fully entitled to the paid leave in addition to the full 12 weeks of leave under the Act. § 825.208.

In Chaffin v. John H. Carter Co., 1998 WL 19624 (E.D. La. 1998), the plaintiff took full and paid medical leave pursuant to the employer's policy for five weeks. When the employee returned to work, she was terminated. The plaintiff claimed she was terminated for taking FMLA leave while the employer claimed she was terminated for performance problems.

Despite the fact the employee was unquestionably out of work on account of a serious health condition and the employer was aware of this, the court concluded she was not on FMLA leave. The employer had never forced any employee to utilize FMLA leave while on a paid leave pursuant to its policy. Had plaintiff needed time in addition to the employer's paid leave, she could have then taken FMLA leave when paid leave ran out. Additionally, she did not request her leave to be considered FMLA leave. The court refused to let her retroactively declare her leave to be FMLA leave.

6. Comp Time

Public employers may not substitute compensatory time off for FMLA leave. The employee may elect to use compensatory time off for the purposes of FMLA leave, but this does not count against the employee's 12 weeks of FMLA leave time. § 825.207(i).

J. TIME FOR DESIGNATING LEAVE AS FMLA LEAVE

The regulations place 100% of the responsibility for designating leave as FMLA leave on the employer. § 825.208(a). The regulations require very quick designation, within two days of the employer becoming aware of the FMLA qualifying nature of the leave. Failure to timely designate leave results in the employer being unable to count the leave against an employee's twelve weeks. According to the regulations, the designation of whether the leave is FMLA-qualifying must be made before the leave begins, or before a leave extension is granted. § 825.208(c).

If the employer does not have sufficient information to determine whether a leave is FMLA-qualifying before the leave starts or before granting an extension of the leave when it did not know the FMLA qualifying reason at the beginning of the leave, the employer may designate the leave as FMLA-qualifying after the leave begins. § 825.208(d). An employer may not designate leave as FMLA-qualifying after the leave has ended unless it did not know of the FMLA qualifying reason for the leave until after the leave has ended. §825.208(e). If the employer designates a leave that has already commenced as an FMLA leave when it did not know of the FMLA qualifying reason at the beginning of the leave, the leave period already taken can be retroactively counted against the 12 week FMLA leave entitlement. § 825.208(d).

The result of these regulations is that by an employer's failure to designate, an employee can obtain a greater amount of leave than the twelve weeks contemplated by the ADA. A number of cases have arisen out of an employer's failure to properly designate leave as FMLA leave. In most of these

cases, an employer has terminated an employee for taking more than 12 weeks of leave. Courts have held employers liable even though they had provided leave well in excess of that required by the FMLA.

In Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998), an employee was demoted when he returned from a thirteen-week leave of absence. The employer argued this action did not violate the FMLA because the employee was no longer on FMLA leave when he returned. The court disagreed finding that because Wal-Mart had not designated the week of vacation the employee had at the time he began leave, the employee had a right to a full thirteen weeks of leave, 12 weeks of FMLA plus one week of vacation.

Dintino v. Doubletree Hotels, 1997 WL 717208 (E.D. Pa. 1997) is an even more egregious case of an employer's failure to designate expanding an employee's allowable leave. The plaintiff left work on June 21 when her doctor ordered her to bed for complications arising out of her pregnancy. She notified her employer of this event. She also advised the employer that she intended to utilize all leave available to her, although she never specifically mentioned the FMLA. When notified of her leave, the employer set a return date for the plaintiff of the middle of October, well more than 12 weeks after she left. When she refused to come back to work at that time, the employer terminated her contending she abandoned her job.

The employee sued arguing her termination violated the FMLA because when she was terminated, she was on FMLA leave despite the fact she had been absent from work for longer than 12 weeks. The court agreed and granted summary judgment in her favor. The employer's misstep was failing to notify the employee that her maternity leave was to be counted against her FMLA leave entitlement. As a result, the employee was considered to be on FMLA leave when she was terminated. Additionally, because when the employer terminated her, it had made no efforts to determine whether she was on protected leave, the court noted the employee would be entitled to request liquidated damages from a jury trying the damages portion of the case.

This case is a perfect example of a dichotomy in the FMLA between its treatment of employees and their employers. Many courts have allowed an employee to assert that a leave of absence was covered by the FMLA even if the employee never requested FMLA leave. Employers, however, except in very limited circumstances, have not been allowed to retroactively declare a leave of absence as FMLA leave and count such an absence against an employee's twelve week entitlement. See also Vierick v. City of Gloucester, 961 F. Supp. 703 (D. N.J. 1997).

The Eleventh Circuit concluded these regulations are invalid. In McGregor v. Autozone, 180 F.3d 1305, 1308 (11th Cir. 1999), the plaintiff took a thirteen-week maternity leave. When she returned to work, she was demoted to an assistant manager position. She quit alleging that her employer violated the FMLA by not returning her to her position or an equivalent one. The court held, however, that because she had been on leave for longer than 12 weeks, she was not entitled to be restored to her position. It explained:

29 C.F.R. § 825.208 converts the statute's minimum of federally-mandated unpaid leave into an entitlement to an additional 12 weeks of leave unless the employer specifically and prospectively notifies the employee that she is using her FMLA leave. The statute provides for only 12 weeks of leave. 29 U.S.C. § 2612(a)(1) ("employee shall be entitled to a total of 12 workweeks of leave during any 12-month period"); see also 29 U.S.C. § 2612(d)(1) ("if an employer provides paid leave for fewer than 12 workweeks ... the additional weeks of leave necessary to attain the 12 workweeks ... may be provided without compensation"). The Act's legislative history also indicates FMLA establishes a baseline of 12 weeks of leave. S.Rep. No. 103-3, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6 (FMLA "accommodates the important societal interest in assisting families by establishing a minimum standard for leave"); S.Rep. No. 103-3, at 28 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 30 ("Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis.") (emphasis provided).

The statute does not suggest that the 12 week entitlement may be extended. Where Congress wanted explicit notice provisions with significant consequences, it provided for them. 29 U.S.C. § 2613 (detailing notice requirements for employees seeking leave); 29 U.S.C.

§ 2614 (employer may deny restoration to highly compensated employee if “the employer notifies the employee of the intent to deny restoration on such basis at the time the employer determines that such injury would occur”).

The regulations not only add requirements and grant entitlements beyond those of the statute but they also are inconsistent with the stated purpose of the statute. One of the explicit purposes of the Act is to “balance the demands of the workplace with the needs of families ... in a manner that accommodates the legitimate interests of employers.” 29 U.S.C. § 2601(b)(3); see also 29 U.S.C. § 2653 (“Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act”). Where an employer such as defendant exceeds the baseline 12 weeks by providing not only more leave than FMLA but also paid leave, the employer should not find itself sued for violating FMLA.

McGregor v. Autozone, Inc., 180 F.3d 1305, 1308 (11th Cir. 1999). See also Covucci v. Service Merchandise Co., 178 F.3d 1294 (table), 1999 WL 115531 (text) (6th Cir. 1999) (court refused to find FMLA violation based on failure to designate leave as FMLA leave when employer provided employee a full year of leave before terminating him); Covey v. Methodist Hosp. of Dyersburg, Inc., 56 F.Supp.2d 965 (W.D. Tenn. 1999)(declaring regulation requiring employer to designate leave as FMLA leave invalid). But see, Ritchie v. Grand Casinos of Mississippi, Inc., 49 F.Supp.2d 878 (S.D. Miss. 1999) (regulations requiring employer to designate leave as FMLA leave to count it against employee’s entitlement a valid exercise of the Department of Labor’s regulatory authority).

Other cases have also refused to find that an employee who took more than 12 weeks of leave was protected by the FMLA despite the employer’s failure to designate the leave as FMLA leave. However, these cases do not directly address the regulations. See Kur v. Fox Valley Press, 1997 WL 89140 (N.D. Ill. 1997); Stopka v. Alliance of Amer. Insurers, 1996 WL 717459 (N.D. Ill. 1996), aff’d. 141 F.3d 681 (7th Cir. 1998); Haggard v. Farmers Ins. Exchange, 1996 WL 146048 (D. Or. 1996).

Walthall v. Fulton County School District, 18 F.Supp.2d 1378 (N.D. GA. 1998) presents an interesting twist on the designation cases. There, an employee claimed that her employer violated the FMLA when it refused to reinstate her to her former position upon her return from a medical leave. The court rejected the contention because of the *employee's* failure to designate. The plaintiff was notified that her leave would be covered under her employer's sick leave policy and she did not request that the sick leave be counted as FMLA leave. As such, the court concluded the leave was not protected.

An employer is entitled to declare qualifying leave as FMLA leave regardless of whether the employee desires the leave to be FMLA leave. Harvender v. Norton Co., 1997 WL 793085 (N.D. N.Y. 1997).

K. NOTICE REQUIREMENTS

1. Employer Responsibilities

a) Posting Requirement

Under FMLA regulations, an employer even if it has no eligible employees must:

- post the DOL's notice of the FMLA's provisions and the Act's procedures for filing complaints with the Wage and Hour Division;
- post the notice in a conspicuous place; and
- the size of the notice must be susceptible of being easily read and contain legible text.

The employer may use the notice form provided by the DOL, and may post the notice in English only, unless a significant portion of the employee speak a second language. Then, the notice must be in both English and the second language.

If the posting requirements are not satisfied, the employer cannot deny an employee's FMLA leave request on the basis that the employee failed to provide proper notice. Two courts have noted that this penalty is limited to an employee's request for foreseeable, not unforeseeable leave. Satterfield v. Wal-Mart Stores, Inc., 135 F.3d 973 (5th Cir. 1998); Gay v. Gilman Paper Co., 125 F.3d 1432 (11th

Cir. 1997). If the DOL finds the employer's violation of the posting notice was willful, the DOL can assess a fine of up to \$100 for each offense. § 825.300.

To date, courts have refused to find a cause of action on behalf of private litigants for failing to post the required notices. The courts have reasoned such a claim falls outside the scope of civil actions allowed by 29 U.S.C. 2617(a). Additionally, while the statute expressly provides for a civil penalty, it does not expressly provide for a civil cause of action. See Jessie v. Carter Health Care Center, 926 F. Supp. 613 (E.D. Ky. 1996); Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D. Ind. 1995). However, while recognizing the lack of a civil cause of action, the Hendry court noted an employer with more than one building in its “facility” may have to post the notice in more than one place. Moreover, a failure to properly post the notice could estop the employer from denying leave to an employee on the grounds the employee failed to request it.

b) Employee Handbooks

If the employer has an employee handbook or some other written employment policy, the employer must include information on FMLA entitlements and employee FMLA obligations within the handbook or written policy. § 825.301(a)(1). If the employer has no handbook and no written employment policies, the employer must inform employees in writing of FMLA entitlements and employee obligations when the employee requests leave. § 825.301(a)(2).

Employers must be careful that the information provided in their handbooks is clear and accurate. In Ery v. First Fidelity Bancorp., 3 WH Cas.2d 115 (E.D. Pa. 1996) the employer offered its employees a 16-week maternity leave. However, it counted the first 12 weeks as FMLA leave. The plaintiff took the entire 16 weeks of leave. When, upon returning, she was not returned to her former or an equivalent position, she brought suit. The employer argued she had no FMLA rights because she had not returned to work at the end of her FMLA leave. The court refused to grant summary judgment on this basis. Instead, the court held the employee’s claim that the employer’s handbook misled her by not

explaining that she lost FMLA rights when she took the entire 16 weeks stated a viable FMLA claim. The handbook, in fact, did not explain the forfeiture. Additionally, the handbook contained a statement that the employer's policy was intended to provide the employees with greater rights than those provided by the FMLA. The court concluded the failure to explain the forfeiture combined with this statement violated the regulation requirement of providing information to employees about FMLA leave. Other courts, while not finding violations, have concluded this is a viable theory. See Kosakow v. New Rochelle Radiology Associates, -- F.Supp.2d --, 2000 WL 279816 (S.D. N.Y. 2000); Lacoparra v. Pergament Home Centers, 982 F. Supp. 213 (S.D. N.Y. 1997); Mion v. Aftermarket Tool & Equipment Group, 990 F. Supp. 535 (W.D. Mich. 1997).

c) Notice Requirements When Leave Is Requested

When an employee gives notice of the need for FMLA leave, the employer must inform the employee of the consequences of this request, including that:

- the leave may count against the 12-week leave entitlement;
- the employee may be required to obtain medical certification of the serious health condition;
- the employee may have the right to substitute paid leave for unpaid leave;
- the employee may be required to pay health premiums and other benefit premiums;
- the employee may be required to provide fitness-for-duty certification upon expiration of the FMLA leave;
- the employee has been designated a key employee and the consequences of such a designation; and
- the right to restoration.

§ 825.301(b)(c).

Employers may not rely on their employee handbooks to provide this specific notification. Rather, it must be individually provided each time an employee requests leave. In Henderson v. Whirlpool Corp., 17 F.Supp.2d 1238 (N.D. Okla. 1998), the court held that a provision in the

employee manual requiring employees to provide medical certification each time they take medical leave does not satisfy the employer's obligation to notify the employee each time a certification is required. Reliance on the employee handbook in this manner only serves to convert the employer's right to require medical certification into an impermissible additional obligation on the employee's right to exercise their FMLA rights.

If the employer fails to provide the specified information, it may not discipline an employee for failing to comply with any provision required to be included in the notice. §825.301(f). In Sherry v. Protection, Inc., 981 F. Supp. 1133 (N.D. Ill. 1997), the plaintiff was demoted when he returned from a leave to care for his father. The defendant argued the demotion was permissible because the plaintiff had not returned to work immediately upon his father's death and therefore, was not on FMLA leave. The court recognized the leave might not have been FMLA leave. However, the employer had failed to provide the employee with the required notice when he went on leave. The court reasoned this failure barred the employer from taking action against the employee on account of his failure to return to work timely.

The Second Circuit recently excused an employer's failure to provide an employee with notice that the FMLA provided him twelve-weeks of leave with a "no harm, no foul" analysis. Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155 (2nd Cir. 1999). In Sarno, the plaintiff took a leave for a worker's compensation injury. The employer told him it would treat the leave as FMLA, but did not tell him the FMLA provided twelve weeks of leave. The employee was terminated after he had been on leave for five months. He argued the employer's failure to notify him the FMLA only protected him for twelve-weeks interfered with his right to FMLA leave. The court disagreed because, at the time he had been on leave for twelve weeks, he was not capable of returning to his job. Thus, the employer's failure to tell him of the twelve- week limit did not have any impact on his decision not to return to work at that time. The court carefully noted that this conclusion was not necessarily applicable to employees

taking other types of leave. Although the court did not explain why this was, it is presumably because employees taking leave to care for another or for the birth of a child have the ability to make a decision whether or not to return to work that could be influenced by the information, or lack thereof, they receive from their employer. See, e.g., Longstreth v. Copple, 189 F.R.D. 401 (N.D. Iowa 1999) (where employee contended she would have returned to work at the end of twelve weeks had she known her FMLA leave was up at that time, employer's failure to notify her of FMLA nature of leave and subsequent termination of employee while on leave could violate the FMLA).

