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The Family and Medical Leave Act of 1993: Proving Or Defending a Claimed Violation

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THE FAMILY AND MEDICAL LEAVE ACT OF 1993: PROVING OR DEFENDING A CLAIMED VIOLATION

Anita, a thirty-six year old divorced mother of two, works part-time at a local retail clothing store. The store is one of a chain of stores that employs hundreds of full and part-time employees within a seventy-five mile radius. Anita works twenty-five hours per week, and she has not missed a scheduled day of work in over a year. Anita's youngest daughter, Brittany, recently developed a respiratory infection as a result of catching a bad cold. Brittany's doctor examined her, prescribed an antibiotic, and then examined the child a second time after Brittany had an adverse reaction to the antibiotic. The doctor advised Anita to keep Brittany home from school for the next four days to ensure that she could rest and to make sure there were no adverse reactions to the new medicine. Anita asks her manager about taking the four days off without pay. What should the manager say? Does she have a choice? Does the answer change if it is the week before Christmas, and the store is already shorthanded?

I. INTRODUCTION

The Family and Medical Leave Act of 1993 ("the Act" or "FMLA")[1] was enacted to help working people take the time they need to care for their own serious health conditions, or those of certain specified relatives, without fear of losing their jobs.[2] Although some states already had family leave statutes in place, the FMLA created a uniform national "floor" for family leave benefits.[3] Recently, an increasing number of FMLA cases are making their way through the American judicial system, and it is important for litigators to be aware of the various methods federal judges are using for analyzing these claims.[4] This Note will focus on the substantive

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[1] 29 U.S.C. §§ 2601-2654 (1994).

[2] *Id.*

[3] *See* 29 U.S.C. § 2651 (b) (stating FMLA cannot reduce state or local family leave rights).

[4] *See infra* notes 101-111 and accompanying text (discussing trends developing in FMLA case law).

rights guaranteed by the FMLA and the responsibilities assigned to both employer and the employee under the Act.[5]

Section II of this Note will provide a brief overview of the FMLA.[6] Section III examines the requirements that employees must satisfy to give their employer "adequate notice" of their need for FMLA protected leave.[7] Section IV analyzes what federal courts require to find that an employee, or someone in the employee's immediate family, has a "serious health condition."[8] Section V considers whether there are any discernible trends developing in the FMLA case law.[9] Finally, Section VI concludes that while the first five years under the FMLA has generated some conflicting case law, the courts are now developing a consistent method of analysis that

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[5] *See* Hodgens v. General Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998) (distinguishing between FMLA substantive rights and discrimination protection). In *Hodgens*, a case of first impression for the First Circuit, the Court of Appeals ruled that where an employee alleges he was discriminated against for using FMLA rights, only the anti-discrimination protection of the Act is involved. *Id.* at 160. The court opined that descrimination claims under the FMLA should be analyzed differently than those involving substantive rights, and where discrimination is alleged the court will employ the same burden shifting analytical framework used when reviewing other discrimination cases, such as those related to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e through 2000 e-17. *Id.* The First Circuit's decision to adopt the split analysis method was consistent with earlier decisions in other circuits. *See* Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 713 (7th Cir. 1997) (rejecting burden shifting approach to FMLA cases involving denial of substantive rights); *see also* Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (utilizing burden shifting approach only when analyzing proscriptive portion of FMLA).

[6] *See infra* notes 11-30 and accompanying text (summarizing history of the Act).

[7] *See infra* notes 31-65 and accompanying text (discussing notice requirements).

[8] *See infra* notes 66-100 and accompanying text (examining legislative and judicial interpretations of what constitutes a "serious health condition").

[9] *See infra* notes 101-111 and accompanying text (discussing whether any trends emerging in FMLA case law).

should allow both employees and their employers more certainty as to what their respective rights and obligations are under the Act.[10]

II. OVERVIEW OF THE FMLA

President Clinton signed the FMLA on February 5, 1993, and the Act required adherence by most employers beginning six months later.[11] The FMLA covers all state, local, and federal employers, as well as all private sector employers that employ fifty or more employees within a seventy-five mile radius.[12] Employers with fewer than fifty employees cannot voluntarily subject their companies to coverage under the Act.[13] The FMLA expressly acknowledges a number of socioeconomic realities that challenge today's American workforce in general and women in particular.[14] The FMLA pro-

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[10] *But see infra* note 112 and accompanying text (contending FMLA case law analysis not well developed).

