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ANALYSIS AND UNDERSTANDING OF THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Jane Rigler†

During the middle of an academic semester, a forty-three-year-old law professor who resides and works in Pennsylvania learns that her seventy-three-year-old mother has cancer. The mother is retired, lives in California, and is scheduled to begin chemotherapy in two days. The course of the chemotherapy is expected to cover a six-month period with doses administered every other week. The professor approaches her boss, the school's dean, and asks if she might be granted a leave of absence, effective the next day, to stay with her mother over the course of the chemotherapy. The law school has never dealt with a similar request and has no institutional policy covering the subject. How should the dean respond?

Most states, including Pennsylvania, do not have comprehensive state legislation dealing with an employer's obligation to grant leaves of absence to accommodate employees' familial needs and responsibilities. Thus, the dean's response in the above-described scenario will be dictated primarily by the terms of the federal Family and Medical Leave Act of 1993 (FMLA).¹ That legislation, effective August 5, 1993,² requires employers of nearly fifty percent of the nation's workforce³ to provide leaves of

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1. See 29 U.S.C. §§ 2601-2654 (1988 & Supp. V 1993) (awarding unpaid leave for up to 12 weeks to attend to certain familial needs).

2. The Family and Medical Leave Act of 1993 § 405(b)(1), 29 U.S.C. § 2601(b) (1988 & Supp. V 1993). If an effective collective bargaining agreement existed between the relevant employer and its employees on August 5, then the Act took effect on the expiration of the contract or February 5, 1994, whichever occurred first. *Id.*

3. H.R. REP. NO. 8, 103rd Cong., 1st Sess., pt. 1, at 60 (1993). Others have

absence to employees when the leave sought is associated with the birth of a child,⁴ the placement of a child for adoption or in foster care,⁵ the employee's ill-health,⁶ or the ill-health of the employee's immediate family member.⁷ Employers must continue to provide health insurance coverage during the leave.⁸ When the employee returns the employer must restore the employee to her original position or an equivalent one.⁹

The FMLA represents a fundamental change in the way American employers are required to acknowledge and accommodate employees and their families.¹⁰ This Article examines the new legislation and the accompanying interim final regulations promulgated by the Department of Labor¹¹ and considers the interplay between the FMLA and other pieces of federal and state legislation dealing with workplace issues. The Article is designed to provide a comprehensive understanding of FMLA rights and obligations as well as to explore the Act's inconsistencies and shortcomings. Particular emphasis is placed on issues likely to require resolution through litigation or remedial congressional action. After a brief look at the impetus for the legislation, the Article focuses on four primary issues: (1) To whom does the Act apply? (2) to what protections are employees entitled? (3) how are those protections secured? and (4) how does the FMLA relate to

estimated that only 40 percent of the U.S. workforce is affected by the Act. *DOL Plans to Extend FMLA Comment Period*, 1 Analysis/News and Background Info., 143 Lab. Rel. Rep. (BNA) 508, 509 (Aug. 16, 1993).

4. 29 U.S.C. § 2612(a)(1)(A) (1988 & Supp. V 1993).

5. *Id.* § 2612(a)(1)(B).

6. *Id.* § 2612(a)(1)(D).

7. *Id.* § 2612(a)(1)(C).

8. *Id.* § 2614(c)(1); *see also infra* text accompanying notes 119-26.

9. 29 U.S.C. § 261(a)(1)(A)-(B) (1988 & Supp. V 1993); *see also infra* text accompanying notes 163-74.

10. The General Accounting Office estimated that about 2.5 million people were likely to take FMLA leave. The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,810 (1993).

11. "As of Nov. 11, the Labor Department had not yet forwarded the final rules to the Office of Management and Budget, where they could remain under review for up to 90 days." *House Republicans Question Whether Uponcomg FMLA Regulations Are Tainted*, Daily Lab. Rep. (BNA) Item 10, (Nov. 16, 1994). It has been suggested by the Republican members of the House Education and Labor Committee that "certain interest groups [may] have had an opportunity to unfairly influence the final Family and Medical Leave Act regulations." *Id.* The Republicans, in a November 14th letter to Secretary of Labor Robert Reich, "expressed concern that Labor Department staff may have shared advance copies of the draft regulations with a select number of interest groups and, after negotiating with these groups, incorporated suggested changes in the final rules." *Id.*

other relevant legislation? The Article does not provide an exhaustive review of the interim regulations which supply detailed guidance to many of the Act's nuances, but still uses the regulations extensively. The Article focuses on issues of consistency, fairness, and manageability as they relate to the Act's mission and framework.