2. Employee Responsibilities

a) Notice to Employers -- Foreseeable Leave

The FMLA requires an employee desiring to take foreseeable leave on account of the birth or placement of a child to give the employer 30 days notice of the need for leave except in circumstances where the birth or placement requires leave to begin sooner, (i.e. a baby born two months prematurely). In those cases, the employee should ordinarily provide notice of the need for leave within one or two working days of the leave commencing. § 825.302(a);(b).

When the employee takes leave for the employee's own serious health condition or for that of a qualifying family member, the same requirement of 30 days notice applies, except when the notice is impracticable. 29 U.S.C. § 2612(E)(2). The regulations define impracticable to include situations where there is a lack of knowledge of when leave will begin, a change in circumstances, or a medical emergency. § 825.302(a)-(b). Employees must make a reasonable effort to schedule treatment so as not to unduly disrupt the operations of the employer. 29 U.S.C. § 2612(E)(2). Where notice for the need to take leave is given but the employee neglects to schedule the leave with his employer so as not to disrupt the employer's business, an employer may require the employee to attempt to reschedule treatment, if possible and if consistent with appropriate health considerations. § 825.302(e).

If an employee fails to give the proper notice of the need for foreseeable leave, the employer is allowed to delay the leave until 30 days from the date notice is first given. However, employers should be cautious of changes in circumstances that may trigger the employee's right to take leave immediately.

The Fifth Circuit recently addressed these issues in Hopson v. Quitman Country Hospital, 126 F.3d 635 (5th Cir. 1997). There, the plaintiff requested leave for medically necessary, non-emergency, breast reduction surgery. She obtained pre-approval of the treatment from her health insurer and in conjunction with her employer, scheduled the surgery for July. In March, her health insurer advised her that beginning May 1, it would no longer cover the surgery for which she had been pre-approved. She then requested her employer move her leave to May so she could undergo the surgery in April. It refused. She underwent the surgery in April anyway and was fired when she did not report to work.

The district court granted the employer summary judgment holding that the employer was not obligated to move up the leave date to which it had already agreed. It reasoned that as long as the change was not brought on by medical emergency, the employer was obligated to take leave as requested.

The Fifth Circuit disagreed. It concluded that the insurer's reducing coverage could be a "change in circumstances."

b) Notice to Employer – Unforeseeable Leave

As the Fifth Circuit has noted, "Significantly, the [FMLA] does not specify the form of notice required for foreseeable leave, nor does it mention any notice requirement for unforeseeable leave." Manuel v. Westlake Polymers Corp., 66 F.3d 758, 761 (5th Cir. 1995). Thus, what an employee needing leave for an unforeseeable circumstance must do to be protected by the FMLA is purely a creature of the DOL regulations. The regulations provide that the employee must provide notice of the leave request as soon as practicable. Notice should normally be provided within one to two working days of the employee's learning of the need for leave. § 825.302(a)(b). The employee can provide this

notice in person, by telephone, facsimile, or by a personal representative if the employee is physically unable to provide notice. § 825.303(b).

The regulations state and the cases have held that an employee need not actually invoke the term FMLA to be entitled to its protection under the Act. Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995). See also, Price v. City of Forth Wayne, 117 F.3d 1022 (7th Cir. 1997) (employee filling out employer provided leave request form and attaching note from doctor requiring her to take time off sufficient to put employer on notice); Goodwin-Haulmark v. Menninger Clinic, 76 F.Supp.2d 1235 (D. Kan. 1999) (employee's request for medical leave attaching doctor's note stating she was unable to work and would be out for three weeks sufficient notice). Instead, the employee must "state a qualifying reason for the needed leave." § 825.208. This is the opposite of a bright line test. As the Fifth Circuit stated in Westlake:

We decline to announce any categorical rules for the content of the notice by an employee. When an employee cannot give 30-days advance notice of the need for FMLA leave, the FMLA requires notice "as is practicable." 29 U.S.C. Sec. 2612(e) (2) (B). What is practicable, both in terms of the timing of the notice and its content, will depend upon the facts and circumstances of each individual case. The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.

Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995).

The Fifth Circuit revisited what information is sufficient to put the employer on notice in Satterfield v. WalMart Stores, 135 F.3d 973 (5th Cir. 1998). In Satterfield, the employee did not report to work. She sent her mother with a note to pick up her paycheck. The note stated she was "sick" and "in pain". Additionally, her mother told the manager the employee was sick, but that she did not know what was wrong. The manager decided to fire her on this occasion because it was her fourth unexcused absence in three weeks. The court concluded that the note and mother's statement to the manager were not sufficient to put WalMart on notice of the FMLA qualifying nature of the leave. Factors the court

considered important were (1) the nebulousness of the note and mother's statement; (2) the employee made no other attempt to contact WalMart until after she went to the doctor four days later; (3) the employee had previously requested medical leave and was well aware of the forms that needed to be filled out to obtain medical leave; (4) that in the three weeks proceeding the leave, she had three unexcused absences. The court concluded:

Requiring an employer to undertake to investigate whether FMLA leave is appropriate each time an employee, who has been absent without excuse three times in the preceding three weeks, informs the employer that she will not be at work "that day" because she is "having a lot of pain in her side" or is "sick", is quite inconsistent with the purposes of the FMLA, because it is necessary for the protection of the employees who suffer from "serious health conditions", and would be unduly burdensome for the employers, to say the least."

Satterfield, 135 F.3d at 981. The employee also tried to rely on two doctor's notes submitted to WalMart after the decision to terminate her had been made. Neither of these notes addressed her being absent from work on the day she was fired. Instead, they referenced a period beginning shortly after her termination. The court wasted little time dismissing these notes as adequate notice. "It was either too little, or too late, or both." Satterfield, 135 F.3d at 981.

A similar case is McGraw v. Sears, Roebuck & Co., 1998 WL 650896 (D. Minn. 1998). There the court held, "[A] mere declaration that an employee is going to counseling, or that a family member is ill, is insufficient to comply with FMLA's notice requirement. While an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant." See also Austin v. Haaker, 76 F.Supp.2d 1213 (D. Kan. 1999) (statement by employee that he was ill and would not be in to work not sufficient to put employer on notice).

On the other hand, some courts have held significantly less information satisfies the employee's notice obligations. For example, a district court in California held statements that the employee was "sick" combined with subsequently submitted doctor's notes to satisfy the notice requirement.

Here, Sims notified AC Transit of his need for leave “as soon as practicable” and submitted his medical notices to AC Transit within the outer limit of two days after his return to work. It is undisputed that Sims called into work on April 18, 1994 and told the dispatcher that he “needed to be put on the sick book.” AC Transit concedes that during Sims’ absence, Sims went into the bus yard on at least three occasions and signed the “sick book.” AC Transit also concedes that Sims submitted the three doctor’s slips within two days of his return to work. This was sufficient information to put AC Transit on notice that Sims’ absence was due to a potentially FMLA-qualifying reason, and thus triggered AC Transit’s duty to inquire further into whether the leave qualified for FMLA protection.

Sims v. Alameda-Contra Costa Transit Dist., 2 F.Supp.2d 1253 (N.D. Cal. 1998). But see, Slaughter v. American Bldg. Maintenance Co. of New York, 64 F.Supp.2d 319 (S.D. N.Y. 1999) (employee’s notifying his employer he was sick combined with doctor’s notes provided more than two days after the absence was not sufficient evidence to grant employee summary judgment on issue of notice.).

Likewise, in Brannon v. Oshkosh B’Gosh, Inc., 897 F. Supp 1028 (M.D. Tenn. 1995), the employee called the employer and said she was staying home to take care of her “sick” daughter. The court held this statement was sufficient to put the employer on notice of the potentially FMLA qualifying nature of the leave. If the employer desired more information, it was up to the employer to ask for it. The employer made no inquiries. Therefore, the employer’s assessment of points against the employee for these absences and her subsequent termination because of them violated the FMLA.

The nebulous notice standards have resulted in conflicting decisions. In Reich v. Midwest Plastic Engineering, Inc., 2 WH Cas.2d 1409 (W.D. Mich. 1995) the employee told her employer that she had chicken pox when she missed a week of work. However, she did not tell the employer she had been hospitalized for chicken pox, nor that she was under the continuing care of a health care provider for chicken pox. The court held these communications did not provide the employer with the information about her condition necessary to entitle her to FMLA leave. It reasoned because of these omissions, the plaintiff “failed to communicate sufficient information to inform Midwest that her leave was as the result

of a ‘serious health condition’ and was, therefore, protected as FMLA qualifying leave.” Merely notifying the employer of a medical condition without advising it of any of the other requisites entitling an employee to leave was not enough. See also Johnson v. Primerica, 3 WH Cas.2d 109 (S.D. N.Y. 1996) (employee’s intimating to his employer his son was ill was insufficient notice to entitle him to FMLA leave).

But in George v. Associated Stationers, 932 F. Supp. 1012 (N.D. Ohio 1996), the court reviewed the termination of another employee who missed work on account of chicken pox. The employee, prior to seeing a doctor, called his supervisor and told him he could not work because he had chicken pox. The employer terminated the employee without further inquiry because this absence put him past the limit of the employer’s no-fault attendance policy.

The court held the termination was unlawful. In discussing the notice given by the employee, it held:

George contacted his supervisor the morning of January 3, thus supplying the required verbal notification that he needed the qualifying leave. He was not required to assert rights under the Act. 29 C.F.R. § 825.303(b); Hendry v. GTE North, Inc., 896 F. Supp. 816, 828 (N.D. Ind. 1995). The obligation shifted to the employer to determine whether leave was sought under the Act and to obtain any additional information. *Id.* If the Company required medical certification in conjunction with a leave request, it was required to give notice of its demand to George. 29 C.F.R. § 825.305.

Id. at 1016.

An employee mentioning a hospital stay may reduce the amount of information sufficient to serve as notice. In Bryant v. Delbar, 18 F.Supp. 2d 799 (M.D. Tenn. 1998), the plaintiff had advised the employer “My son is in the hospital and I’ve got to work things out.” The court concluded that this statement gave the employer sufficient “concrete” information to recognize the possibility that FMLA leave was involved. The employer’s assessing a half point penalty under its attendance policy for this absence violated the FMLA. See also Vincent v. Wells Fargo Guard Services, Inc. of Fla., 3

F.Supp.2d 1405 (S.D. Fla. 1998)(plaintiff's wife's advising employer he was being hospitalized was sufficient notice); Routes v. Henderson, 58 F.Supp.2d 959, 981 (S.D. Ind. 1999) (“When Routes notified Gould that he needed time off from work to be treated for his severe headaches on an inpatient basis at a hospital, he supplied sufficient notice to his employer that his leave might qualify for FMLA-protection.”).

The type of condition the employee mentions may also play a large part in whether notice is proper. A district court in California concluded: “This Court finds that, as a matter of law, a reasonable jury must find that an employee who told his employer that his son was HIV positive and had a very high fever and that he ‘cannot leave him when he is so ill,’ provided sufficient notice that he needed leave because of his son's serious medical condition. Mora v. Chem-Tronics, Inc., 16 F.Supp.2d 1192, 1212 (S.D. Cal. 1998). See also Vargo-Adams v. U.S. Postal Service, 992 F. Supp. 939 (N.D. Ohio 1998)(employee's claim she advised her absences were due to migraine headaches created issue of fact as to whether she had given proper notice). But see, Seaman v. CSPH, Inc., 179 F.3d 297 (5th Cir. 1999) (employee's statement to supervisor that he might need to seek treatment for bipolar disorder not specific enough where employee did not schedule or seek to schedule time off).

The employer's providing the employee with the FMLA forms has resulted in two different holdings. In one case, the court found that the employer's providing FMLA information to the employee prevented it from claiming it did not have adequate notice. “Furthermore, in the exchange of correspondence, defendants repeatedly refer to the FMLA. Therefore, it is incongruous for the defendants to claim that the plaintiff failed to provide adequate notice...” O'Hara v. Mt. Vernon Bd. of Educ., 16 F.Supp.2d 868, 890 (S.D. Ohio 1998). In another case, the employer's providing FMLA request forms combined with the employee's failure to return the completed forms resulted in the holding that the employer did not have notice. In Carter v. Ford Motor Co., 121 F.3d 1146 (8th Cir. 1997), the employee told his supervisor that he was sick and would be out for a few days. The court

held that this was insufficient notice in light of the employee's complete failure to turn in the medical leave request forms. See also Sampson v. Citibank, F.S.B., 53 F.Supp.2d 13, 19 (D. D.C. 1999) ("Here, Plaintiff was advised in writing of her FMLA option on at least three occasions and further told that she affirmatively had to seek such leave. ... Notwithstanding, Plaintiff never expressly requested FMLA leave and, as a result, the Court concludes that she cannot now complain that it was denied to her.").

Where an employer has prior notice of an employee's chronic condition, it has to be particularly sensitive to the employee's reference to that condition. In Ware v. Stahl Specialty Co., 4 WH Cas.2d 974 (W.D. Mich. 1998) the employer knew the employee suffered from migraine headaches. The employer's knowledge included the employee stating at the outset of employment that he took prescription medication for migraine headaches, the employee's supervisor's awareness that he took several days off because of migraine attacks, that the employee had previously left work early to go to the emergency room because of migraine headaches, and that the employee had submitted a doctor's notice indicating that his absence was due to migraine headaches. Thus, when the employee called and said he would be absent due to a "headache," the employer had sufficient notice of the FMLA qualifying nature of the leave. See also Barnett v. Revere Smelting & Refining Corp., 67 F.Supp.2d 378 (S.D. N.Y. 1999) (employer's knowledge of employee's heart condition created issue of fact as to whether his calling in with "chest pains" was sufficient notice to employer of need for FMLA leave); Rhoads v. E.D.I.C., 956 F. Supp. 1239 (D. Md. 1997) (employee created issue of fact with respect to notice where the employer was aware of her absence due to asthma and the employee called in while on leave and stated she still did not feel well enough to work). But see, Bailey v. Amsted Industries Inc., 172 F.3d 1041, 1046 (8th Cir. 1999) ("Bailey argues that the notice requirements were satisfied by the company's knowledge that he had serious medical conditions, was under medical care, and needed to miss work from time to time. An attempt to satisfy the notice requirements by an indication that he might

have to be absent at some unforeseen time in the future satisfies neither the requirement of notice of "the anticipated timing and duration of the leave," 29 C.F.R. § 825.302(c), nor the requirement of notice "as soon as practicable if dates ... were initially unknown," 29 C.F.R. § 825.302(a.)