[11] 29 C.F.R. § 825.102(a) (1996).

[12] 29 U.S.C. § 2611(4)(iii).

[13] *See* Douglas v. E.G. Baldwin & Assoc., Inc., 150 F.3d 604, 608 (6th Cir. 1998) (holding fifty employee threshold statutorily created and not subject to waiver).

[14] 29 U.S.C. § 2601(a). The full section states:

Congress finds that—

> the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly; it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions; the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting; there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods; due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

poses to "provide a national policy that supports families in their efforts to strike a workable balance between the competing demands of the workplace and the home."[15] Only two-thirds of all American employees, however, work at sites covered by the FMLA.[16] The number of workers actually protected by the FMLA slips to about fifty percent after applying the Act's length of service and hours-related eligibility requirements.[17]

The FMLA entitles eligible employees to up to twelve weeks of unpaid leave per twelve month period for a variety of reasons.[18] Eligible employees are those who have worked for a covered employer for at least one year and have worked at least 1,250 hours for the employer within the last twelve months.[19] Even those that are not current employees may be entitled to protection under the FMLA.[20]

Employers may require an employee on a FMLA protected absence to provide certification from a health care provider of their

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Id.

[15] 29 U.S.C. § 2601(b)(1)-(2).

[16] *See* COMMISSION ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES, (Executive Summary, p. xvi)(1996) (reporting results of two nationally representative surveys).

[17] *Id.* The FMLA covers slightly less than eleven percent of private-sector worksites in the United States. *Id.* A total of sixty percent of all American private-sector employees work at these covered worksites, because they are typically very large. *Id.*

[18] *See* 29 U.S.C. § 2612(a) (detailing absences which qualify for FMLA protected leave). Specifically, covered employees are entitled to leave for the birth and care of the newborn child of the employee, for the placement with the employee of a son or daughter for adoption or foster care, to care for a spouse, child, or parent with a "serious health condition", or to take medical leave when the employee is unable to work because of their own "serious health condition". *Id.*

[19] 29 U.S.C. § 2611(2)(A)(i)-(ii).

[20] *See* Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 5 (1st Cir. 1998) (holding prior leave by former employee cannot be used against that person now seeking re-employment).

need for leave.[21] Once a FMLA protected absence ends, the employer must restore the employee to their original, or a substantially similar position in the organization.[22] The Massachusetts federal district court recently ruled that employers are also prohibited from making an independent determination of whether the employee is fit to return to work.[23] In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned prior to using FMLA leave.[24] Similarly, FMLA leave cannot be counted against the employee under a "no fault" attendance policy.[25]

The possibility of individual supervisors being held liable for FMLA violations is a particularly thorny issue for employers.[26] The Act defines an employer as "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."[27] This language mirrors that of the Fair Labor Standards Act (FLSA)[28] and individual liability under the FLSA has been clearly established.[29] The federal district court for the District of Massachusetts has also held that individuals may be personally liable for adverse employment decisions or actions.[30]

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[21] *See* 29 U.S.C. § 2613(b) (stating employer certification form may require reason and probable duration of leave).

[22] 29 U.S.C. § 2614(a)(1)(A)-(B).

[23] *See* Albert v. Runyon, 6 F. Supp. 2d 57, 62 (D. Mass. 1998) (deciding postal worker's recovery from depression not challengeable by employer).

[24] 29 U.S.C. § 2614(a)(2).

[25] 29 C.F.R. § 825.220(c) (1996).

[26] *See* Freemon v. Foley, 911 F. Supp. 326, 330 (N.D. Ill. 1995) (holding individual liability appropriate under FMLA).

[27] 29 U.S.C. § 2611(4)(A)(ii)(I).

[28] 29 U.S.C. § 203(d) (1938).

[29] *See* Michael Z. Green, *Individual Supervisors May Be Found Liable For Violations of the FMLA*, 1/98 CORPLT 61, (col. 1). (explaining ramifications of recent court decisions on individual supervisor liability).