I. LEGISLATIVE BACKGROUND

The Family and Medical Leave Act of 1993 was the first piece of legislation signed by President Bill Clinton.¹² Although virtually identical bills had been passed by the 101st and 102nd Congresses, President George Bush vetoed them.¹³ The Democratic Congress was unable to muster the votes to override the vetoes.

The bills passed by the 101st, 102nd, and 103rd Congresses were preceded by several years' consideration of family leave issues. The Select Committee on Children, Youth and Families, in 1984, conducted a comprehensive investigation of the issues and "unanimously recommended that Congress review improving current leave policies, including the issue of job continuity."¹⁴ Representative Patricia Schroeder then introduced H.R. 2020, the Parent and Disability Leave Act of 1985, on April 4, 1985.¹⁵ Representative Schroeder's bill provided unpaid leave to employees upon the birth or adoption of a child or to care for a seriously ill child, as well as unpaid leave necessitated by an employee's own serious health condition.¹⁶ Other, similar pieces of legislation were offered in subsequent years with various committees holding hearings and issuing reports.¹⁷

Motivation for the legislation was summarized by the Senate Report which accompanied the 1993 Act. It asserted that "[t]he United States has experienced a demographic revolution in the composition of the workforce, with profound consequences for the lives of working men and women and their families."¹⁸ A particu-

12. *Doing the Leave Policy Shuffle*, U.S. NEWS & WORLD REP., Feb. 8, 1993, at 21.

13. See H.R. REP. NO. 8, *supra* note 3, at 20-21 (tracing the history of this legislation).

14. *Id.* at 18.

15. *Id.*

16. *Id.*

17. *Id.* at 18-21.

18. S. REP. NO. 3, 103rd Cong., 1st Sess. 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. at 3, 7.

lar focus was the dramatic change over the last forty years in the number of women in the workforce and the substantial increase in the number of single-parent households. The report noted a more than two-hundred percent increase in the female civilian labor force since 1950.¹⁹ It stated: "The Bureau of Labor Statistics predicts that by the year 2005, the female labor force participation rate will reach 66.1 percent."²⁰ While in 1900 the percentage of women in the labor force was nineteen, "today 74 percent of women aged 25-54 are in the labor force."²¹ The Senate Report highlighted Census Bureau reports that "single parents accounted for 27 percent of all family groups with children under 18 years old in 1988, more than twice the 1970 proportion."²² It asserted that "[d]ivorce, separation, and out-of-wedlock births have left millions of women to struggle as single heads of households to support themselves and their children."²³

Also of congressional concern was "another dramatic demographic shift: the aging of the American population."²⁴ The Senate Report relied on a National Council of Aging estimate that "20 to 25 percent of the more than 100 million American workers have some caregiving responsibility for an older relative."²⁵

The Report characterized these demographic changes as "far reaching,"²⁶ and went on to assert:

With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has [sic] become increasingly difficult for families to fulfill. When there is no one to provide such care, individuals can be permanently scarred as basic needs go unfulfilled. Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived

19. *Id.* at 5, reprinted in 1993 U.S.C.C.A.N. at 7-8.

20. *Id.*, reprinted in 1993 U.S.C.C.A.N. at 8.

21. *Id.* at 6, reprinted in 1993 U.S.C.C.A.N. at 8.

22. *Id.*

23. S. REP. NO. 3, *supra* note 18, at 6, reprinted in 1993 U.S.C.C.A.N. at 8.

24. *Id.*

25. *Id.* at 7, reprinted in 1993 U.S.C.C.A.N. at 9.

26. *Id.*

children and adults.²⁷

The Senate Report also commented on the United States' international reputation regarding family leave issues, observing:

The United States is one of the few remaining countries in the world that has not enacted a law setting a standard for family leave. With the exception of the United States, virtually every industrialized country, as well as many Third World countries, have national policies that require employers to provide some form of maternity or parental leave.²⁸

The Report also noted that "[t]he United States' major competitors provide some form of *paid* leave."²⁹

The formula chosen by Congress to recognize these changes in the American workforce was characterized by the Senate Report as "a minimum labor standard for leave."³⁰ "The [legislation] is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment."³¹ These types of legislation establish a floor, a minimum, that a covered employer must provide employees. Employers are free to enact policies and programs more generous than the federal minimum and states may establish requirements more beneficial than those imposed by the federal FMLA.

II. COVERAGE

By excluding most federal employees,³² Title I of the FMLA covers employees of private employers and state and local govern-

27. *Id.*

28. S. REP. NO. 3, *supra* note 18, at 19, *reprinted in* 1993 U.S.C.C.A.N. at 21.

29. *Id.* (emphasis added).

30. *Id.* at 4, *reprinted in* 1993 U.S.C.C.A.N. at 6.