Note, however, that at least one court has held an employer may require employees with chronic conditions to comply with the employer's policy to call in every day they are going to be absent as long as their medical condition does not prevent them from doing so. Holmes v. Boeing Co., 1999 WL 9760 (10th Cir. 1999).

Notice of a tragedy may increase the employer's duty to inquire. In Stubl v. T.A. Systems, 984 F. Supp. 1075 (E.D. Mich. 1997), the court concluded the employee's statement that he needed to take a personal leave "based on my personal loss caused by the death of [son] with regards to my personal health" was sufficient to put the employer on notice of the potentially qualifying nature of the leave.

It is important to document conversations with employees regarding absences in order to defeat a change in stories about the absence. One court held that where the employee provided the employer with a non-qualifying reason for leave, his own poison ivy, and later changed his story to state a qualifying reason, he was needed to care for his daughter during her recovery from surgery, he had not given proper notice. Godwin v. Rheem Manufacturing Co., 15 F.Supp.2d 1197 (M.D. Ala. 1998).

Where an employee deliberately withholds information regarding her condition, she has not given proper notice. In Gay v. Gilman Paper Co., 125 F.3d 1432 (11th Cir. 1997), the plaintiff was admitted to a hospital for a nervous breakdown. Shortly thereafter, her husband called her employer and said she had been admitted to the hospital "for some tests." Under oath, he admitted he had deliberately lied about her condition. The court concluded that because her husband had withheld information about the true nature of her condition, the burden never shifted to the employer to obtain

more information about her condition and the employer was not adequately apprised of the employee's need for leave.

“Where the employee provides the employer with a reason for his absence that the employer, based on the physician's certification, knows is not ‘qualifying,’ the Act and the regulations place no obligation on the employer to grant the employee FMLA leave.” Stoops v. One Call Communications, Inc., 141 F.3d 309 (7th Cir. 1998). Additionally, where an employee's doctor certifies the condition does not incapacitate the employee, the employer need go no further in concluding the leave is not FMLA leave. *Id.* Thus, in Stoops, because the employee's doctor certified that the employee's chronic fatigue syndrome did not incapacitate him, the employer acted properly in denying his request for FMLA leave. Moreover, where the employee later requests leave for the same condition that has been determined to be non-qualifying, the employer may rely on the prior certification to conclude the leave is not FMLA qualifying in the absence of conflicting information. The employer need not request a new medical certification on the off chance the condition is now qualifying. *Id.*

Courts tend to give significant weight to information provided by doctors. In Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043 (8th Cir. 1999) an employee was released to return to work with restrictions following a period of leave for an arm injury. After working for a few days, she notified her employer that she would not be coming in because her arm was numb. She did not report to work the next three days and was unsuccessful in her efforts to contact her employer. During that week, the employer called the doctor twice to determine if the restrictions had changed. Both times, the doctor indicated the restrictions remained the same and the plaintiff was released to return to work with restrictions. The employer then terminated the employee for job abandonment. The court upheld the jury's determination the employee's statement she could not come in because of numbness in her arm was insufficient to put the employer on notice that the condition qualified for FMLA leave. The court did not address, however, the FMLA's prohibition on forcing an employee to come back to work before

they are fully recovered from a serious health condition. In this case, the plaintiff could have argued that the employer was aware of her continued need for FMLA leave because she remained under restrictions that prevented her from performing the full scope of her job despite the fact she had tried to return to work.

An employer must be particularly careful when an employee does mention the FMLA. A classic example of how not to respond to an employee's request for leave was presented in Ozolins v. Northwood-Kensett Community School Dist., 40 F.Supp.2d 1055 (N.D. Iowa 1999). There, the employee, a teacher, provided a note stating, "I would like to request the rest of this week to help take care of my mother. She fell Friday--had x-rays--nothing broken but is hard for her to walk. Her family doctor is Dr. Ronald Creswell in Spencer, if need of verification." The employer denied this request that day. After the denial, the employee had a long discussion with her supervisor detailing her mother's condition (which was more significant than simply difficulty walking) and expressly claiming her entitlement to FMLA leave. Her request was again denied. Nevertheless, she took the rest of the week off and the next morning had her mother's doctor fax her employer a note stating, "Elina's mother is having medical problems and Elina's help is needed. Could she please be excused from school for a few days." Despite having all this information, the employer suspended her without pay for 10 days for missing the remainder of the week. At the school board hearing regarding the suspension, the superintendent who denied the leave testified, "There was no indication in the original request that she was even requesting family medical leave. You have to request those types of things. They are just not granted." The court concluded that the employee provided sufficient information to put the employer on notice of the FMLA qualifying nature of her leave and that the employer's suspension of her for taking this time off was a willful violation of the FMLA.

An employee cannot give notice he needs FMLA leave after he is terminated or resigns. Hammon v. DHL Airways, Inc., 165 F.3d 441 (6th Cir. 1999) (employee's failure to notify his

employer of his medical condition until after he resigned did not satisfy notice requirements); Brohm v. IH Properties, Inc., 149 F.3d 517 (6th Cir. 1998) (employee's failure to request any leave during his employment defeated FMLA claim).

c) Practical Tips For Dealing With Notice Issues

Some simple rules can be formulated from these cases. First, the employer should concentrate on the objective facts surrounding the particular absence, i.e. has it lasted more than three days, has the employee seen a doctor, has the employee identified his condition as a known serious condition such as cancer. The employer should refrain from making decisions based on subjective beliefs about the condition. In Manuel, the qualifying condition was complications arising from removal of an ingrown toenail. Second, if the employer feels it cannot make a determination with the information it has, it should attempt through informal means to obtain more from the employee. Third, the employer should never wait until the employee comes back to work before seeking information from the employee.

3. Noncompliance With Notice Requirements

Before assessing penalties against an employee for noncompliance with the notice requirement, it must be clear the employee was aware of the notice requirement. § 825.304(c). Also, it must be clear the leave was foreseeable. If the leave is foreseeable, the employee fails to provide notice, and no reasonable excuse exists for the late notice, the employer may deny leave for 30 days. All penalties must be applied uniformly. § 825.304(b).

L. MEDICAL CERTIFICATION REQUIREMENTS

Generally, an employer is not entitled to require any form of certification with respect to leave taken for the birth or placement of a child. §825.305(a). The employer may require certification, however, for leave taken for the employee's own serious health condition or for the serious health condition of a child, parent, or spouse. § 825.305(a).

The employer must provide an employee a written initial request for medical certification. The employer need only provide verbal requests for all subsequent certifications. § 825.301(a). When the leave is foreseeable and 30 days notice of the need for leave has been provided, the employee should provide the medical certification before the leave begins. § 825.301(b). In situations where the leave is unforeseeable, the employer must generally request certification within two business days the commenced leave. § 825.305(b). At the time of the request the employer must also advise the employee of the anticipated consequences of an employee's failure to provide adequate certification. The employee's failure to provide the requested certification in a timely manner allows the employer to deny FMLA leave. If the certification is inadequate, the employer must provide the employee with sufficient time to remedy the inadequacy. § 825.305(d). When an employee substitutes paid leave for unpaid FMLA leave, the employer's sick leave certification policy, if less stringent, must be used. § 825.301(e).

1. Certification Information

A medical certification must provide the following information:

- The medical facts that support the condition's meeting the definition of serious health condition;
- The date the condition developed and likely duration;
- An estimate of the time needed for the employee to take care of an individual when the leave is for the care of a child, spouse, or parent;
- When leave is for the serious health condition of a family member, whether the family member requires assistance for basic needs or psychological support and/or if intermittent leave will be required;
- When leave is for the employee's own serious health condition, a statement that the employee is unable to perform the functions of his or her job and/or must be absent from work for treatment;
- For an employee's own serious health condition, whether intermittent leave is necessary and its expected duration;
- If intermittent leave is requested to care for a family member, the likely duration of the leave.

- If the condition is chronic (i.e. asthma) or pregnancy, the likely duration and frequency of episodes of incapacity;
- When intermittent or reduced schedule leave is requested for planned medical treatment, the expected dates and duration of that treatment. § 825.306.

2. Requesting a Second Opinion

If the employer doubts the validity of the initial certification, it may, at its own expense, require a second certification by a health care provider, which it designates or approves. The health care provider cannot be regularly employed by the employer. § 825.307(a)(2).

Thus, the Seventh Circuit refused to consider a second opinion evaluation by a doctor employed by the Plaintiff's employer. Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997). However, in a separate case, the Seventh Circuit held that an employee's failure to appear for a second opinion by a doctor not regularly employed by the employer eliminated the employee's FMLA protections. The employer lawfully fired the employee for failing to appear for the second opinion examination. Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711 (7th Cir. 1997).

3. Requesting a Third Opinion

If the first and second opinions conflict, the employer may, at its own expense, require a third certification, supplied by a health care provider designated or approved jointly by the employer and the employee. The third opinion is final and binds both the employer and the employee. § 825.307(c).

The practical effect of the provisions allowing second and third medical certifications is the employer will have to pay for two certifications to overcome the employee's initial medical certification: the second that creates the "tie," and the third that breaks it.

4. Recertification

If the reason for the FMLA leave is pregnancy, chronic, or permanent/long-term conditions, recertification may be requested no more than every 30 days in connection with the absence of an

employee unless (1) circumstances of the previous certification have changed; or (2) the employer receives information casting doubt on the employee's stated reason for the leave § 825.308(a).

If the initial certification states a duration of more than 30 days, the employer may not request recertification until the duration ends. § 825.308(b).

For any other conditions, the employer may request that an employee obtain recertification of the employee's medical condition at reasonable intervals. Normally, this recertification cannot occur more often than once every 30 days. § 825.308(c). Recertification may occur sooner than thirty days if the employee asks to extend the leave [§ 825.308(c)(1)], the circumstances providing the basis of the medical certification change [§ 825.308(c)(2)], the employer receives information calling into question the validity of the certification [§ 825.308(c)(3)].

5. Noncompliance with Certification Requirements

If the employee does not provide medical certification when requested and the leave was foreseeable, the employer may delay the leave until the required certification is provided. Toro v. Mastex Indus., 32 F.Supp.2d 25 (D. Mass. 1999). If the leave is not foreseeable and the employee does not provide requested certification in a reasonable time under the circumstances, usually within 15 days after the request, the employer may delay continuation of the leave. If the employee does not produce the certification, the leave is not FMLA leave. § 825.311(a);(b). When, due to a change in circumstances, an employee learns more or less leave than originally requested is necessary, the employee must inform the employer. § 825.309(c).

If an employee returns a certification sooner than the 15 days allowed, establishing that the condition is not FMLA qualifying, the employer may act on that information, i.e. treat the absence without regard to the FMLA. It is not required to wait until the expiration of the fifteen days to act. Boyd v. State Farm Insurance Companies, 158 F.3d 326 (5th Cir. 1998).

Where the need for FMLA leave was unforeseeable the employee must provide the medical certification within the time frame specified by the employer which time frame must be at least fifteen calendar days, unless it is not practical to do so despite the employee's best efforts. § 825.305(b). One court has found that where plaintiff's physician was unavailable during the fifteen-day period in which the certification was requested and the doctor returned upon a holiday weekend the court was unable to determine as a matter of fact that plaintiff's delay was unreasonable. Uema v. Nippon Express Hawaii, 26 F.Supp.2d 1241 (D. Hawaii 1998).

M. RETURNING TO WORK

An employer may require an employee to indicate whether he or she intends to return to work. This request can be made periodically. § 825.309(a). The request, however, must be nondiscriminatory. When the employee provides unequivocal notice that he or she does not intend to return to work, the employer is no longer obligated to maintain health benefits or to restore the employee at the end of leave. § 825.309(b). An employee who fraudulently obtains leave is not protected by the Act's restoration or benefits protections. § 825.312(g).

1. Fitness-for-Duty Reports

An employer may require an employee to provide a fitness-for-duty report before restoring the employee if the employee took FMLA leave because of his or her own serious health condition. § 825.310(a). This prerequisite to restoration must be imposed pursuant to an employer's uniformly applied policy or practice that requires submission of fitness-for-duty reports from all employees returning to work after suffering similar serious health conditions. The employer must notify the employee the fitness-for-duty report will be required when the employee first requests FMLA leave. § 825.310(e). The fitness-for-duty report can only be requested when it is job-related (i.e. the condition affects the employee's ability to do his job). It may only relate to the condition for which FMLA leave was taken. § 825.310(c). The cost of the certification is to be borne by the employee. § 825.310(d).

An employer may not require certification of fitness to return when an employee takes intermittent leave. The employer may not require a second or third fitness-for-duty report. § 825.310(e). The employer may delay reinstatement until certification is provided. § 825.311(c). Thus, filling an employee's position while he is on leave does not automatically establish a violation. Watkins v. I&S Oil Co., 164 F.3d 55 (1st Cir. 1998).

The FMLA regulations state the medical certification "need only be a simple statement of an employee's ability to work." § 825.310(c). This limitation on the substance of the certification is not a substitute for a return to work physical given under the ADA. Nor does the limitation interfere with an employer's ability to request a physical for determining an employee's ability to perform the essential functions of his job. Porter v. United States Alumoweld Co., 125 F.3d 243 (4th Cir. 1997). There is contrary authority on this point. For an extended discussion of the issue, see Section IX, B., *infra*.

N. EMPLOYMENT AND BENEFITS PROTECTION

Generally, an employee is entitled to return to the same position he or she held before the leave began. However, the employer may put the returning employee in an equivalent position, with equal benefits, pay, and other terms and conditions of employment. § 825.214(a). Most courts have held, if upon returning, the employee cannot perform the essential functions of the position he left, he has no right to restoration. Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998)(employee unable to return at end of twelve week period not protected by the FMLA); Green v. Alcan Aluminum Corp., 198 F.3d 245 (table), 1999 WL 1073686 (text) (6th Cir. 1999) (employer did not violate FMLA by terminating employee unable to return to her position at the end of her leave); Clark v. New York State Elec. & Gas Corp., 67 F.Supp.2d 63, 80 - 81 (N.D. N.Y. 1999) ("[T]he fact that Plaintiff was not restored to her position at the end of the 12-week period did not infringe her FMLA rights--it is undisputed that at the end of that period she remained unable to perform the essential functions of her position."); Tardie v. Rehabilitation Hosp. Of Rhode Island, 168 F.3d 538 (1st Cir.