[30] *See* Meara v. Bennett, 27 F. Supp. 2d 288, 290 (D. Mass. 1998) (noting virtual unanimity among federal district courts that individual liability can be appropriate). In this case, a former assistant district attorney who suffered a nervous breakdown in court was allowed to sue the county district attorney

III. EFFECTIVE NOTICE TO EMPLOYER

Before employees can utilize the protections of the FMLA, they must provide their employer with adequate notice of their need for leave.[31] When the need for FMLA leave is foreseeable, at least thirty days advance notice must be provided.[32] Where thirty days notice is not possible, notice must occur as soon as practicable.[33] The "as soon as practicable" standard entails a close examination of the particular facts of the case involved.[34] The employee only needs to give the employer notice once, but the employee must alert the employer "as soon as practicable" if dates of scheduled leave change or are extended.[35]

When giving notice to an employer, the employee does not need to expressly assert rights under the FMLA.[36] In fact, in the landmark case on this issue the employee gave adequate notice to an employer although she was not even aware of the existence of the FMLA.[37] Under the final regulations and case law, once the employer is notified the burden shifts to the employer to seek out information as to whether the employee is seeking a FMLA protected

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alleging the district attorney prevented him from returning to work despite clearance from his physician. *Id.* at 288.

[31] *See* Richard Heffern, *Federal Act Continues to Confuse Employers*, 9/1/97 Cap. Dist. Bus. R. (Albany N.Y.) 21; 1997 WL 10936047 (explaining what notice triggers employer obligations under the Act).

[32] 29 U.S.C. § 2612(e)(1) (1994).

[33] *Id.*

[34] 29 C.F.R. § 825.302(b) (1996). Where thirty days notice is not possible, "as soon as practicable" ordinarily requires at least verbal notification to the employer within one or two business days of the date when the need for leave becomes known to the employee. *Id.*

[35] 29 C.F.R. § 825.302(a) (1996).

[36] 29 C.F.R. § 825.302(c) (1996).

[37] *See* Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995) (interpreting regulations as not requiring knowledge of rights under statutes to invoke its protection). In addition, the *Manuel* court held that determining adequate notice is a question of fact. *Id.*

leave.[38] The employer may require a certification from a health care provider that the leave addresses a "serious health condition."[39]

An employer may require an employee seeking FMLA leave to provide written notice, or certification, from a health care provider that explains when the serious health condition began, how long the condition is likely to last, and the medical facts known to the health care provider pertaining to the condition.[40] Although the FMLA specifically allows this certification process by employers, failure of the employee to provide certification does not automatically nullify the employee's protection.[41] If an employee gives the employer timely verbal or other notice, the employer is obligated to promptly grant an employee's otherwise protected leave.[42] When the need for medical treatments is foreseeable, the employee must consult with the employer prior to the scheduling of medical treatment.[43] The intent of the consultation is to work out a treatment schedule that best suits the needs of both the employer and the employee.[44] If the employee fails to make reasonable attempts to consult with the employer regarding the scheduling of treatments, the employer has the right to initiate treatment-scheduling discussions.[45]

Most conflicts arise when an employee's need for leave is unforeseeable.[46] The employee should provide notice to the employer

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[38] *See supra* note 36 (outlining employee notice responsibilities under FMLA); *see also* Price v. City of Fort Wayne, 117 F.3d 1022, 1026 (7th Cir. 1997) (holding employer on notice of employee's need for leave has responsibility to inquire further).

[39] 29 C.F.R. § 825.305(a) (1996). "An employer must give notice of a requirement for medical certification each time a certification is required." *Id.*

[40] 29 U.S.C. § 2613(b)(1)-(3) (1994).

[41] 29 C.F.R. § 825.302(d).

[42] *Id.*

[43] 29 C.F.R. § 825.302(e).

[44] *Id.*

[45] *Id.*

[46] *See, e.g.*, Gay v. Gilman Paper Co., 125 F.3d 1432, 1436 (11th Cir. 1997) (analyzing whether husband's telephone conversation sufficient to notify employer of employee's need for FMLA leave); Hopson v. Quitman County Hosp. and Nursing Home, Inc., 126 F.3d 635, 640 (5th Cir. 1997) (considering

either in person or by telephone, telegraph, facsimile ("fax"), or other electronic means.[47] If the employee is unable to personally give notice, the employee's spouse, adult family member, or other responsible party may provide notice.[48] As with foreseeable leave, the employee need not expressly assert rights under the FMLA or reference the Act.[49] The employee simply needs to alert the employer that they need leave for medical reasons.[50] The employer then bears the burden of obtaining any additional required information.[51] The employee or spokesperson must then provide information such as the length of leave needed.[52]