31. *Id.*

32. Title I excludes "any Federal officer or employee covered under subchapter V of chapter 63 of Title 5." 29 U.S.C. § 2611(B) (1988 & Supp. V 1993). Instead, these persons, commonly referred to as federal civil service employees, are covered under Title II of the FMLA. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 7, 19 (1993). Moreover, employees of the U.S. Senate and House of Representatives are covered by Title V of the FLMA. 2 U.S.C. § 60m (1988 & Supp. V 1993). Nevertheless, some federal employees are still covered under Title I. *See* The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.109 (1993) (listing various federal employees covered under Title I).

ments. The focus of this article is on Title I. Title I of the FMLA requires "employers," as defined by the Act,³³ to provide certain benefits to "eligible employees."³⁴ The Act defines "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."³⁵ The term "employer" also "includes any 'public agency' as defined in section 3(x) of the Fair Labor Standards Act of 1938 (FLSA)"³⁶ Under the FLSA, and accordingly under the FMLA, "[a] 'public agency' . . . [includes] the government of a State or political subdivision thereof, a State, or a political subdivision of a State."³⁷

In the definition of "employer," use of the phrase "engaged in commerce or in any industry or activity affecting commerce"³⁸ refers to interstate commerce.³⁹ The interim regulations specify that employers who meet the fifty employee test are thereby deemed to engage in commerce or to affect commerce.⁴⁰ Employer coverage, then, should generally be a simple matter of counting employees, and if the employer has fifty or more employees, the employer is covered, subject only to the twenty calendar workweek requirement.⁴¹ The twenty workweeks, however, need not be con-

33. 29 U.S.C. § 2611(4)(A) (1988 & Supp. V 1993) (defining "employer").

34. *Id.* § 2611(2)(A) (defining "eligible employee").

35. *Id.* § 2611(4)(A) (1988 & Supp. V 1993). The interim regulations provide that whether an employer satisfies the 50-employee requirement "is determined when the employee requests the leave." 29 C.F.R. § 825.111(d) (1993). A subsequent or expected decline in employees does not affect eligibility. *Id.*

[O]nce an employee is determined eligible . . . eligibility is not affected by any subsequent change in the number of employees Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an employee who requests leave in August for a period of leave to begin in December.

Id.

36. 29 U.S.C. § 2611(4)(A)(iii) (1988 & Supp. V 1993).

37. Fair Labor Standards Act of 1938 § 3(x), 29 U.S.C. § 203(x) (1988). Note that no minimum number of employees is required for "public agency" coverage while private employers must employ 50 employees to meet the "employer" definition. *But see infra* text accompanying note 49.

38. 29 U.S.C. § 2611(4)(A)(i) (1988 & Supp. V 1993).

39. 29 C.F.R. § 825.104(b) (1993).

40. *Id.*

41. The interim regulations use a payroll method for determining the number of employees employed by an employer during a particular time period. *Id.* § 825.105(a).

secutive.⁴²

Obviously, some employers that have over fifty employees one year may have less than fifty employees in a future year. Having less than fifty employees for one year, however, does not eliminate the employer's FMLA obligation. Rather, the employer must employ fewer than fifty employees for two consecutive years to avoid FMLA liability.⁴³

It is, however, entirely possible for a covered "employer" not to employ any "eligible employees" entitled to FMLA benefits. The FMLA defines "employee" by reference to subsections (e) and (g) of section 3 of the Fair Labor Standards Act of 1938.⁴⁴ The Fair Labor Standards Act provides that an employee is "any individual employed by an employer"⁴⁵ and provides that "[employ]" includes to suffer or permit to work."⁴⁶

Nevertheless, simply working for an employer who employs more than fifty employees does not guarantee the employee leave since the Act's entitlements flow only to an "eligible employee."⁴⁷ An "eligible employee" is a person who has "been employed—[(1)] for at least 12 months by the employer with respect to whom leave is requested . . . ; and [(2)] for at least 1,250 hours of service with such employer during the previous 12-month period."⁴⁸ Thus, a

"Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week." *Id.*

42. *Id.* § 825.105(d).

43. *See* 29 U.S.C. § 2611(4)(A)(i) (1988 & Supp. V 1993) (stating an employer is covered if it employs 50 or more employees "in the current or preceding calendar year").

44. *See id.* § 2611(3) (referring to 29 U.S.C. § 203(e) & (g) (1988)).

45. 29 U.S.C. § 203(e)(1) (1988).

46. *Id.* § 203(g).

47. *See* 29 U.S.C. § 2612(a)(1) (1988 & Supp. V 1993) (giving the "eligible employee" right to leave); *id.* § 2614(a) (giving an "eligible employee" who takes a leave the right to have her position restored).