1999) (employee unable to work more than 40 hours a week not entitled to reinstatement to job requiring she work 50 to 60 hours a week); Nunes v. Wal-Mart Stores, 980 F. Supp. 1336 (N.D. Cal. 1997), reversed on other grounds, 164 F.3d 1243 (9th Cir. 1999) (employer entitled to terminate employee who did not return to work at conclusion of twelve-week leave period); Santos v. Shields Health Group, 996 F. Supp. 87 (D. Mass. 1998) (employee unable to return to work at end of twelve weeks not entitled to restoration); Urbano v. Continental Airlines, Inc., 3 WH Cas.2d 1032 (S.D. Tex. 1996), *aff'd*. 138 F.3d 204 (5th Cir. 1998) (employee who was still pregnant and unable to work at the end of her 12 weeks of leave had no right to be restored to an equivalent position). The Americans With Disabilities Act likely covers this situation. § 825.214(b).

Recently, an employee's inability to return to work at the end of his FMLA leave did not stop a jury from concluding that his termination, two weeks into the leave, was in retaliation for his taking FMLA leave. Rogers v. AC Humko Corp., 56 F.Supp.2d 972 (W.D. Tenn. 1999). Nevertheless, the judge refused to award backpay damages finding the employee's continuing disability would have kept him from working during the period for which backpay was sought.

One circuit has held that the employer "may take into account the employee's physical capabilities in determining the equivalent work involved." Watkins v. I&S Oil Co., 164 F.3d 55 (1st Cir. 1998). In Watkins, the court concluded without much discussion, that despite the fact the employee could no longer perform his former job, the employer was required to provide him reasonably equivalent employment. The court also recognized there is uncertainty as to the respective obligations of the employer and the employee to communicate when an employee is ready to return to work, but is not being returned to his former position. It did not reach any conclusions as to these obligations, and limited its holding to the conclusion that the employee does not have to show up on the employer's doorstep to satisfy his obligation to report to work at the end of leave. Rather, he could communicate his ability and willingness to return by telephone.

Because of the uncertainties involved in the equivalent position analysis, it is probably best that an employer be aggressive in seeking information regarding an employee's return to work and place all offers of restoration in writing clearly delineating the positions being offered.

The Eighth Circuit recently allowed an employer to utilize the employee's inability to return to work at the end of twelve weeks as a defense to a claim of failure to reinstate even though the employee was actually terminated long before the end of his protected leave. Reynolds v. Phillips & Temro Industries, Inc., 195 F.3d 411 (8th Cir. 1999). In Reynolds, the employer terminated the plaintiff for violating its no call no show rule during the second week of his absence for a single serious health condition. The facts of the case are sketchy and it is unclear whether the employer was even aware the employee's leave was protected or had designated the leave as FMLA. The Eighth Circuit ignored these issues and exonerated the employer by focusing on the evidence establishing the employee was not physically able to perform his job at the end of the twelve-week period. Because he was not able to perform, he had no right to reinstatement. This analysis reflects a growing trend of court's being very practical in the application of the FMLA. Based upon the sketchy facts, it appears the employer violated the FMLA on the date it terminated the plaintiff. At that time, it had notice of the employee's condition and his need for leave. But instead of looking at the employer's misstep at the time it took action, the court essentially utilized a "no harm, no foul analysis." Since the employee had no right to reinstatement based upon his physical condition at the end of the twelve weeks, it did not matter that the employer terminated him ten weeks early. This outcome may have been different had there been issues relative to the employee's health insurance being terminated 10 weeks early, but health insurance does not appear to have been an issue in the case.

1. Case Law Interpreting What Constitutes An Equivalent Positions

In Lobster v. Sierra Power Co., 12 F.Supp.2d 1105 (D. Nev. 1998), the court concluded evidence that the job offered to the plaintiff paid a lower salary than the one she held when she went on leave constituted evidence the position was not equivalent.

In Blackwell v. Harris Chemical North America, Inc., 11 F.Supp.2d 1302 (D. Kan. 1998), the allegation the plaintiff was placed on probation when she returned from her leave was a sufficient allegation of failure to restore to an equivalent position to withstand a motion to dismiss.

In Land v. Sheraton Tunica Corp., 3 WH Cas. 2d 1694 (N.D. Miss. 1997) the employee returned to her same job with the same wages and benefits. However, the shift she worked prior to her FMLA leave was no longer available. The court held that changing the employee's shift did not violate the obligation to restore the employee to her position.

In Lempres v. CBS Inc., 916 F. Supp. 15 (D. D.C. 1996), the plaintiff went on a six-month maternity leave provided by the employer. Shortly before she was to return to work, she called to inquire about her job. She was invited to return to the same position she held before she went on maternity leave. During the conversation, she inquired as to the permanence of the position, to which the supervisor replied, "It is as permanent as any job in the news business." The plaintiff refused to return to work claiming she was constructively discharged. She brought suit alleging the employer's refusal to guarantee the position would have some permanence to it violated the FMLA. The court had no trouble in rejecting this contention. It held, "[T]he FMLA does not require employers to give returning employees any assurances of job security to which they would not have been entitled, prior to taking maternity leave."

In Brown v. J.C. Penney, Corp., 924 F. Supp. 1158 (S.D. Fla. 1996), the plaintiff, a customer service manager, took a covered leave to care for his sick father. He requested a 12-week leave, but informed his supervisor that he might return sooner. In the eighth week of the leave, his father died. The

Plaintiff did not report this to his employer, but stayed on leave until the end of the 12-week period. When he reported to work at the end of the twelfth week, his employer assigned him to a sales associate position at his former rate of pay. Plaintiff refused to return in this position and was terminated. He filed suit alleging his employer violated the ADA by failing to return him to his former position. The court found no violation because the plaintiff gave up his FMLA rights when he failed to return upon his father's death. Looking to the FMLA provisions providing for leave to care for a family member with a serious health condition, the court reasoned the plaintiff's father's serious health condition ended upon his death. As such, time spent by plaintiff tending to his father's estate after the death was not "caring for a family member with a serious health condition," and hence, not protected by the Act. See also Beal v. Rubbermaid Commercial Products, 972 F. Supp. 1216 (S.D. Iowa 1997) (FMLA does not require leave because of the death of a relative).

In Peterson v. Slidell Memorial Hospital and Medical Center, 3 WH Cas.2d 1131 (E.D. La. 1996), the plaintiff, a secretary, alleged, when she returned from a protected leave, the employer had assigned her to a non-equivalent secretarial post that had more demanding typing requirements than the one she held before the leave. The court held the allegation the new position had more demanding typing requirements was sufficient to withstand a 12(b)(6) motion to dismiss on the issue of the equivalency of the position.

In Patterson v. Alltel Information Services, Inc., 919 F. Supp. 500 (D. Me. 1996), the employer decided to demote the plaintiff three weeks before he went on FMLA leave. The leave had not been requested at the time of the demotion. However, the employer did not implement the demotion until after the plaintiff had started his leave. When the plaintiff returned, it was to a new position. Shortly following his return, the employer had a reduction in force and laid plaintiff off. The plaintiff claimed the employer's failure to return him to his former position resulted in his being in a position subject to layoff. The court rejected this contention and held that the timing of the demotion was irrelevant to the plaintiff's

right to be returned to an equivalent position. Rather, the critical issue was the timing of the decision to demote the plaintiff. As this had indisputably occurred prior to the plaintiff's taking leave, he was only entitled to be returned to the position that was envisioned at the time the decision to demote was made.

2. Accrual of Benefits

All benefits accrued prior to the leave cannot be reduced or taken away as a consequence of taking the leave. The employee is not entitled to accrual of seniority while on leave. § 825.215(d)(2). Employees are not entitled to any right, benefit, or position to which they would not have been entitled had they not taken the leave. § 825.215(e); 216; 312(d). For example, if an employee is to be laid off or terminated prior to the leave, then the reinstatement rights are whatever they would have been but for the leave. § 825.216(a). The employer will carry the burden of proving the termination or layoff would have taken place if not for the employee's leave. § 825.216. Any period of FMLA leave shall not be considered a break in service for vesting purposes under the employer's pension and retirement plans. However, unpaid FMLA leave need not be counted as service for vesting, accrual of benefits and eligibility to participate. § 825.215(d)(4).

3. Health Insurance Premiums

If the employer requires employee contributions to a health plan, and the employee requests FMLA leave, the employer and employee must make arrangements for payment of the employee's contribution to the health care premium. The method of payment must be determined in advance of the leave and the employer must provide written notice of the method before leave commences. § 825.210.

If an employee does not make a required payment, the employer must maintain the employee's health care benefits for 30 days. § 825.212(a)(1). In order to remove the employee from the Plan, the employer must mail notice of the impending removal at least 15 days prior to the action.

§ 825.212(a)(1). Even if coverage lapses during the FMLA leave,³ when the employee returns to work, the employee must be re-enrolled, and is not required to qualify, wait a certain period, or suffer any other consequence as a result of the reinstatement. § 825.212(c). The employer may require the employee to repay the amount of the health care premium the employer paid on behalf of the employee during the 30 day grace period to prevent the coverage from lapsing. The employer may not recover its share of the premium paid during the grace period although coverage lapsed. § 825.212(b).

4. Status of Benefits Upon Failure to Return to Work

If an employee does not return to work after the FMLA leave, the employer may recoup the health care premiums it paid during the leave period, including any premium the employer paid during the first 30 day period and before dis-enrolling the employee. § 825.213. These premiums may be deducted from an employee's unpaid wages, vacation pay, severance pay, and any other moneys due the employee from the employer, provided applicable wage and hour laws are otherwise not violated. § 825.213(f). However, the employer will have no right to repayment if the employee does not return to work because of a continuation of the same serious medical condition that created the need for the leave or if the employee does not return to work because of circumstances beyond his or her control. § 825.213(a)(1);(2). An employee is considered to have not returned to work if the employee does not return to work for at least 30 calendar days after leave expires. § 825.213(c).

5. Non Health Insurance Benefits

An employer is not required to maintain benefits other than health insurance (i.e. disability, life insurance) during a period of unpaid FMLA leave. § 825.209. Upon the employee's return to work, however, these benefits must be restored as if no lapse in coverage had occurred. § 825.214; 215(d). Further, the employee may not be required to retake any physical exams or otherwise re-qualify for the

³ The employer should check the COBRA provisions to make sure that the employee's dis-enrollment does not trigger the requirement for a COBRA notice.

benefits. § 825.215(d). There is no provision in the regulations for requiring the employee to pay his/her share of these benefits while out on unpaid FMLA leave. If the employee fails to return to work, the employer may recover payments made for the employee's share of these benefits from the employee. § 825.213(b).

6. Limitations On The Right To Reinstatement

An employee is entitled to no greater right to reinstatement than he would be if he were not on leave. § 825.216. The employer has the burden of proving any adverse action affecting an employee on leave would have been taken even if the employee had not taken leave. § 825.216(a). This includes items such as elimination of the employee's position, reduced overtime and different shifts. § 825.216(a)(1);(2). See e.g., O'Conner v. PCA Family Health Plan, 5 Wage & Hour Cas.2d (BNA) 1409, 2000 WL 331666, -- F.3d – (11th Cir. 2000) (employee laid off in large scale reduction in force while on FMLA leave had no right to reinstatement); Illhardt v. Sara Lee Corp., 118 F.3d 1151 (7th Cir. 1997) (part-time attorney whose position was eliminated as part of a RIF not entitled to reinstatement); Maxwell v. American Red Cross Blood Services, 3 WH Cas.2d 633 (N.D. Ala. 1996) (employee whose position was eliminated while on FMLA leave is not entitled to reinstatement). **But see**, Vargas v. Globetrotters Engineering Corp., 4 F.Supp.2d 780 (N.D. Ill. 1998) (despite cessation of project to which employee was assigned while employee was on leave and elimination of employee's position, presence of permanent assignments in company headquarters created issue of fact existed as to whether employer had substantially equivalent employment it could have reassigned plaintiff to when she returned). This means that an employee on FMLA leave may be terminated for performance issues unrelated to the leave. See, e.g., Renaud v. Wyoming Department of Family Services, 2000 WL 139984, --- F.3d ----, (10th Cir. 2000) (employer did not violate FMLA when it terminated employee on FMLA for treatment of alcoholism based on violation of employer's substance abuse policy occurring prior to the beginning of the leave); Doe v. King County, 168 F.3d 498 (table), 1999 WL

50860 (text) (9th Cir. 1999) (same except drug use instead of alcohol); Hubbard v. Blue Cross Blue Shield Ass'n, 1 F.Supp.2d 867 (N.D. Ill. 1998) (“Consequently, if Hubbard would have been terminated because of poor performance regardless of whether she took leave, then Blue Cross did not violate the FMLA.”). Nevertheless, at least one employee has successfully challenged her employer’s claim her position was eliminated. Atchley v. Nordam Group, Inc., 180 F.3d 1143 (10th Cir. 1999). In Atchley, the plaintiff, a document clerk, was the only employee whose job was eliminated during a restructuring. After her termination, the company hired another document clerk on a different project performing the same functions as the plaintiff. The court held this evidence was sufficient to support the jury’s conclusion that the plaintiff’s job would not have been eliminated if she was not on leave.

Nor does an employee’s request for leave insulate him from adverse action pending before the beginning of the leave in the absence of a causal connection between the request and the termination. Gunnell v. Utah Valley State College, 152 F.3d 1253 (10th Cir. 1998) (employee terminated for insubordination and disruptive behavior prior to date leave was to commence not entitled to sue under the FMLA in absence of causal connection between request for leave and termination). In Cianci v. Pettibone Corp., 152 F.3d 723 (7th Cir. 1998) the court refrained from addressing the issue of whether an employee terminated prior to a scheduled leave had an FMLA cause of action. Rather, it concluded the employee was unable to prove that in such a situation, the FMLA’s limited remedies provided her any relief. It concluded the absence of a remedy defeated the plaintiff’s claim.

The Fifth Circuit has now weighed in on the issue of an employee’s right to restoration with a rather confusing opinion. In Nero v. Industrial Molding Corp., 167 F.3d 921 (5th Cir. 1999), the plaintiff was terminated upon his return from a medical leave of absence resulting from a heart attack. He sued alleging, 1) he was terminated in violation of ERISA’s anti-retaliation provision due to the employer’s fear his condition would cause insurance premiums to skyrocket and 2) the employer’s failure to return him to his position at the end of his leave violated his right to be restored to an

equivalent position. He did not claim the employer terminated him because he took leave. The employer defended both claims on the grounds the decision to terminate was made prior to his taking the leave because of his poor performance and prior to its knowledge of his heart attack.