In *Price v. City of Fort Wayne*,[53] the court of appeals liberally interpreted the adequate notice requirement.[54] The court found that filling out the city-provided leave request form, combined with an indication that the cause pertained to medical problems, was sufficient to put the city on notice that the leave was possibly FMLA protected.[55] In addition, the court ruled that once put on notice of an employee's request to take FMLA leave, the employer has the responsibility to inquire further.[56]

The Eleventh Circuit Court of Appeals analyzed the adequate notice standard in *Gay v. Gilman Paper Co.*[57] In *Gay*, the employee was admitted to a psychiatric hospital to receive treatment for a

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whether change in circumstance can justify less than thirty days notice to employer); Carter v. Ford Motor Co., 121 F.3d 1146, 1147 (8th Cir. 1997) (deciding wife gave inadequate notice when stating husband would be out due to "family problems").

[47] 29 C.F.R. § 825.303(b) (1996).

[48] *Id.*

[49] 29 C.F.R. § 825.303(a) (1996).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] 117 F.3d 1022.

[54] *Id.* at 1025.

[55] *Id.*

[56] *Id.* at 1026.

[57] 125 F.3d 1432, 1436.

nervous breakdown.[58] When the plaintiff's husband contacted her employer, he told the supervisor that she was "undergoing tests."[59] The court found that the plaintiff's husband had failed to adequately put the employer on notice that the leave was "potentially FMLA-qualifying."[60] Other cases have echoed this approach.[61]

A change in the employee's circumstances can also override the thirty-day notice requirement.[62] In *Hopson v. Quitman County Hospital and Nursing Home, Inc.*,[63] the plaintiff rescheduled her breast reduction surgery to ensure insurance coverage.[64] The *Hopson* court ruled that the adequacy of notice in such a case is a question of fact, and the trier of fact should examine the issue using a three-pronged analysis..[65]

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[58] *Id.* at 1433.

[59] *Id.*

[60] *Id.* at 1436.

[61] *See, e.g.*, Carter v. Ford Motor Co., 121 F.3d at 1147 (finding employee gave insufficient notice when wife notified employer husband would be "out for a while"). In that case, thirteen days after his last day of work the employee verbally notified employer that he was requesting sick leave, but he failed to turn in a completed form by his doctor (describing the need for leave) prior to his termination two days later. 121 F.3d at 1146-47.

[62] *See* Hopson v. Quitman County Hosp. and Nursing Home, Inc., 126 F.3d at 640 (holding change need not be medical emergency to trigger reduction of advanced notice requirement).

[63] *Id.* at 639

[64] *Id.* at 640.

[65] 126 F.3d at 640. The first prong of the analysis entails an examination of whether there was a change in circumstance. *Id.* If the trier-of-fact finds that there was a change in circumstance, they must then decide whether the employee gave notice as soon as practicable and made reasonable efforts to schedule treatment so as not to unduly disrupt the employer's operations. *Id.* The trier-of-fact will need to answer each of these questions affirmatively before determining whether the employee provided adequate notice. *Id.*

IV. SERIOUS HEALTH CONDITION

Assuming the employee provided adequate notice to the employer, the next critical issue is whether the employee can establish that they or an applicable family member had a " serious health condition" that warranted protection by the FMLA.[66] The FMLA defines "serious health condition" as an " illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider."[67] Federal judges sometimes criticize this requirement as overly vague because what constitutes a condition serious enough to trigger FMLA protection is often difficult to determine.[68] Perhaps anticipating the concern over the exact meaning of the statute's language, the Department of Labor's final

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[66] *Compare* Victorelli v. Shadyside Hosp., 128 F.3d 184, 187 (3d Cir. 1997) (finding peptic ulcer potentially "serious health condition") *and* Thorson v. Gemini, Inc., 123 F.3d 1140, 1142 (8th Cir. 1997) (holding even relatively minor ailments can sometimes trigger FMLA protection) *with* Murray v. Red Kap Indus., Inc., 124 F.3d 695, 699 (5th Cir. 1997) (finding respiratory tract infection not "serious health condition" as matter of law) *and* Price v. Marathon Cheese Corp., 119 F.3d 330, 335 (5th Cir. 1997) (holding carpal tunnel syndrome not "serious health condition").