48. *Id.* § 2611(2). According to the regulations, the 1250 minimum hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (*see* 29 CFR part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used; in the absence of actual records of hours worked, employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541)

business with fifty employees which has just opened its doors or which employs only part-time employees who work less than 1250 hours a year, will not have employees entitled to FMLA benefits.

The statute excludes from the definition of "eligible employee" any employee employed "at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50."⁴⁹ Under this exclusion, employees of small "public agencies," such as small villages or townships, which meet the definition of "employer" but do not have fifty employees are not entitled to benefits under the Act. Also excluded is an employee of a covered private employer if fewer than fifty employees work at her worksite and combining employees at worksites within seventy-five miles of each other does not total fifty.

Certain "key employees,"⁵⁰ although they satisfy the "eligible employee" criteria, are limited in their FMLA protections. These "key employees" are entitled to leave and a continuation of their health benefits during that leave, but under limited circumstances the employer may refuse to reinstate them to their prior positions.⁵¹ The employee who may be denied restoration is defined as a "salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed."⁵² Denial

and who have worked for the employer for at least 12 months will be presumed to have worked at least 1,250 hours during the previous 12 months. See § 825.500(d). For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test.

Id. § 825.110(c) (1993). The 12 months "need not be consecutive months." *Id.* § 825.110(b). "The determinations of whether an employee has worked for the employer for at least 1,250 hours . . . and been employed . . . for a total of at least 12 months must be made as of the date leave commences." *Id.* § 825.110(d).

49. 29 U.S.C. § 2611(2)(B)(ii) (1988 & Supp. V 1993). "The 75-mile radius is measured by road miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee requesting leave is employed." 29 C.F.R. 825.111(b) (1993). The term worksite is also addressed in the interim regulations. See *id.* § 825.111(a).

50. See 29 C.F.R. § 825.217(a) (1993) (defining key employee). The term "key employee" is nothing more than the regulation's method of referring to the employee described in subsection (b)(2) of section 2614 of the Act. See *infra* note 52 and accompanying text.

51. 29 U.S.C. § 2614(b) (1988 & Supp. V 1993). Since "key employees" are not guaranteed their former positions when ready to return to work, it may be inaccurate even to characterize their absence from work as "leave."

52. 29 U.S.C. § 2614(b)(2) (1988 & Supp. V 1993). The "highest paid 10 percent" in-

of restoration is permitted, however, only if it is "necessary to prevent substantial and grievous economic injury to the operations of the employer."⁵³ The employer must notify the "key employee" of the intent to deny restoration at the time the employer determines that such injury would occur.⁵⁴

cludes all employees, whether eligible or ineligible, salaried and non-salaried. 29 C.F.R. § 825.217(c) (1993). Earnings include wages, premium pay, incentive pay, and bonuses. *Id.* § 825.217(c)(1). Although § 2614(b) is titled "exception concerning certain highly compensated employees," 29 U.S.C.A. § 2614(b) (West Supp. 1993), an employee need not be particularly well paid to meet the § 2614(b)(2) definition. If the employer compensated the bulk of its workforce on an hourly basis and paid them the federal minimum wage, \$4.25 per hour, and a salaried supervisor receives \$300 a week, she may very well be a § 2614(b) "highly compensated employee."

53. *Id.* § 2614(b)(1)(A).

An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time FMLA leave is requested (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after receipt of a request for leave (or the commencement of leave, if earlier) . . . [A]n employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

29 C.F.R. § 825.219(a) (1993).

54. 29 U.S.C. § 2614(b)(1)(B) (1988 & Supp. V 1993); *see also* 29 C.F.R. § 825.219(b)-(d) (1993) (detailing employer's notice requirements). These regulations provide:

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has requested or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement

The Act clearly specifies that it must be the restoration which will cause "substantial and grievous" injury,⁵⁵ not the employee's absence. While it may be reasonable to conclude that certain individuals are so critical to an employer's success that their absence is intolerable, the FMLA "key employee" exception does not address such an individual. The Act provides no relief for an employer of that valuable an employee. The interim regulations specify that, in determining "substantial and grievous injury," the employer

[m]ay take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.⁵⁶

While the "economic viability" of the firm need not be threatened in order to deny restoration,⁵⁷ the regulations nonetheless focus on whether it would be too costly for an employer that has perma-

at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

Id.

55. 29 U.S.C. § 2614(b)(1)(A) (1988 & Supp. V 1993). "The plain meaning of the statutory language is that it must be the restoration to employment, rather than the taking of the leave, which would cause the injury. The legislative history on this point, however, is somewhat confused." The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,805 (1993).