The case was tried to a jury who concluded that the decision to terminate the plaintiff did not occur prior to the heart attack as the employer contended. Rather, it concluded the decision came while he was on leave. As such, it determined that the real reason he was terminated was because of the employer's fear of increased health insurance premiums. The Fifth Circuit upheld this determination as supported by the evidence. Up to that point, the case was unremarkable.

The Fifth Circuit then turned to the plaintiff's claim the employer violated the FMLA by failing to restore him to his position when he returned from leave. After expressly noting that the plaintiff was not claiming he was retaliated against for taking FMLA leave, it concluded, in what looks suspiciously like a retaliation analysis, that, the plaintiff was entitled to be restored to his position.

On the basis of the evidence, a jury could reasonably believe that Nero was performing his job properly for a number of months and that the time of IMC's termination of Nero (days after his heart attack) was not merely a coincidence. A jury also could reasonably believe that IMC's stated reasons for firing Nero--substandard management practices and department restructuring--were not the real reasons for its termination decision. Although conflicting, some evidence supports the jury's finding that the decision to terminate Nero did not occur prior to his heart attack, and therefore the FMLA entitled Nero to return to his job as plant manager.

Id. at 926. By focusing on the timing of the decision to terminate the plaintiff, the court missed a crucial point. The FMLA does not protect an employee on FMLA leave from adverse action while on leave that is not "because of" the leave. The supposition in the regulations is that evaluating the rights of an employee terminated will be done using a retaliation analysis, i.e., can the employer prove the action would have been taken had the employee not been on leave at the time the action was taken. §825.216. If an employer terminates an employee on FMLA leave, and he would have been terminated regardless

of the leave, he loses his substantive right to restoration. He has been terminated. On the other hand, if the employee proves he was terminated because he was on leave, he has proven a retaliation case that, as part of damages, may entitle him to restoration. But he has not been subjected to a refusal to restore him to the same or equivalent position.

In *Nero*, the court found a violation without any discussion of the reasons underlying the employer's decision to terminate the employee. Instead, it focused on the timing of the decision alone. But timing, while on occasion sufficient to prove a retaliation case, cannot defeat an employer's right to terminate an employee on FMLA leave. Perhaps the court disbelieved the employer's stated reason for terminating the employee, the employee's performance. But the employee admitted that he was not terminated because he took FMLA leave. This should have defeated his FMLA claim.

O. KEY PERSONNEL EXCEPTION

If an employee is considered key, an employer may refuse to restore the employee if the restoration will cause "substantial and grievous economic injury" to the employer's operations. § 825.216(c). A key employee is a salaried employee who is one of the highest paid 10% of the employer's workforce within a 75-mile radius of the employee's worksite. § 825.217(a).

1. Key Personnel Determination

To determine whether an employee is one of the highest paid 10%, an employer must consider the employee's year-to-date earnings divided by the weeks the employee worked. The determination whether an employee is among the highest 10% must be made at the time the employee gives notice of the need for leave. § 825.217(c)(1);(2).

2. Granting Leave and Restoring Benefits to Key Personnel

When determining whether restoration of a key personnel would cause a substantial and grievous injury, the employer may consider the ability to replace or do without the employee, the cost of restoring the employee if a permanent replacement was hired while the employee is on leave, or the

effect of restoration on the operations of the company. § 825.218(b);(c).

The one case to analyze this issue relied on many factors in concluding the employee was in fact a key employee. In Kephart v. Cherokee County, 52 F.Supp.2d 607 (W.D. N.C. 1999), the employee at issue was the Tax Assessor. He requested leave under the FMLA during a time when his department was supposed to be sending out the tax bills for the year. The county, due to civil service rules, could not hire an interim replacement. If the bills did not go out, the county was going to be severely strapped for money. Under these circumstances, the court concluded that restoration of the employee would cause a grievous economic injury. The fact the employee's position and responsibility were directly involved in the collection of revenues was a significant factor in this decision.

To properly deny restoration to a key employee, an employer must first provide written notice to the employee that he or she is considered a key employee at the time leave is requested. § 825.219(a). The employer must also notify the employee of the potential consequences of the designation. §825.219(a). If the employer cannot inform the employee when the employee requests leave, the employer must provide notice as soon as practicable after making the determination. § 825.219(a).

The employer must, upon making the determination that substantial and grievous injury will occur, immediately in writing notify the key employer if it intends to deny restoration. The employee must then be given a reasonable time to return to work. § 825.219(c).

If the employee does not return to work upon notification of his or her status as a key employee, the employer must maintain health benefits and may not recover the cost of this maintenance. This obligation continues until the employee gives notice that he or she does not intend to return to work or until the employee is denied restoration when FMLA leave expires. § 825.219(c).

According to the regulations, if at the end at the leave, the key employee requests reinstatement, the employer must make a new and independent determination that reinstatement would cause severe

grievous injury at that time to deny reinstatement. § 825.219(d). One court noted this regulatory requirement appears to conflict with the statute, although it stopped short of declaring it invalid. Kephart v. Cherokee County, 52 F.Supp.2d 607 (W.D. N.C. 1999).

III. PROCEDURAL ASPECTS OF LITIGATING AN FMLA LAWSUIT

Employees may file either an individual or class action lawsuit against an employer if the employer failed to provide FMLA-required entitlements. The following is a discussion of some of the procedural aspects of FMLA litigation.

A. REMOVAL

Suits brought in state court may be removed to the United States District Courts as an action arising under the laws of the United States. Ladner v. Alexander and Alexander, Inc., 879 F. Supp. 598 (W.D. La. 1995). Additionally, it has been held to be an abuse of discretion for a district judge to remand pendent state law claims arising out of a termination that allegedly violated the FMLA. Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100 (5th Cir. 1996).

B. JURISDICTION

The federal district courts have jurisdiction to hear claims brought under the FMLA. However, that jurisdiction does not extend to purported FMLA claims against employers not covered under the FMLA. Thus, in Douglas v. E.G. Baldwin & Assoc., Inc., 150 F.3d 604 (6th Cir. 1998), the court dismissed for want of jurisdiction a claim against an employer not covered by the FMLA based upon the employer's alleged agreement in its handbook to comply with the FMLA. See also Hukill v. Auto Care, Inc., 192 F.3d 437 (4th Cir. 1999) (court has no jurisdiction in suit against entity that is not an employer under the FMLA's definition); Wascura v. Carver, 169 F.3d 683 (11th Cir. 1999) (same).

C. WAIVER

In determining the validity of an employee's release of FMLA claims, courts generally apply the knowing and voluntary standard. Under this standard, they consider, but are not limited to the following

factors: 1) clarity and specificity of the release language, 2) plaintiff's education and business experience, 3) amount of time plaintiff had for deliberation about the release before signing it, 4) whether plaintiff knew or should have known his rights upon execution of the release, 5) whether plaintiff encouraged to seek or in fact received benefit of counsel, 6) whether there was an opportunity for negotiation of the terms of the agreement, and 7) whether consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law. Riddell v. Medical Inter-Insurance Exchange, 18 F.Supp.2d 468 (D. N.J. 1998).

In Riddell, the court determined that an employee's waiver was not knowing and voluntary where 1) the release was presented to the employee at the exit interview, 2) neither the wording of the release nor the employer informed the employee she had time to deliberate or proposed a deadline for signing and 3) the employee, in fact, only deliberated for three to five minutes. Id.

One court, however, has concluded that an FMLA regulation prohibits employees from ever waiving their rights under the FMLA. In Bluitt v. Eval Co. of America, Inc., 3 F.Supp.2d 761 (S.D. Tex. 1998), the plaintiff was terminated on November 16, 1995. On December 1, 1995, in conjunction with the settlement of a sexual harassment lawsuit she had previously filed against the company, she signed a release including the provision, "[plaintiff] hereby irrevocably and unconditionally release and forever discharge[] EVALCA ... from all charges, complaints, claims, demands, liabilities, obligations, actions and causes of action of any kind or nature, including for attorneys' fees, interest, expenses and costs actually occurred, that exist or have accrued as of the date of this Agreement, whether known or unknown, suspected or unsuspected, ... arising out of or relating to the Civil Action or Bluitt's employment with EVALCA." She then filed suit alleging the employer had violated the FMLA when it terminated her. The employer defended with the release.

The DOL promulgated the following regulation under the retaliation provision of the FMLA.

Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA. For example, employees (or their collective bargaining representatives) cannot “trade off” the right to take FMLA leave against some other benefit offered by the employer.

§ 825.220(d). The court held, “On its face, this regulation seems to clearly rebut EVALCA's allegations that Bluit has waived her right to bring this lawsuit.” The court then concluded the regulation, as interpreted by the court, was a valid exercise of the DOL’s regulatory authority.

Actually, the regulation has nothing to do with waivers. It is intended to prevent employers from saying to employees, “Look, if you don’t take but six weeks of leave, I’ll give you a company car.” While the regulation represents a paternalistic attitude by the DOL, it certainly should not be read to be so paternalistic that an employee cannot release FMLA claims upon termination for money.

D. RIGHT TO JURY TRIAL

One court has held that the remedies provided by the FMLA are equitable in nature and therefore, a plaintiff in an FMLA action has no right to a jury trial. Hicks v. Maytag Corp., 3 WH Cas.2d 992 (E.D. Tenn. 1995).

The Sixth Circuit, however, concluded that there is a right to a jury trial under the FMLA. Frizzell v. Southwest Motor Freight, 154 F.3d 641 (6th Cir. 1998). It reasoned: 1) the FMLA provided for damages as well as equitable relief, 2) the FMLA was modeled after the FLSA which provided for jury trials; and 3) legislative history suggested Congress intended jury trials of FMLA claims. Several district courts have also concluded plaintiffs have a right to a jury trial. See, Mora v. Chem-tronics, Inc., 16 F.Supp.2d 1192 (S.D. Calif. 1998); Bryant v. Delbar Prods., Inc., 18 E.Supp.2d 799 (M.D. Tenn. 1998); Helmly v. Stone Container Corp., 957 F. Supp. 1274 (S.D. Ga. 1997); Souders v. Fleming Cos., 960 F. Supp. 218 (D. Neb. 1997)

Additionally, several FMLA cases have been tried to juries. See e.g., Haschmann v. Time

Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998); Cline v. Wal-Mart Stores, Inc., 144 F.3d 294 (4th Cir. 1998); McDonnell v. Miller Oil Co., Inc., 134 F.3d 638 (4th Cir. 1998); Miller v. Julia Corp., 3 WH Cas.2d 913 (S.D. Ohio 1996). The Fifth Circuit, without directly addressing the issue, has declared that certain determinations under the FMLA are jury questions. Hopson v. Quitman Country Hospital, 126 F.3d 635 (5th Cir. 1997) (what constitutes a change in circumstances, whether a plaintiff's notice is given as soon as practicable and whether an employee has made a reasonable effort to schedule her leave were questions for a jury).

E. JURY INSTRUCTIONS

The Sixth Circuit recently affirmed the use of a jury instruction defining “serious health condition” by quoting the definition from the statute with no reference to the regulatory definition. Keys v. Joseph Beth Booksellers, Inc., 173 F.3d 429 (6th Cir. 1999). The court concluded that the definition requested by the plaintiff based on the regulations would have required him to prove more than the jury instruction based on the statutory definition. Particularly, the regulation would have added the “period of incapacity” that is not part of the statutory text. Because it concluded the proposed definition was more onerous than the one given, the court concluded there was no harm to the plaintiff.

F. ARBITRATION OF FMLA CLAIMS

Courts have held that a plaintiff who is a party to an arbitration agreement may be compelled to arbitrate FMLA claims. O'Neil v. Hilton Head Hospital, 115 F.3d 272 (4th Cir. 1997); Satarino v. A.G. Edwards & Sons, Inc., 941 F. Supp. 609 (N.D. Tex. 1996). The language of the arbitration agreement is critical. In Satarino, the plaintiff had signed a training agreement, a Broker Agreement and a Form U-4. The Broker Agreement and the training agreement provided for arbitration of “any controversy or dispute arising between [Satarino] and Edwards in respect to ... his employment.” The Form U-4 provided for arbitration of “any dispute, claim or controversy that may arise between me [Satarino] and my firm.” The court held these provisions encompassed claims arising under the FMLA

and compelled binding arbitration. See also Shaw v. Walsh Services, Inc., 1997 WL 30907 (N.D. Tex. 1997).

Employers must be careful not to place significant burdens on the employee in their arbitration agreement. In Jones v. Fujitsu Network Communications, Inc., -- F.Supp.2d --, 1999 WL 1068467 (N.D. Tex. 1999), the court refused to enforce the provision of an arbitration agreement requiring the employee to pay half the cost of an arbitration proceeding as invalid. Because the arbitration agreement had a severability clause, the remainder of the agreement was enforced.

Clear inclusion of the FMLA in the arbitration provision is also a concern. In Hoffman v. Aaron Kahmi Inc., 927 F. Supp. 640 (S.D. N.Y. 1996), the arbitration agreement provided “any claim or controversy among or between the parties hereto pertaining to the Corporations ... or respecting any matter contained in this agreement of any difference as to the interpretation of any of the provisions of this agreement is subject to binding arbitration.” The court held the scope of the agreement was ambiguous. Additionally, the agreement had been executed eight years before the enactment of the FMLA. Therefore, it was not a knowing waiver of the employee’s right to bring suit and the motion to compel arbitration was denied.

A different result was reached when an employer moved to dismiss FMLA claims on the ground the employee failed to arbitrate his claims under a governing collective bargaining agreement. In McGinnis v. Wonder Chemical Company, 3 WH Cas.2d 71 (E.D. Pa. 1995), the court refused to dismiss the employee’s statutory claims citing Alexander v. Gardner Denver, Co., 415 U.S. 36 (1974). Although the court does not give much detail on the facts, it flatly rejected the argument that an employee could be required to arbitrate statutory claims pursuant to a collective bargaining agreement. Note, however, this case was decided prior to the Fourth Circuit’s decision in Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) holding an employer’s failure to arbitrate an ADA claim under a CBA foreclosed a civil action. The first reported case to address the issue

following Austin, reached the contrary conclusion. In Jessie v. Carter Health Care Center, Inc., 930 F. Supp. 1174 (E.D. Ky. 1996), the court, expressly relying on Austin, held a plaintiff's claims under the FMLA were barred by her failure to pursue available remedies through the grievance procedure under the governing collective bargaining agreement. Jessie may be suspect in light of the Fourth Circuit's recent clarification of its Austin decision in Brown v. Transworld Airlines, 127 F.3d 337 (4th Cir. 1997). In Brown, the Fourth Circuit held FMLA claims would be arbitrable under CBA that explicitly incorporated the statutory provisions of the FMLA. In Brown the CBA at issue did not expressly incorporate the provisions of the FMLA and the court refused to compel arbitration.