[67] 29 U.S.C. § 2611(11) (1994). Inpatient care is usually readily apparent because it requires an overnight stay in a hospital, but the continuing treatment option is more elusive because a variety of conditions will satisfy its requirements. *Id.* For example, continuing treatment includes any period of time that an employee is unable to come to work and perform their duties for three consecutive days, as long as the employee receives two or more treatments by a health care provider for the condition. *Id.* Any subsequent incapacitation for the same condition also qualifies for FMLA protection, and even a single treatment by a health care provider may satisfy the continuing treatment test. *Id.* Therefore, a course of prescription medication or therapy requiring special equipment to resolve or alleviate the health condition may satisfy the "serious health condition" test, but treatment that includes the taking of over-the-counter medications is not sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave. *Id.*

[68] *See* Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238, 242 (E.D. Pa. 1994) (characterizing FMLA "serious health condition" definition as "somewhat ambiguous").

FMLA regulations endeavored to establish a detailed definition of a "serious health condition."[69] Despite these and other attempts to create a concrete definition, however, the various federal courts occasionally decide factually similar cases with inconsistent and contradictory results.[70]

The FMLA also expressly protects chronic medical conditions that result in incapacity.[71] For a long-term or permanent period of incapacity, the employee or family member must be under the continuing supervision of a health care provider.[72] Alzheimer's disease, severe strokes, or the terminal stages of a disease are examples of this type of incapacity.[73]

Eligible employees or their families who are receiving cosmetic treatments for acne or plastic surgery are not "serious health conditions" unless they require inpatient hospital care or complications develop.[74] Similarly, the common cold, flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental

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[69] 29 C.F.R. § 825.114 (1996). The FMLA began its life accompanied by interim regulations developed by the Department of Labor, but final regulations became effective in 1996 that attempted to clarify what conditions are "serious" for FMLA purposes. *Id.*

[70] *Compare* Richmond v. Oneok, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (concluding chicken pox not "serious health condition") *with* George v. Associated Stationers, 932 F. Supp. 1012, 1017 (N.D. Ohio 1996) (holding chicken pox is "serious health condition").

[71] 29 C.F.R. § 825.114(a)(2)(iii) (1996). The final regulations define a "chronic serious health condition" as one which:

> A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
>
> B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
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> C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

Id.

[72] 29 C.F.R. § 825.114(a)(2)(iv) (1996).

[73] *Id.*

[74] 29 C.F.R. § 825.114(c) (1996).

or orthodontia problems, or periodontal disease are examples of conditions that do not meet the definition of a "serious health condition" unless they result in inpatient care or continuing treatment by a health care provider.[75] FMLA protected leave must entail treatment by a health care provider or by a provider of health care services on referral by a health care provider.[76] Conversely, an employee's absence resulting from substance abuse does not qualify for FMLA protection.[77]

During the first five years of the Act, the number of cases involving the "serious health condition" issue have risen steadily.[78] Federal judges look to the statute and its regulations for assistance in determining the outcomes of these difficult cases.[79] Some of the early FMLA cases took a strict constructionist view of the "serious health condition" requirement.[80]

The case of *Seidle v. Provident Mutual Life Insurance Co.*[81] exemplifies this narrow approach.[82] In *Seidle*, the district court granted the employer's motion for summary judgment, deciding the plaintiff's four-year-old son's otitis media (ear infection) was not a "serious health condition."[83] The court, referring to the Act's legislative history, noted that ear infections were "conspicuously absent"

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[75] *Id.*

[76] 29 C.F.R. § 825.114(d) (1996).

[77] *Id.*

[78] *See* Allan N. Taffet, *Family Medical Leave Act Five Years Later*, Vol. 218 No. 88 N.Y.L.J. 1, (Col. 1) (1997) (commenting on foreseeability of increasing FMLA litigation); *see also* William McDevitt, Commentary, *Evaluating the Current Judicial Interpretation of "Serious Health Condition" Under the FMLA*, 6 B.U. PUB. INT. L.J. 697, 701 (1997) (discussing causes of increasing FMLA litigation).

[79] *See* Martyszenko v. Safeway, Inc., 120 F.3d 120, 123-24 (8th Cir. 1997) (evaluating whether alleged sexual molestation of plaintiff's son created serious condition because son not "incapacitated").

[80] See infra notes 84-89 (finding ear infection not "serious health condition" despite contrary expert testimony).

[81] 871 F. Supp. 238.