The interim regulations are also somewhat confused. These regulations state that the employer "must provide the employee a reasonable time in which to return to work, taking into account the circumstances, *such as the length of the leave and the urgency of the need for the employee to return.*" 29 C.F.R. § 825.219(b) (1993) (emphasis added). These factors suggest that it is the employee's leave, not the restoration, which is causing the injury.

56. 29 C.F.R. § 825.218(b) (1993).

57. *Id.* § 825.218(c).

nently replaced the on-leave employee to maintain both employees on the payroll.

The key employee exception poses many difficulties. Arbitrarily using the top ten percent of salaried workforce can lead to troubling results. Insignificant differences in pay might cause significant differences in FMLA protections. An employee earning \$65,000 annually may be in the top ten percent, while her colleague earning \$64,950 may not. Changes in the employer's payroll might cause an individual to be in the top ten percent one year, but not the next. Finally, differences in how employees are compensated, such as salary versus commission, might affect coverage since the exclusion refers only to salaried employees. What about a highly compensated individual who receives no salary but a whopping income in commissions?⁵⁸ The Act's literal language precludes any assertion that such an employee may be denied the full range of FMLA benefits.

The notion that restoration to employment will cause "substantial and grievous economic injury" will also lead to disquieting outcomes. A highly paid employee's restoration in one year might cause no such injury; in a subsequent year, the same employee might be denied restoration if leave was taken, the employer replaced her and restoration would cause "substantial and grievous economic injury" to the employer. In addition, two employees holding identical positions taking FMLA leave at the same time could have different levels of job security. The employer might seek replacements for both employees but be able to put only one replacement on the payroll by the time both leaves end. Restoring one employee plus continuing the employment of the replacement might not lead to "substantial and grievous economic injury," but restoring two employees and maintaining the replacement might.

58. *Family Leave Law Could Spark Litigation*, 1 Analysis/News and Background Info., 143 Lab. Rel. Rep. (BNA) 496, 497 (Aug. 16, 1993) (questioning whether a highly commissioned employee should be considered a "key employee"). The interim regulations provide that "[t]he term 'salaried' means 'paid on a salary basis,' as defined in 29 C.F.R. 541.118." 29 C.F.R. § 825.217(b) (1993). 29 C.F.R. § 541.118(a) (1993) states:

[A]n employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed.

Surely there is no fairness in permitting the employer to deny restoration to one of these two employees.

Under this Act, any sort of advanced planning by highly compensated employees to have a child or to care for an elderly parent will be almost impossible. How do such employees know whether they fall within the top ten percent of payroll? Should the employee broach these very personal matters of pregnancy and parental care with the employer in order to determine whether the employer would try to replace her? Should the employee seek information about the employer's financial condition to make an independent judgment about whether having a replacement as well as the employee on the payroll would cause "substantial and grievous economic injury?"

It is difficult to predict what effect the potential denial of restoration for the highly compensated employee will have on all interested parties. The employer might assume that any benefit gained by permanently replacing a temporarily absent employee will be outweighed by the litigation risks associated with the employer's obligation to establish "substantial and grievous injury" to justify the replacement.⁵⁹ Thus, employers may be reluctant to deny restoration to any employee. On the other hand, the mere potential for job loss might so discourage highly compensated employees that they might forgo their FMLA entitlement, never presenting the issue of whether their restoration would result in "substantial and grievous economic injury."⁶⁰

The "key employee" exception does not ensure that an employer can insist upon continuous service by an indispensable employ-

59. Neither the statute nor the interim regulations explicitly provide that the burden is on the employer to demonstrate that restoration would cause substantial and grievous economic injury; however, the interim regulations suggest such an approach. See 29 C.F.R. § 825.219(b) (noting that employer "must explain the basis for the employer's finding that substantial and grievous economic injury will result"). An employer may very well argue that the burden is on the employee to establish that restoration would not cause substantial and grievous economic injury. See *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993) (discussing the burdens of persuasion in employment discrimination litigation). In response to an inquiry regarding the reinstatement rights of a non-"key employee," the Department of Labor has opined that "[a]n employer has the *burden of proving* that an employee would not otherwise have been employed at the time the employee returning from FMLA leave seeks reinstatement." U.S. Dep't of Labor Advisory Op., 2 Empl. Prac. Guide (CCH) § 5407 (New Developments, Oct. 15, 1993) (emphasis added).

60. The failure of highly compensated individuals to avail themselves of FMLA leave might also mean that fewer rank-and-file employees will use the FMLA's protections. Those employees may see the supervisor's reluctance to take FMLA leave as a subtle message that they should behave similarly.

ee. Telling evidence that the enacted exception for "key employees" is not a necessary aspect of a workable system of personnel management is the complete absence of such an exception in Title II of the FMLA, the section dealing with federal civil service employees. It is only the private and state and local government sectors which will have to struggle with the "key employee" exception.