G. EXCLUSIVITY

The majority of the courts have found that Congress intended the FMLA's specific remedies to be exclusive. Therefore, other government statutes and state laws do not provide an alternative means for enforcing the rights granted by the FMLA. Desrochers v. Hilton Hotels Corp., 28 F.Supp.2d 693 (D. Mass. 1998); O'Hara v. Mount Vernon Bd. of Educ., 16 F.Supp.2d 868 (S.D. Ohio 1998); Jolliffe v. Mitchell, 971 F. Supp. 1039 (W.D. Va. 1997); Clay v. City of Chicago, Dept. of Health, 1996 WL 613164 (N.D. Ill. 1996); Cf. Peterson v. Slidell Memorial Hospital and Medical Center, 1996 WL 732840 (E.D. La. 1996).

Nevertheless, in Danfelt v. Board of County Com'rs of Washington County, 998 F. Supp. 606 (D. Md. 1998), the court concluded that a wrongful termination claims under Maryland tort law based on an FMLA violation was a cognizable state law claim. Moreover, despite its inarguable reliance on a violation of a federal statute, the cause of action did not imbue the court with jurisdiction.

H. PLEADING REQUIREMENTS

Unlike Title VII, filing a complaint with the Wage and Hour Division is not a prerequisite to a suit under the FMLA. § 825.400(a)(2).

Some courts have held plaintiffs faced with motions to dismiss to a very particularized standard

of pleading. A plaintiff's complaint must allege the *underlying facts* establishing the following essential elements of an FMLA claim:

- that he is an eligible employee under FMLA
- that his employer is an employer under the FMLA
- that he was entitled to leave under the FMLA
- that his employer engaged in some prohibited act

Blidy v. Examination Management Services, Inc., 3 WH Cas.2d 989 (N.D. Ill. 1996). Thus, in Blidy, the court dismissed the plaintiff's claim for failing to allege the facts establishing he was an eligible employee. Specifically, the plaintiff, although alleging he had been employed for more than twelve months, did not allege he had worked 1250 hours during that twelve-month period and his claim was dismissed. Moreover, complaints containing conclusory allegations of eligibility and employer status that do not allege the underlying facts are insufficient. Spurlock v. Nynex, 949 F. Supp. 1022 (W.D. N.Y. 1996). So when an employee alleges only he is an "eligible employee" and his employer is an "employer," the complaint fails to state a claim under the FMLA. *Id.* See also Nowak v. EGW Home Care, Inc., -- F.Supp.2d --, 2000 WL 146817 (W.D. N.Y. 2000) (employee's allegation she was placed on a disability leave by her doctor was insufficient to establish that she had a serious health condition as the pleading did not address the continuing treatment prong of the definition); Reddinger v. Hospital Central Services, Inc., 4 F.Supp.2d 405, 411 (E.D. Pa. 1998) ("It is equally clear that in order to state a claim under the FMLA, a complaint must at least contain allegations which establish that, within the meaning of the FMLA, the defendant employer is an 'employer' and the plaintiff employee is an 'eligible employee.'"); Boyce v. New York City Mission Society, 963 F. Supp. 290 (S.D. N.Y. 1997).

However, not every court will hold plaintiffs to this standard of specificity. In Johnson v. A.P. Products Ltd., 934 F. Supp. 625 (S.D. N.Y. 1996) the defendant moved to dismiss the claim on the

ground plaintiff had been on leave longer than 12 weeks and therefore, was not entitled to the protections of the FMLA when she returned to work. Plaintiff's complaint did not allege the date on which she returned to work. The court held that without this information, it could not determine if the plaintiff was protected when she returned and denied the motion to dismiss.

This case does not conflict with Blidy and Spurlock if one accepts that the four necessary elements of a claim are eligibility, a covered employer, an FMLA covered situation, and an illegal act. The Johnson plaintiff did allege these elements. What was at issue was had she lost the protection of the FMLA. The court's treatment of this issue on the motion to dismiss suggests that the employer will carry the burden of establishing that the employee lost the protection of the act.

I. STATUTE OF LIMITATIONS

The FMLA has a two-year statute of limitations that runs from the last date on which a violation occurs. 29 U.S.C. §2617(c)(1). In Wenzlaff v. Nations Bank, 940 F. Supp. 889 (D. Md. 1996), plaintiff brought suit alleging her employer had failed to return her to a substantially equivalent position when she returned from maternity leave. However, the reassignment occurred more than two years prior to suit being filed. The plaintiff attempted to circumvent the clear bar claiming her employer had also violated the FMLA when, after her employment had been terminated, it refused to rehire her for her former position. The court rejected this theory holding the language of the FMLA "implicitly limits the scope of any violations to interactions between individuals sharing the an employer-employee relationship at the time of the alleged violation... Reading the law otherwise would effectively circumvent the Congressional purpose behind the statute of limitations as such a reading would enable any potential plaintiff to 'revive' a time barred claim at any time by simply reapplying for her former position." *Id.* at 912. At least one other court has also rejected an attempt to expand the statute of limitations. See Burke v. Nalco Chemical Co., 1996 WL 411456 (N.D. Ill. 1996). Another court has

concluded that the statute of limitations runs from the date of denial of leave. Moore v. Payless Shoe Source, 139 F.3d 1210 (8th Cir. 1998).

In the event of a “willful” violation, the statute of limitations is extended to three years. 29 U.S.C. § 2617(c)(2). One district court held a plaintiff need allege a willful violation only generally to obtain the three-year statute of limitations at the motion to dismiss stage. “[W]here, as here, a plaintiff sufficiently alleges facts supporting the claimed violation of the FMLA, a general averment as to willfulness should be sufficient to trigger the three-year limitations period.” Settle v. S.W. Rodgers, Co., 998 F. Supp. 657, 664 (E.D. Va. 1998). The plaintiff in Settle ultimately failed to prove the alleged violation, failure to notify him of FMLA rights, was willful. Settle v. S.W. Rodgers, Co., 182 F.3d 909 (4th Cir. 1999).

Willful conduct sufficient to support the extension of the limitations period has been defined as, “[the] employer ... knows its conduct to be wrong or has shown reckless disregard for the matter in light of the statute.” Sampson v. Citibank, E.S.B., 53 F. Supp.2d 13, 19 (D. D.C. 1999).

J. SUPERVISOR LIABILITY

The FMLA’s definition of employer is virtually identical to the definition used in the Fair Labor Standards Act. It defines employer to include “any person who acts directly or indirectly, in the interest of such employer to any of the employees of such employer.” 29 U.S.C. § 2611(4). Courts have split on whether under this definition an individual supervisor can be liable for violations of the FMLA with the larger number of cases holding individuals can be liable for FMLA violations.

In Erizzell v. Southwest Motor Freight, Inc., 906 F. Supp. 441 (E.D. Tenn. 1995), the court looked to Title VII for guidance in interpreting the FMLA’s definition of employer. It determined that the reasons for deciding against supervisor liability under Title VII, i.e. that the intent of Congress defining employer to include agent was to incorporate principles of *respondeat superior* liability, applied with equal force to the determination under the FMLA and granted a motion to dismiss in favor

of the supervisor. See also, Carter v. Rental Uniform Service, 977 F. Supp. 753 (W.D. Va. 1997).

Several other cases have looked to case law construing the definition of employer under the FLSA to hold supervisors may be individually liable and this is now clearly the majority view. In Freemon v. Foley, 911 F. Supp. 326 (N.D. Ill. 1995) the court refused to dismiss an individual supervisor. It noted that since the FLSA's definition was the model for the FMLA, case law under Title VII and the ADA was inapplicable. Looking to case law construing the term under the FLSA, it concluded employees who had recommended the termination of and terminated another employee for absences allegedly protected by the FMLA were subject to suit. It explained, "Rather, because of the expansive interpretation given to the term 'employer' in the FLSA, we believe the FMLA extends to all those who controlled 'in whole or in part' [the employee's] ability to take a leave of absence and return to her position." Likewise, in McKiernan v. Smith-Edwards Dunlap, 3 WH Cas.2d 272 (E.D. Pa. 1995) the court refused to dismiss the individual supervisor who signed the papers terminating the plaintiff. In Johnson v. A.P. Products Ltd., 934 F. Supp. 625 (S.D. N.Y. 1996), the court found that legislative history indicating the definition of employer should be construed in accordance with Title VII could not overcome the similarity in language between the FLSA and the FMLA and followed Freemon's construction of the term. Importantly, however, the court dismissed the individual supervisor on the grounds the complaint did "not allege in any manner that [the supervisor] exercised any control over [the employee's] ability to take a leave of absence or her termination." Instead, it merely alleged the supervisor was the human resources manager and along with the company, terminated the plaintiff. See also Buser v. Southern Food Service, 73 F.Supp.2d 556 (M.D. N.C. 1999); Carpenter v. Refrigeration Sales Corp., 49 F.Supp.2d 1028 (N.D. Ohio 1999) (individual who made decision to terminate employee in violation of FMLA was personally liable for decision); Mercer v. Borden, 11 F.Supp.2d 1190 (C.D. Calif. 1998); Meara v. Bennett, 27 F.Supp.2d 288 (D. Mass. 1998); Rupnow v. TRC, Inc., 999 F. Supp. 1047 (N.D. Ohio 1998); Stubl v. T.A. Systems, 984 F. Supp. 1075 (E.D.

Mich. 1997); Beyer v. Elkay Manufacturing, 1997 WL 587487 (N.D. Ill. 1997); Holt v. Welch Allyn, 3 WH Cas. 2d 1622 (N.D. N.Y. 1997).

In the public sector, the analysis is slightly different as there is a more clearly defined history of recognizing these employees have two distinct capacities, individual and official. The Eleventh circuit recently concluded that, consonant with its decisions regarding public official liability under the FLSA, such officials could only be sued in their official capacity under the FMLA. Wascura v. Carver, 169 F.3d 683 (11th Cir. 1999). But see, Luder v. Endicott, -- F.Supp.2d --, 2000 WL 193275 (W.D. Wis. 2000) (holding public employee could be liable in their individual capacities under the Fair Labor Standards Act); Kilvitis v. County of Luzerne, 52 F.Supp.2d 403, 409 (M.D. Pa. 1999) (holding public employee could be liable in his individual capacity under the FMLA even though 11th Amendment barred claim against state employer).

K. INTERFERENCE WITH PROTECTED RIGHTS

The FMLA's anti-retaliation provision encompasses more than simply retaliation. It states "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). Courts have concluded a variety of acts by employers less severe than termination could constitute interference with the exercise of FMLA rights.

In Mardis v. Central National Bank Co., 173 F.3d 864 (table), 1999 WL 218903 (text) (10th Cir. 1999) the plaintiff alleged her employer told her she would have to forfeit all her accrued leave and vacation because she was taking FMLA protected leave. The court held that such conduct, if proven, could constitute interference with an attempt to exercise FMLA rights.

In Goodwin-Haulmark v. Menninger Clinic, 76 F.Supp.2d 1235 (D. Kan. 1999), the employer 1) failed to inquire or to grant leave when the plaintiff notified it of the need for a three week medical leave of absence; 2) failed to post required FMLA notices and failed to provide information in the

employee handbook; and 3) gave the plaintiff the choice of working without leave or resigning. The court concluded these actions interfered with the employee's exercise of her FMLA rights.

L. FMLA RETALIATION AND THE PRIMA FACIE CASE

The FMLA prohibits an employer from retaliating or discriminating against an employee for exercising his rights under the Act. In analyzing claims where there is no direct evidence of discrimination, courts have borrowed the McDonnell-Douglas burden shifting analysis utilized in Title VII cases. Under this analysis, the elements of a *prima facie* case under the FMLA are: 1) the plaintiff is an employee exercising or attempting to exercise his rights under the FMLA; 2) the plaintiff was meeting the employer's legitimate expectations; 3) the plaintiff suffered an adverse employment action; 4) employees who were not members of the protected class were treated more favorably. McCowan v. UOP, 2 WH Cas.2d 1669, 1673-1674 (N.D. Ill. 1995); Petsche v. Home Federal Savings Bank, 1997 WL 61270 (N.D. Ohio 1997). Another court has stated the fourth factor as "a person who did not take FMLA leave replaced the plaintiff." Burress v. Sears, Roebuck & Co., 3 WH Cas.2d 692, 696 (S.D. Ohio 1996). Still, other courts have stated the elements in accordance with the elements for a retaliation claim under Title VII. That is, as part of the *prima facie* case, the employee must prove a causal connection between the protected act and the complained of decision. Chaffin v. John H. Carter Co., Inc., 179 F.3d 316 (5th Cir. 1999); King v. Preferred Technical Group, 166 F.3d 887 (7th Cir. 1999); Richmond v. ONEOK, 120 F.3d 205 (10th Cir. 1997); Morgan v. Hilti, Inc., 108 F.3d 1319 (10th Cir. 1997); Sharpe v. MCI Telecommunications Corp., 19 F.Supp.2d 483 (E.D. NC 1998); Cross v. Southwest Recreational Indus., Inc., 17 F.Supp.2d 1362 (N.D. Ga. 1998); Dollar v. Shoney's, 981 F. Supp. 1417 (N.D. Ala. 1997); Kaylor v. Fannin Regional Hospital, Inc., 946 F. Supp. 988, 1001 (N.D. Ga. 1996). One court has noted the fourth factor will depend upon the evidence the plaintiff produces, i.e., either a causal connection such as suspect timing or disparate treatment evidence. Peters v. Community Action Committee, 977 F. Supp. 1428 (M.D. Ala. 1997).

1. Adverse Employment Action

Courts seem to be following the Title VII jurisprudence that requires, at a minimum, some materially adverse employment decision. Thus, a disciplinary memorandum warning an employee about non-FMLA protected absences was held to be insufficient to support a *prima facie* case. Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274 (11th Cir. 1999). “Verbal reprimands and threats of termination do not constitute adverse employment actions.” Mistretta v. Volusia County Dept. of Corrections, 61 F.Supp.2d 1255 (M.D. Fla. 1999). A supervisor’s threatening an employee with termination was not an adverse employment action. Boriski v. City of College Station, 65 F.Supp.2d 493 (S.D. Tex. 1999). However, a plaintiff’s uncontroverted testimony that “upon returning from FMLA leave, her work space was moved to a compact area, a person with less seniority was moved into her previous work space, she was assigned the most time-consuming work, and she was treated rudely by Walters and some co-workers” was sufficient to create a dispute of fact as to whether the employee suffered a materially adverse employment action. Hite v. Biomet, Inc., 38 F.Supp.2d 720, 741 (N.D. Ind. 1999).