[82] *Id.* at 243-44.

[83] *Id.*

from the list of serious health conditions.[84] The court also considered the fact that the plaintiff's son had only been to his doctor one time in determining that he was not receiving "continuing treatment."[85] Interestingly, the court granted the defendant's motion for summary judgment despite the affidavits of two medical experts that ear infections are "serious" medical conditions.[86]

The district court in *Brannon v. OshKosh B'Gosh, Inc.*[87] used similar analytical methodology but reached a contradictory result.[88] In *Brannon*, the plaintiff's gastroenteritis and upper respiratory infection was not considered a "serious health condition" because she failed to prove incapacitation during her absence from work.[89] The throat and upper respiratory infection suffered by employee's daughter, however, did constitute a FMLA covered "serious health condition" because of the testimony by her parents and doctor that her fever "incapacitated" her for the statutory threshold of more than three days.[90]

Other early FMLA cases came to different judgments as to what constituted a "serious health condition" and whether the analysis should be a question of fact or law.[91] The Department of Labor issued an opinion letter in December of 1996 that sought to better define the required aspects of a "serious health condition."[92] Subse-

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[84] *Id.* at 242 (referencing U.S.Code Cong. & Admn. News 1993 at pp. 3, 31).

[85] 871 F. Supp. at 244.

[86] *Id.* at 245.

[87] 897 F. Supp. 1028 (M.D. Tenn. 1995).

[88] *See id.* at 1035 (discussing proper methods for determining whether particular illness is "serious health condition").

[89] *Id.* at 1037.

[90] *Id.*

[91] *Compare* McClain v. Southwest Steel, Co., Inc., 940 F. Supp. 295, 298 (N.D. Okl. 1996) (ruling chronic nausea, diarrhea, and severe headaches may be "serious health condition") *with* Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 475-76 (D. Kan. 1996) (finding plaintiff's pregnancy-related back pain, nausea, headaches, and swelling not "serious health condition").

[92] *See* FMLA-86 (discussing which illnesses should be considered "serious health conditions" under FMLA).

quently, federal courts considering alleged FMLA violations have tended to view "serious health conditions" more broadly.[93]

In addition, some of the latest FMLA cases evaluating this issue noted that the entire matter is often a question that a jury should decide.[94] In contrast, a number of courts continue to consider the question of a "serious health condition" as a question of law.[95] The decision often turns on the evidence that the plaintiff can provide that tends to indicate incapacity for more than three days combined with at least one consultation with a health care provider.[96]

Perhaps the best example of the current method of analysis is *Bauer v. Varity Dayton-Walther Corp.*[97] In *Bauer*, the plaintiff suffered from hematochezia, or the passage of bloody stools.[98] The court found that the condition was not a "serious health condition" because the plaintiff never sought inpatient care, was capable of per-

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[93] *See* Price v. City of Fort Wayne, 117 F.3d at 1023 (deciding combination of relatively minor illnesses may constitute a "serious health condition"); *see also* Rhoads v. Federal Deposit Ins. Corp., 956 F. Supp. 1239, 1255 (D. Md. 1997) (concluding asthma and migraines may qualify as serious health conditions).

[94] *See* Victorelli v. Shadyside Hosp., 128 F.3d at 190 (reversing district court summary judgment for employer in case of employee with peptic ulcer). The *Victorelli* court found that the final regulations of the Act allowed for instances where the employee is suffering from incapacity only occasionally. *Id.* *See also* Thorson v. Gemini, Inc., 123 F.3d 1140, 1141 (8th Cir. 1997) (citing FMLA-86 in deciding minor illnesses can trigger statute if they result in incapacity).

[95] Murray v. Red Kap Indus., Inc., 124 F.3d at 699 (holding respiratory tract infection not "serious health condition" as matter of law); Price v. Marathon Cheese Corp., 119 F.3d at 335 (deciding mild carpal tunnel syndrome not "serious health condition" as matter of law).

[96] *See* Price v. Marathon Cheese Corp., 119 F.3d at 335 (deciding condition not serious where doctor did not testify condition prohibited continued job performance); Hodgens v. General Dynamics Corp., 963 F. Supp. 102, 106 (D. R.I. 1997) (finding hypertension and arrhythmia not "serious" where plaintiff not incapacitated).

[97] 118 F.3d 1109 (6th Cir. 1997).