III. TO WHAT PROTECTIONS ARE ELIGIBLE EMPLOYEES ENTITLED?

A. General Provisions

The essence of the FMLA is the concept of job security: employees may attend to familial responsibilities confident that their employment is secure. In terms of employment benefits and protections, an employee on FMLA authorized leave must be treated at least as well as any other employee whose temporary absence is excused and, with regard to certain benefits, maybe better.

During each twelve-month period⁶¹ "an eligible employee [is]

61. 29 U.S.C. § 2612(a)(2) (1988 & Supp. V 1993). The employer is permitted to select one of four methods "for determining the '12-month period' in which the 12 weeks of leave entitlement occurs." 29 C.F.R. § 825.200(b) (1993). The methods are:

- (1) The calendar year;
- (2) Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date;
- (3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or
- (4) A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993).

Id. § 825.200(b)(1)-(4). Under the calendar year or fixed leave year methods,

an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in [which the leave is measured forward from the date any employee's first FMLA leave begins,] an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the . . . "rolling" 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 1994, four weeks beginning June 1, 1994, and four

entitled to a total of 12 workweeks of leave . . . for one or more of the following:"⁶² (1) because of the birth of a child of the employee and in order to care for such child⁶³ (2) because of the placement of a child with the employee for adoption or foster care⁶⁴ (3) in order to care for the employee's spouse, son, daughter, or parent if such spouse, son, daughter or parent has a serious health condition⁶⁵ or (4) because of a serious health condition that makes the employee unable to perform her employment functions.⁶⁶

If a husband and wife are employed by the same employer, the aggregate number of weeks of leave to which both may be entitled is limited. During any twelve-month period, if the leave is taken because of the birth or placement of a child or to care for a sick parent, the couple is entitled to no more than twelve weeks.⁶⁷ The Report of the House Committee on Education and Labor that ac-

weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, on February 1, 1995, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, etc.

. . . Employers will be allowed to choose any one of the alternatives . . . provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

Id. § 825.200(c)-(d).

62. 29 U.S.C. § 2612(a)(1) (1988 & Supp. V 1993).

63. *Id.* § 2612(a)(1)(A).

64. *Id.* § 2612(a)(1)(B).

65. *Id.* § 2612(a)(1)(C).

66. *Id.* § 2612(a)(1)(D).

67. 29 U.S.C. § 2612(f)(1)-(2) (1988 & Supp. V 1993). "This limitation in the total weeks of leave applies as long as a husband and wife are employed by the 'same employer.' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other" 29 C.F.R. § 825.202(b) (1993). The interim regulations also provide:

Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for [birth or placement of a child or to care for a parent], the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than [birth or placement of a child or to care for a parent]. For example, if each spouse took 6 weeks of leave for the birth of a child, each could later use an additional 6 weeks due to a personal illness or to care of a sick child.

Id. § 825.202(c).

accompanied the bill asserted that this provision was included so that employers would not be discouraged from hiring husbands and wives.⁶⁸ The statute, however, will hardly encourage employers who are predisposed against hiring such couples. As stated, the twelve-week couple maximum is limited to leaves associated with birth or placement of a child or care for a sick parent.⁶⁹ The Act, however, provides no spousal limitation on leaves to care for a non-newborn child or to care for each other. Thus, a couple with an ill eight-year-old child would *each* be entitled to twelve weeks of leave. Such leave could be taken simultaneously by the parents or separately, at different times during the year. Imagine further that a husband and wife are employed by the same employer and the wife undergoes a Caesarean delivery. If the Caesarean delivery was medically necessary, the wife would be entitled to up to twelve weeks leave associated with her "serious health condition." Simultaneously, the husband could take up to twelve weeks of FMLA leave because of the childbirth or the need to care for his spouse.

The restriction on leave for couples for childbirth or placement can also lead to unfair results. If a man and woman, unmarried but employed by the same employer, have a child together, each would be entitled to twelve weeks of leave since the statute imposes a limitation only on a "husband and wife."⁷⁰

The limitation on a couple to twelve weeks of leave to care for a parent is unnecessary. "Parent" does not include a parent-in-law⁷¹ and, therefore, the limitation would apply only in those extraordinary circumstances where a husband and wife have a common parent.⁷²

The terms "spouse," "son," "daughter," and "parent" are defined by the Act. In addition to biological parents, the term "parent" includes "an individual who stood in loco parentis to an employee when the employee was a son or daughter."⁷³ Obviously, the use of the expression "in loco parentis" encompasses a broad

68. H.R. REP. NO. 8, *supra* note 3, at 38.

69. *See supra* note 67 and accompanying text.