2. Causal Connection

To date, the cases suggest timing of decisions will be an important factor in evaluating a plaintiff’s *prima facie* case. In Dollar, *supra*, the court held the timing of a demotion that occurred while the plaintiff was on leave was sufficient to establish a causal connection and a *prima facie* case. See also Gleklen v. Democratic National Campaign Committee, 199 F.3d 1365 (D.C. Cir. 2000) (timing between employee’s notifying employer of pregnancy and adverse decision established *prima facie* case of FMLA retaliation); Mistretta v. Volusia County Dept. of Corrections, 61 F.Supp.2d 1255 (M.D. Fla. 1999) (one year between use of leave and termination precluded finding of causal connection based on timing); Baltuskonis v. US Airways, Inc., 60 F.Supp.2d 445 (E.D. Pa. 1999) (six days between termination and return from FMLA leave sufficient to establish causal connection for *prima facie* case);

Summerville v. Esco Co. Ltd. Partnership, 52 F.Supp.2d 804 (W.D. Mich. 1999) (ten month gap between Summerville's FMLA leave and his termination is still sufficient evidence of a causal connection for the purpose of establishing a prima facie case of FMLA discrimination); Leary v. Hobet Mining, 981 F. Supp. 452 (S.D. W.Va. 1997) (assuming without deciding that timing could establish causal connection); Peters v. Community Action Committee, 977 F. Supp. 1428 (M.D. Ala. 1997). But see Garcia v. Fulbright & Jaworski, 3 WH Cas.2d 742 (S.D. Tex. 1996) (holding timing of termination, three weeks after plaintiff returned from leave, was insufficient to establish a *prima facie* case of retaliatory discharge). “Statements by a supervisor that reveal animus against the employee for exercising a protected right also suffice to show discrimination.” Routes v. Henderson, 58 F.Supp.2d 959, 979 (S.D. Ind. 1999).

Timing can also be critical in whether the employee can present an issue of fact as to pretext at summary judgment. In Petsche v. Home Federal Savings Bank, 1997 WL 61270 (N.D. Ohio 1997), the plaintiff was terminated four days after she had advised her employer she was going to take a three-month maternity leave pursuant to the FMLA. While holding the timing of decisions was not the whole reason for rejecting the employer’s motion for summary judgment, when combined with a *prima facie* case, it created an issue for trial. In Cross v. Southwest Recreational Industries, Inc., 17 F.Supp.2d 1362 (N.D. Ga. 1998) timing alone appeared to be sufficient to defeat summary judgment. The court denied summary judgment finding that where an employee was demoted one week prior to returning from her maternity leave, the close temporal proximity between the exercise of her FMLA rights and the employer’s decision to demote her was sufficient to establish the inference of a causal connection between the two. See also, Morris v. VCW, 3 WH Cas.2d 763 (W.D. Mo. 1996).

Timing alone, however, may not carry the burden. In McCowan v. UOP, 2 WH Cas.2d 1669, 1673-1674 (N.D. Ill. 1995), the court considered the timing of a disciplinary memo that came two days after the employee’s request for leave had been approved. The court held, without any additional

evidence linking the memo to the employee's request for leave, it could not overcome the employer's legitimate stated reason for the action. The court noted "The FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA leave." *Id.* at 1674 -1675. See also Bond v. Sterling Inc., 77 F.Supp.2d 300 (S.D. N.Y. 1999) ("[T]he proximity of Plaintiff's discharge is insufficient, in and of itself, to support her retaliatory discharge claim."); Baltuskonis v. US Airways, Inc., 60 F.Supp.2d 445 (E.D. Pa. 1999) (timing alone not enough to overcome legitimate reason for discharge).

In Munizza v. State Farm Mut. Auto. Ins. Co., 103 F.3d 139 (table), 1996 WL 711563 (text)(9th Cir. 1996), the employee was placed on probation the day he returned from FMLA leave. The court found that the temporal connection between the challenged employment action and the FMLA leave gave rise to an inference of discrimination sufficient to support a *prima facie* case. However, this temporal connection was insufficient, standing alone, to rebut the employer's legitimate non-discriminatory reason for the action. *Id.* at **3.

Some courts have applied a retaliation analysis in cases that did not call for it. For example, in Dillon v. Carlton, 977 F. Supp. 1155 (M.D. Fla. 1997), the plaintiff was terminated for attendance problems. The last straw was the plaintiff's leaving work early to pick up her son. She had requested this time under the FMLA, but her employer denied her request on the grounds her son's condition was not a serious health condition. The issue in the case was whether the leave plaintiff had been terminated for taking was protected, not whether the employer's reason for terminating the plaintiff was pretextual. Nevertheless, the court analyzed the issue using a retaliation analysis. For a more thorough analysis of this issue, see Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711 (7th Cir. 1997).

One court concluded evidence of suspicious timing, along with the employer's complete failure to evaluate or investigate the employee's leave request was sufficient to uphold a jury verdict finding retaliation. Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998).

M. DAMAGES

1. Equitable

If an employer violates the FMLA, an employee may recover wages, benefits, other compensation the employee lost, actual monetary losses resulting from the violation, interest on the amount awarded, (including pre-judgment interest) liquidated damages for an amount equal to that of actual damages, equitable remedies, court costs, and attorney and expert witness fees. 29 U.S.C. 2617. Damages for emotional distress are not available. Dawson v. Leewood Nursing Home, Inc., 14 F.Supp.2d 828 (E.D. Va. 1998); Lloyd v. Wyoming Valley Health Care System, Inc., 994 F. Supp. 288 (M.D. Pa. 1998); McAnnally v. Wyn South Molded Products, Inc., 912 F. Supp. 512 (N.D. Ala. 1996).

One court has held that an employer should not withhold income, FICA or state taxes from a damage award under the FMLA. The court reasoned:

[F]ederal withholding, as noted above, applies only to wages or remuneration “for services performed by an employee for [her] employer.” 26 U.S.C. § 3401. In this action, plaintiff, who had been terminated from her job, sought damages for the period when she was an ex-employee. Thus, the jury's award does not and cannot represent wages for services performed since she performed none during the relevant time frame. The FMLA explicitly recognizes this reality. The employer who violates the statute is liable not for any denied or lost wages but for damages “equal to the amount of” any denied or lost wages. 29 U.S.C. § 2617(a)(1)(A)(i)(I).

Churchill v. Star Enterprises, 3 F.Supp.2d 622, 624 (E.D. Pa. 1998). The court found two Internal Revenue regulations stating the contrary position to be invalid.

2. Punitive

The FMLA does not create a cause of action for punitive damages. McAnnally v. Wyn South Molded Products, 912 F. Supp. 512 (N.D. Ala. 1996); McKiernan v. Smith-Edwards Dunlap, Co., 3 WH Cas.2d 272 (E.D. Pa. 1995).

3. Liquidated

To avoid liquidated damages, the employer must prove the violation was in good faith. 29 U.S.C. 2617(a)(1); § 825.400(c). In Miller v. Julia Corp., 3 WH Cas.2d 913 (S.D. Ohio 1996) the plaintiff won a jury trial finding her employer had terminated her because she had taken FMLA leave. The jury returned a verdict finding the employer's violation was willful. The court relied on this finding to reject the defendant's post trial arguments that its violation was in good faith and awarded liquidated damages equal to the amount of actual damages and interest. Liquidated damages are not recoverable where an employer fails to provide adequate notice of FMLA procedures if the employee still receives the FMLA's intended benefits. Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 17 F.Supp.2d 271 (S.D. N.Y. 1998).

4. Taxation of Amounts Awarded or Paid In Settlement

Awards of damages under the FMLA are generally subject to income taxation by the federal government. However, at least one court has concluded that although taxable, the employer paying such amount has no right to withhold taxes because they are not payments for "services rendered" within the meaning of 26 U.S.C.A. § 3401. Churchill v. Star Enterprises, 3 F.Supp.2d 622 (E.D. Pa. 1998). The court also concluded the employer could not withhold any portion for FICA although it refrained from addressing whether such amounts were subject to FICA taxation.

N. ATTORNEY'S FEES

The FMLA makes an award of reasonable attorney's fees to a prevailing plaintiff mandatory. 29 U.S.C. §2617(a)(3); Sherry v. Protection, Inc., 14 F.Supp.2d 1055 (N.D. Ill. 1998) (employee may be eligible for fees even if he or she fails to meet the requirements of a prevailing party). However, if an employee proves a violation of the FMLA, but has no damages and receives no judgment, no fee award is proper. Dawson v. Leewood Nursing Home, Inc., 14 F.Supp.2d 828 (E.D. Va. 1998). No fee award is proper when the plaintiff's claim is dismissed. Bond v. Abbott Laboratories, 188 F.3d 506 (table), 1999 WL 717977 (text) (6th Cir. 1999). The amount of fees to be awarded is discretionary and

where a plaintiff has only limited success, the district court may award a greatly reduced fee that reflects the plaintiff's limited success. *McDonnell v. Miller Oil Co.*, 134 F.3d 648 (4th Cir. 1998). Nevertheless, a district court recently awarded over \$75,000 in fees and costs to a plaintiff who was awarded only \$1297.58. *Estes v. Meridian One Corp.*, 77 F.Supp.2d 722 (E.D. Va. 1999).

IV. FMLA ENFORCEMENT

A. GOVERNMENTAL INVESTIGATIVE AUTHORITY

The Secretary of Labor is to receive, investigate, and attempt to resolve complaints of FMLA violations. Employees may file complaints with the Wage and Hour Division, Employment Standards Administration of the Department of Labor. The complaint may be filed in person, by mail, or by telephone. The complaint must be filed within two years of the violation, or within three years of a willful violation. § 825.400(a)(1); 825.401(a);(b).

In *Blumenthal v. Murray*, 946 F. Supp. 623 (N.D. Ill. 1996), the plaintiff sought injunctive and declaratory relief to address threats by his employer to terminate him if he requested FMLA leave. By the time the employee brought suit, the Department of Labor had already investigated his complaint and ordered his employer to reinstate him at the conclusion of his FMLA leave and repay him the share of insurance premiums he had been required to pay. The DOL also concluded the employer's conduct violated the FMLA and declared this in its order. On the basis of the DOL's order, the court declared the plaintiff's claims moot and dismissed his request for declaratory relief.

V. FMLA RECORD KEEPING REQUIREMENTS

Employers are required to make, keep, and preserve records concerning their obligations under the FMLA. The DOL may require an employer to submit records once each 12-month period. § 825.500(a). Upon request, an employer must provide the records for inspection, copying, and transcription. § 825.500(b).

FMLA record keeping requirements include: basic payroll information identifying employee data; the dates employees took FMLA leave; leave taken in less than daily increments; copies of notices to employees concerning the FMLA; documents describing FMLA benefits, entitlements, and policies; payment of premiums for employee benefits; records of employer/employee disputes concerning FMLA issues; employee schedules when an employee is taking FMLA intermittent or reduced schedule leave; and all records and documents concerning medical certification, recertification, and fitness-for-duty reports. § 825.500(c);(d). Records concerning the employee's medical condition must be kept separate from other records. § 825.500(e).

VI. SPECIAL RULES CONCERNING EDUCATIONAL AGENCIES

Special rules govern educational agencies. This includes all public and private elementary and secondary schools, as well as public institutions associated with elementary and secondary education. The special rules do not apply to colleges, universities, trade schools, and pre-schools. § 825.600. Local educational agencies are automatically covered by the FMLA. Coverage is not premised on an agency satisfying the 50-employee/20 week test. § 825.600(b). The provisions governing instructional employees do not extend to teacher assistants, cafeteria workers, building service workers, bus drivers, and other "primary non-instructional" employees. § 825.600(c).

If an instructional employee of an educational agency requests leave for a planned medical treatment of a serious health condition and would be on leave for more than 20 percent of the total number of working days in the period during which leave is to be taken, the employer may either require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. § 825.601(1).

For educational agencies, the FMLA has special provisions for leave near the end of the school term. If an employee of an educational agency requests leave more than five weeks prior to the end of an academic term and leave is to be three or more weeks duration, the employer may require the

employee to continue taking leave until the end of the term, as long as leave would otherwise end within three weeks of the end of that term. § 825.602(a)(1).

If leave for purposes other than the employee's own condition is requested to begin less than five weeks prior to the end of an academic term and leave is to be of at least two weeks duration, the employer may require the employee to continue taking leave until the end of the term, as long as the leave would otherwise end within two weeks of the term. § 825.602(a)(2).

If an employee requests to begin leave for purposes other than the employee's own serious health condition less than three weeks prior to the end of an academic term and leave is to be more than five working days in length, then the employer may require the employee to continue taking leave until the end of the term. § 825.602(a)(3).

VII. THE EFFECT OF STATE LAWS AND COLLECTIVE BARGAINING AGREEMENTS

A. STATE LAWS

The FMLA does not preempt state law. Employers must comply with both state law and the FMLA. If a leave qualifies under both state and federal law, the leave will count against both the state and federal entitlements. § 825.701.

Substitution of state benefits for FMLA entitlements may not occur when the state benefit is for a purpose that is not FMLA-qualifying. For example, if a state provides family leave so that an employee can provide for the care of his parent-in-law, that state benefit may not be substituted for FMLA benefits. In this instance, no time would be assessed against the employee's FMLA 12-week leave entitlement when the employee takes leave to care for the sick parent-in-law. § 825.701(a)(5).

B. COLLECTIVE BARGAINING AGREEMENTS

All covered employers with collective bargaining agreements are covered by the Act, regardless of the expiration of the collective bargaining agreement. The Act became effective for all such employers February 5, 1994. § 825.102. The Act does not apply to employees of such an employer until the

agreement terminates if the agreement provides for family leave greater than that provided by the FMLA. § 825.700(c)(1). Collective bargaining agreements cannot reduce an employee's FMLA rights. Routes v. Henderson, 58 F.Supp.2d 959, 994 (S.D. Ind. 1999).

VIII. THE INTERPLAY OF THE AMERICANS WITH DISABILITIES ACT AND THE FMLA

An employer cannot ignore the possibility that an employee going on a leave of absence may also have rights under the Americans with Disabilities Act. There are two situations where this possibility is particularly significant: 1) where an employee is requesting a leave of absence not required by the FMLA (i.e. a leave of absence in excess of 12 weeks), and 2) when the employer is attempting to obtain medical information when the employee returns to work.

A. LEAVES OF ABSENCE COVERED BY THE ADA

The Americans with Disabilities Act compounds the problems of administering leave of absence policies. Most courts have recognized that a finite temporary leave of absence can be a reasonable accommodation an employer is required to make for a qualified individual with a disability.