[98] *Id.* at 1110.

forming required tasks, and had perfect attendance at his new employer.[99] Although plaintiff argued that the rectal bleeding was possibly caused by cancer or another explicitly listed ailment protected by the FMLA, the court decided that a plaintiff needs actual evidence of such a condition to qualify for FMLA leave.[100]

V. CURRENT TRENDS

Initially, American business leaders questioned the efficiency of a law that entitles employees to an additional entitlement of leave time from their jobs, however, many employees eligible for FMLA leave cannot afford to utilize its protections because the leave provided is unpaid.[101] There is some support by Congressional Democrats, the National Partnership for Women and Families, and even President Clinton for legislation to increase coverage of the FMLA by including all companies with at least twenty-five employees.[102] Understandably, pro-business members of Congress have introduced legislation designed to make the Act more employer-friendly.[103] The two opposing factions seem to agree a clearer definition of what a "serious health condition" entails will reduce the confusion over

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[99] *Id.* at 1112.

[100] *Id.*

[101] *See* Arielle Horman Grill, Comment, *The Myth of Unpaid Family Leave: Can the United States Implement A Paid Leave Policy Based on the Swedish Model?*, 17 COMP. LAB. L. J. 373, 374 (1996) (advocating movement toward paid family leave).

[102] Jeri White Papa, Richard E. Kopelman, and Gillian Flynn, *Sizing Up The FMLA*, 8/1/98 Personnel J. 38, 1998 WL 14114095 (highlighting differing opinions of whether FMLA has performed as intended).

[103] *Id.* Representative Harris Fawell, a Republican from Illinois, introduced the Family and Medical Leave Clarification Act in April of 1998. *Id.* This legislation, an amendment to the FMLA, would, *inter alia*, narrow the definition of a "serious health condition" and put a greater responsibility on the employee to provide the employer with timely notice of their need for FMLA leave. *Id.*

whether or not an employer is obligated to grant a FMLA leave in a particular instance.[104]

Despite the inherent vagueness of the term "serious health condition," the efforts of the federal judiciary have helped provide a reasonable and supportable analytical framework to predict the outcomes of particular fact patterns.[105] Future cases will likely turn on whether the employee received inpatient care and was capable of performing required tasks of their job.[106] This analysis attempts to incorporate the FMLA stated purpose of being fair to both the employers administering their policies and the employees who occasionally require unpaid leave.[107]

The FMLA and its corresponding final regulations take a practical view toward an employer's obligation to provide their employees with family necessitated leave.[108] The courts have also supported the Act's purpose of helping American workers spend time with their families during a crisis.[109] The *Hopson* court's clear and convincing analysis regarding the requirements an employee must meet to give adequate notice to their employers in FMLA cases may become the standard.[110] Therefore, courts will need to continue to closely examine the facts of each individual case to determine whether the employee provided the employer sufficient notice of the need for FMLA leave, and whether the requested leave is due to a "serious health condition" as described by the Act.[111]

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[104] *See* Sandra Baker, *Family Leave Act Still Met With Confusion*, 9/15/98 Knight-Ridder Trib. Bus. News – KRTBN (Pg. Unavail. Online) 1998 WL 16337342 (advocating for better definition of "serious health condition").

[105] *See* Bauer v. Varity Dayton-Walther Corp., 118 F.3d at 1112 (outlining current FMLA analysis).

[106] *Id.*

[107] *Id.*

[108] 29 U.S.C. §§ 2601-2654.

[109] *See* Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995) (considering FMLA purpose when analyzing whether employee provided adequate notice).

[110] 126 F.3d 635 at 640.

[111] *Id.*

VI. CONCLUSION

The FMLA is still going through some understandable growing pains associated with such a broadly structured federal statute. In addition, the sometimes conflicting judicial interpretations of the Act have compounded these growing pains into what some have defined as a "serious condition."[112] As federal courts begin to establish more predictable methods for analyzing these cases, fewer matters should result in litigation. Consistent results would satisfy the FMLA's overriding goals of helping employees balance their work and family lives, while simultaneously not overburdening American industry.

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[112] Thomas G. Servodidio, Daniel G. Anna, and Jeffrey P. Ferrier, *Employers Struggling to Resolve Convergence of ADA, FMLA 'Leave'*, 2/24/97 NAT'L L.J. C12, Col. 3 (complaining case law on FMLA and interaction with ADA not yet well developed).