70. *See Family Leave Law, supra* note 58, at 497 (noting spousal restriction could be a point of litigation).

71. 29 C.F.R. § 825.113(b) (1993).

72. *See The Family and Medical Leave Act of 1993*, 58 Fed. Reg. 31,794, 31,801 (1993) ("[T]he circumstances in which such [parental leave] limitation might actually apply are extremely unlikely.").

73. 29 U.S.C. § 2611(7) (1988 & Supp. V 1993).

group. Grandparents, aunts, uncles, siblings and even non-relatives may fit the interim regulation's description of "those with day-to-day responsibilities to care for and financially support a child"⁷⁴ or one "who had such responsibility when the employee was a child."⁷⁵ The expansive definition obviously contemplates that for FMLA purposes an individual may have more than two "parents."⁷⁶

The term "spouse" means a husband or wife⁷⁷ and includes common law marriage partners.⁷⁸ "Son" and "daughter" are defined as "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is - [(1)] under eighteen years of age, or [(2)] 18 years of age or older and incapable of self-care because of a mental or physical disability."⁷⁹ The interim regulations specify that the disability for those eighteen and above must be such that the "individual requires active assistance or supervision to provide daily self-care in several of the 'activities of daily living.'"⁸⁰ Accordingly, for an employee to be eligible for family leave to take care of a child over eighteen years old, the child must have not only a "serious health condition" but must also be incapable of self care.

In contrast, no similar limitation regarding incapacity for self-

74. 29 C.F.R. § 825.113(c)(3) (1993).

75. *Id.*

76. Compare the expansive approach to the concept of parenthood with the niggardly approach to what constitutes foster care. The interim regulations describe such care as:

[Twenty-four]-hour care for children in substitution for, and away from, their parents or guardian. Such placement . . . involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

Id. § 825.112(e); *see also* The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,798 (1993) ("Foster care is defined to require State action, rather than just an informal arrangement to take care of another person's child."). Imagine a child, father unknown, who is abandoned by her mother. The child's grandmother takes the child into her home and begins to raise her. Such behavior by the grandmother, absent some state-sanctioned approval, would not constitute "placement for adoption or foster care." Therefore, the grandmother would not be entitled to FMLA leave for foster care during this potentially difficult transition period. After the child becomes an adult and the grandmother falls ill, the child would be entitled to FMLA leave to care for her "parent." 29 C.F.R. § 825.113(b) (1993). Similarly, if the child became ill, her grandparent would be entitled to leave to care for her "daughter." *Id.* § 825.113(c).

77. 29 U.S.C. § 2611(13) (1988 & Supp. V 1993).

78. 29 C.F.R. § 825.113(a) (1993).

79. 29 U.S.C. § 2611(12)(A) (1988 & Supp. V 1993).

80. 29 C.F.R. § 825.113(1) (1993).

care is imposed when leave is sought to care for a spouse or parent. Who, then, will be the caretakers of those over eighteen? Did Congress assume they would be cared for by a spouse? That would be inconsistent with its recognition of the increasing number of single-parent households.⁸¹ Will it be the children of those over eighteen? But surely many of those children will be infants or too young to provide assistance.

Many young people eighteen and over, particularly those furthering their education, are still effectively within their parents' care. A twenty-year-old child is entitled to leave to care for a seriously ill forty-two-year-old parent. Why shouldn't the forty-two-year-old parent be entitled to leave to care for the seriously ill twenty-year-old child? Did Congress assume that familial ties somehow change at eighteen? The fact that "the parent-child relationship is as permanent when adult children are ill as when adult parents are ill"⁸² can hardly be disputed.

Leave because of the birth of a child must be "*to care for such son or daughter*"⁸³ but leave because of placement for adoption or foster care does not have that restriction.⁸⁴ Although it might seem that the parent of a newborn whose spouse is providing the childcare is therefore not entitled to parental leave while a similarly situated employee who has adopted a child is so entitled, it is doubtful that such a disparity in treatment will result. First, such a distinction is blatantly unfair, and unsupported by any legitimate rationale. Neither the House nor Senate Reports that accompanied the FMLA make reference to different requirements for leave sought by "adoptive" and "natural" parents.⁸⁵ Second, as discussed later, the concept of leave "in order to care for" a family member is very broad and does not necessarily mean that the employee seeking leave must be the exclusive care provider.⁸⁶ In other words, a parent should be able to satisfy the requirement that the

81. See *supra* text accompanying notes 22-23.

82. Donna R. Lenhoff & Sylvia M. Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 HARV. J. ON LEGIS. 403, 433 (1989).