In an FMLA medical leave of absence case, it is important to determine if the "serious health condition" could also be construed to be a disability entitled to the reasonable accommodation obligations of the ADA. Not every ailment constitutes a disability under the ADA. Of particular importance to this analysis is the fact that short-term physical injuries such as broken arms are not disabilities. Rogers v. International Marine Terminals, 87 F.3d 755, 759 (5th Cir. 1996). See also McDonald v. Commonwealth of Pa., 62 F.3d 92 (3rd Cir. 1995).

If the employer is faced with a condition that could be a disability, it must then determine if the leave requested is a reasonable accommodation of the disability. Under the ADA, the EEOC regulations suggest that an unpaid leave of absence can be a reasonable accommodation when there is no accommodation that would allow the employee to do the job currently. § 1630.2(o). Generally,

courts have held that a temporary finite leave of absence that will allow the employee to return to his job in the near future are required. Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995). It is clear, however, that an employer is not obligated to provide an employee with an indefinite leave of absence. Monette v. Electronic Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996); Hudson v. MCI Telecoms Corp., 87 F.3d 1167 (10th Cir. 1996); Rogers v. International Marine Terminals, 87 F.3d 755 (5th Cir. 1996); Mitchell v. Washington School District, 992 F. Supp. 395 (S.D. N.Y. 1998). Thus, if an employee cannot advise the employer of when he will return to work, the employer is not required to retain the employee on the payroll. For example, in Nowak v. St. Rita High School, 142 F.3d 999 (7th Cir. 1998), the court held,

The undisputed facts show that Nowak was unable to perform an essential function--regular attendance--required of a teacher at St. Rita. Prior to his termination, Nowak was absent from his teaching position for more than eighteen months.... At no time, during the more than eighteen months Nowak was absent from his teaching position, did he contact St. Rita administrators to inform them that it was his intention to return to his teaching duties.

Id. at 1004.

There is also a strong line of cases holding that regular and reliable attendance is an essential function of any job. See Corder v. Lucent Technologies Inc., 162 F.3d 924 (7th Cir. 1998); Nesser v. Trans World Airlines, Inc., 160 F.3d 442 (8th Cir. 1998); Hypes on Behalf of Hypes v. First Commerce Corp., 134 F.3d 721 (5th Cir. 1998); Moore v. Payless Shoe Source, Inc., 139 F.3d 1210, 1213 (8th Cir. 1998) (quoting Halperin v. Abacus Tech. Corp., 128 F.3d 191, 198 (4th Cir. 1997)); Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996) (“Because [the plaintiff] could not attend work, he [was] not a ‘qualified individual with a disability’ under the ADA.”); Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994) (coming to work regularly was an “essential function”); Tyndall v. Nat'l Educ. Centers, 31 F.3d 209, 213 (4th Cir. 1994) (“[A] regular and reliable level of attendance is a necessary element of most jobs.”).

The Seventh Circuit recently summarized the analysis of whether an employee with attendance problems can be a qualified individual with a disability. “We think it also fair to conclude that in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs.” Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999).

Nevertheless, in some circumstances, courts have held that attendance problems must be accommodated. These courts have determined that the reasonableness of an employer’s response to an employee’s request for leave as an accommodation is a matter for a jury. See, e.g., Cehrs v. Northeast Ohio Alzheimer’s Research Center, 155 F.3d 775 (6th Cir. 1998); Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998); Haschmann v. Time Warner Entertainment Co., 151 F.3d 591 (7th Cir. 1998). The Ninth Circuit explained:

Determining whether a proposed accommodation (medical leave in this case) is reasonable, including whether it imposes an undue hardship on the employer, requires a fact-specific, individualized inquiry. See Hall v. U.S. Postal Serv., 857 F.2d 1073, 1080 (6th Cir. 1988) (reversing grant of summary judgment in a Rehabilitation Act claim). In the summary judgment context, a court should weigh the risks and alternatives, including possible hardships on the employer, to determine whether a genuine issue of material fact exists as to the reasonableness of the accommodation.

Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247 (9th Cir. 1999). The court went on to hold that, as the plaintiff had only been on leave for seven months and the employer’s policy stated that unpaid medical leave could last up to one year, an issue of fact existed as to whether the employer failed in its obligations to reasonably accommodate the plaintiff.

As such, employers should be particularly careful not to attempt to be more restrictive with requests for leave than their own written policies dictate. In such circumstances, it will be nearly impossible to prove that the employee’s request was not reasonable or that granting it would have

caused the company undue hardship. See, e.g., Rascon v. U.S. West Communications, 143 F.3d 1324 (10th Cir. 1998).

The common thread in these cases is that the employee involved in each was requesting a finite leave of absence and the employer made a snap decision to deny the leave. The employers' mistake was failing to seek out information regarding the request and analyze that information in light of their business needs. In fact, it appears in some cases that the employer was just fed up with the employee requesting the leave and did not want to have to administer the situation any more.

As a practical matter, it is probably best for employers to establish a policy that dictates the maximum period of time an employee can be absent from work before the employee will be terminated automatically. Usually these periods run from six months to a year. Most employers find that there comes a time when they need to fill an employee's position. Terminating the employee who has been on leave for long periods frees up money to hire a replacement. The employer can certainly advise the employee so terminated that he is free to reapply when he is ready to return to work.

This type of policy was held to be appropriate in Gantt v. Wilson Sporting Goods, Co., 143 F.3d 1042 (6th Cir. 1998). There, any employee who went on a medical leave was subject to automatic termination if they were unable to return at the end of one year. The court held:

Plaintiff alleged in her complaint that the Company's leave policy violates the ADA because it is applied most often to ill or injured employees. The district court granted the Company's motion for summary judgment on the ADA claim. The court determined that the policy did not violate the ADA as a matter of law because there was no evidence that the policy was applied unfairly or inconsistently enforced.

The stated purpose of the ADA is to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title I of the ADA, which prohibits discrimination against disabled persons in employment, defines "discriminate" to include using standards, criteria, or methods of administration "that have the effect of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3)(A). The Equal

Employment Opportunity Commission ("EEOC"), as the agency charged by Congress to interpret and enforce the ADA, 42 U.S.C §§ 12116 & 12117, has issued interpretive guidelines in conjunction with the regulations. These guidelines provide that "Leave policies or benefit plans that are uniformly applied do not violate this part simply because they do not address the special needs of every individual with a disability." 29 C.F.R. pt. 1630, App. § 1630.5.

The Company's leave of absence policy does not distinguish between disabled and non-disabled employees. It is a uniform policy that requires termination of any employee who does not return to work at the expiration of the leave period. Plaintiff's comparison of herself to another disabled employee who received more favorable treatment gives rise to no logical inference of discrimination on the basis of disability.

This policy is not to be viewed as a substitute for the individualized assessment required by the ADA. Had the employee in Gantt advised her employer that she could return two weeks after the one year leave expired, the court would have been faced with a much more difficult issue. But the application of the policy in the absence of any request for an accommodation was not unlawful.

When faced with a request for a medical leave not required by the FMLA, an employer should engage in the following analysis.

1. Am I dealing with a leave on account of an impairment that may be an ADA disability?
2. What do the employer's policies say with regard to leaves of absences, both medical and non-medical?
3. What information do I have that allows me to evaluate this request?
4. What information do I still need in order to evaluate the request (i.e. prognosis, anticipated date of return).
5. How will this employee's absence effect the company's operations?

This analysis should comply with what courts are expecting of employers. Simple difficulty in handling a leave of absence does not automatically result in an undue hardship. Before making the decision that a company absolutely cannot provide a short-term leave of absence because it would be an undue hardship, it is probably a good idea to obtain some advice.

B. THE DIFFERENCES BETWEEN THE ADA AND THE FMLA IN EVALUATING EMPLOYEES RETURNING TO WORK

As previously noted, the FMLA places severe restrictions on an employer's ability to obtain information regarding an employee's physical condition when the employee returns to work. The employer is limited to a simple statement from the employee's physician that the employee is capable of returning to work.

The ADA, on the other hand, allows an employer more leeway in obtaining information about an employee's physical condition as it relates to the employee's ability to perform the essential functions of the job. "A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions." § 1630.14(c). The commentary on the regulations explains this includes "(fitness for duty exams) when there is a need to determine if the employee is still able to perform the essential functions of his or her job." § 1630.14(c) App. This contemplates conducting physical examinations of employees returning to work from an injury or illness that may have a continued impact on their ability to perform their jobs. Despite the clear restriction on information available under the FMLA, its regulations also contemplate the availability of an ADA physical examination. In discussing the return to work certification, it notes, "requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply." § 825.310(b).

The first court to address the relationship of these differing standards was Porter v. United States Alumoweld Co., 125 F.3d 243 (4th Cir. 1997). There, the employee in question had a history of back injury and had injured his back twice in a year. The employer terminated him when he refused to undergo a functional capacity evaluation. He sued alleging both that his employer's request for a

functional capacity evaluation violated both the ADA and the FMLA. The court rejected both claims.

With regard to the ADA claim, it found:

According to the EEOC, an employer's request for a fitness for duty exam after an on-the-job injury is clearly job-related and a business necessity under § 12112(d)(4) of the Code, and we agree with the EEOC's assessment. We conclude that the exam in this case meets this standard. Further, the facts that Porter's job required lifting and pulling, and that he had encountered problems carrying out his job due to back problems even before the surgery, indicate that the requested fitness for duty exam was indeed job-related and necessary to determine if he could carry out his duties.

Porter, 125 F.3d at 246. It went on to note that the FMLA's limitation on return to work certifications was not violated where the examination comported with the requirements of the ADA.

Under Porter's reading of the FMLA, that Act would be violated every time an employer requested a fitness for duty exam under the ADA, a request which requires the disclosure of more medical information than would be available from the FMLA's "simple statement of an employee's ability to return to work." We reject Porter's attempt to so restrict the operation of the ADA.

Porter, 125 F.3d at 247.

A different result was reached by a district court in Massachusetts when it evaluated the postal service's request for a psychiatric exam before it allowed an employee who had gone on FMLA leave for depression resulting from alleged gender discrimination and harassment in the workplace to return to work. Albert v. Runyon, 6 F.Supp.2d 57 (D. Mass. 1998). In Albert, the employee's physician provided the postal service with a return to work slip stating she was fit to return, "provided that the Postal Service makes the necessary changes that assure her of freedom from gender-based harassment and discrimination, and reverses any previously taken discriminatory action." The postal service refused her request for reinstatement on several grounds including, the vagueness of the note, its regulations allowing it to conduct fitness for duty exams at any time, and the ADA's permissive statements regarding return to work physicals. The court rejected all theories. Regarding the relationship between

the FMLA and the ADA, it first noted that the FMLA places the determination of the employee's ability to return to work in the hands of the employee's physician, not the employer.

The FMLA does not authorize an employer to make its own determination of whether an employee is fit to return from FMLA leave following recovery from a serious health condition. Rather, an employer must rely on the evaluation done by the employee's own clinician and return the employee to work without delay upon receipt of medical certification.

Albert, 6 F.Supp.2d at 62. See also Routes v. Henderson, 58 F.Supp.2d 959 (S.D. Ind. 1999) (postal services request for an evaluation for fitness for duty following receipt of doctor's statement the employee was able to return to work violated the FMLA).

This is in direct contrast to the EEOC's guidance on the employer's duty to evaluate an employee's ability to return to work under the ADA.

16. Under the ADA, is a rehabilitation counselor, physician, or other specialist responsible for deciding whether an employee with a disability-related occupational injury is ready to return to work?

No. **The employer bears the ultimate responsibility for deciding whether an employee with a disability-related occupational injury is ready to return to work.** Therefore, the employer, rather than a rehabilitation counselor, physician, or other specialist, must determine whether the employee can perform the essential functions of the job, with or without reasonable accommodation, or can work without posing a direct threat.

EEOC Enforcement Guidance: Worker's Compensation and the ADA, No. 915.002, Q. 16. Nevertheless, the court's pronouncement that return to work determinations lay in the hands of the employee and the employee's doctor in the FMLA context is correct.

The more troubling aspect of the decision is how the court viewed the interplay between the employer's rights to determine the employee's ability under the ADA and the employee's right to be returned to work upon presentation of a fit for duty certification under the FMLA. While not concluding

that the rights were in conflict, the court seemed to presume that in the event of a conflict, the FMLA's prohibition would trump what the ADA allowed. It reconciled the statutes:

The ADA and the FMLA do not conflict if the ADA's business necessity requirement requires more than an employee's having taken FMLA leave. In sum, an employer may not order an employee returning from FMLA leave to submit to a fitness-for-duty examination because of that leave, or because of an underlying condition that the employee's health care provider has certified will not interfere with the employee's ability to work, or because the employer views the certification as inadequate for its own purposes. An employer only has a sufficient "business need" to examine a returning employee where the employee's ongoing limitations may interfere with her ability to work.

Albert, 6 F.Supp.2d at 69. The problems in this standard are that the court assumes: 1) the employee's health care provider has the information necessary to make an accurate determination of the employee's ability to return to work, and 2) the employee's health care provider will take the time to make a careful and accurate evaluation comparing the employee's abilities with the requirements of the job. Neither of these assumptions will apply even in a majority of return to work cases. Additionally, the employer's right to seek "clarification" of the fitness for duty certification in this situation will be of little succor as the need to clarify "John Doe is fit for duty and can return to work" is non-existent.

Most importantly, the court conditioned the employer's right to conduct a fitness for duty examination on a situation "where the employee's ongoing limitations may interfere with her ability to work." But the court assumes if the employee presents a fit for duty certification, which the employer has no right to question, this situation does not exist. Thus, even if the fit for duty certificate is wrong, and the employer has good reason to believe it is wrong, it has no recourse. Rather, the employer would be required to put the employee back to work and wait for some exhibition of the employee having difficulty performing his job before it could do a thorough analysis. Unfortunately, the most probable exhibition would be another injury.

There are some methods an employer can utilize to prevent the risks associated with an incorrect certification. First, if the employer learns that the employee is about to be released to return to work, it can send the employee's doctor a job description and request an evaluation in light of the job description. Some might, however, argue that this is an impermissible communication with the employee's doctor. The employer might also request a clarification of a fit for duty certificate by sending a copy of the job description to the doctor and asking for a clarification based on the job description. Again, this might be viewed as an impermissible questioning of the certification. Under any circumstances, the situation is difficult to address.

IX. CONCLUSION

The FMLA is having considerable impact on employers because compliance with the provisions and regulations is neither clear nor simple. A familiarity of the Act's requirements will be critical for employers to ensure maximum compliance and minimal litigation.