83. 29 U.S.C. § 2612(a)(1)(A) (1988 & Supp. V 1993) (emphasis added).

84. *Id.* § 2612(a)(1)(B).

85. The interim regulations merely parrot the statute, stating that an employer is required to grant leave "[f]or birth of a son or daughter, and to care for the newborn child," but devote no attention to explication of "and to care for the newborn child." 29 C.F.R. § 825.112(a)(1) (1993).

86. See *infra* text accompanying notes 154-58 (discussing in the context of certification by a health care provider what is meant by "needed to care" for a family member).

leave be "to care for such son or daughter" even if the other parent is the primary child-care provider. Whether the leave is occasioned by birth or placement, it must be used within twelve months of the birth or placement.⁸⁷

B. *Reduced/Intermittent Leave*

Leave taken because of a child's birth or placement may not be taken intermittently or on a reduced leave basis⁸⁸ unless the employer and employee agree.⁸⁹ Leave to care for an immediate family member or oneself may be taken intermittently or on a reduced leave schedule when medically necessary, even though the employer may not agree to such arrangement.⁹⁰ "If the employee requests intermittent leave . . . the employer may require [the] employee to transfer temporarily to an alternative position . . . that has equivalent pay and benefits; and better accommodates [the leave]."⁹¹ A reduced or intermittent leave schedule does not result in a reduction in the total amount of leave to which the employee is entitled beyond the amount of leave actually taken.⁹²

The Act does not specifically address whether an employer may insist on reduced or intermittent leave when the employee would prefer continuous leave. The hypothetical posed at the beginning of this article serves as an example of this situation. The Pennsylvania law professor, who has sufficient financial resources to cover her most pressing bills during a twelve-week stay with her cancer-stricken mother in California, may prefer to remain in Cali-

87. 29 U.S.C. § 2612(a)(2) (1988 & Supp. V 1993).

88. "'Intermittent leave' is leave taken in separate blocks of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks." 29 C.F.R. § 825.203(b) (1993). "A 'reduced leave schedule' is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. In other words, a reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time." *Id.* § 825.203(C). The "employer may limit leave increments to the shortest period of time (one hour or less) that the employer's payroll system uses to account for absences or use of leave." *Id.* § 825.203(d).

89. 29 U.S.C. § 2612(b)(1) (1988 & Supp. V 1993).

90. *Id.*; see also 29 C.F.R. § 825.203(a) (1993) (stating that an employee may take leave for one's own illness or a family member when no employer agreement is specified).

91. 29 U.S.C. § 2612(b)(2)(A)-(B) (1988 & Supp. V 1993); see also 29 C.F.R. § 825.204(a) (1993) (stating that an employee may be required to transfer to an alternate position that better accommodates the leave). The alternative position need not have equivalent duties. *Id.* § 825.204(c).

92. 29 U.S.C. § 2612(b)(1) (1988 & Supp. V 1993).

fornia for a single twelve-week period even though her mother will not require her assistance every day. However, it is expensive and emotionally and physically draining to travel back and forth. The law school, her employer, would prefer not to completely lose the services of a faculty member right in the middle of an academic semester. May the law school insist that she take intermittent leave (in essence requiring that she fly back and forth between Pennsylvania and California every other week), accommodating her need to care for her mother after each chemotherapy session but also accommodating the law school's need for her to teach her classes?⁹³

The Act provides that when leave is sought because of illness and the necessity for leave is foreseeable, the "employee shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer."⁹⁴ While the daughter lacks the capacity to schedule her mother's treatment for her employer's convenience, this language suggests that an employee may be required to adjust personal preferences regarding continuous or intermittent leave to an employer's legitimate interests.

Employees who use intermittent leave pose an interesting question about how to calculate the amount of leave used. Imagine an employee, hourly or salaried, who regularly works fifty hours a week. Her spouse has been seriously ill and requires her assistance with three weekly physical therapy visits, with each visit requiring a total of four hours absence from work (a weekly absence of twelve hours). For what period must the employer permit such a FMLA entitled absence from work? The statute specifies a maximum of twelve weeks of FMLA leave annually but leave can be taken in segments of as brief as one hour.⁹⁵ A workweek of forty hours translates to 480 hours of leave. The hypothetical employee

93. Section 2618 of the Act has special provisions regarding intermittent and reduced leave as well as leave occurring near the end of a term for individuals employed in an instructional capacity by an elementary or secondary school. Depending on the foreseeable duration of the leave or its proximity to the conclusion of a term, the school may restrict the flexibility of leave otherwise available. See 29 U.S.C. § 2618(c)-(d) (1988 & Supp. V 1993) (discussing intermittent or reduced leave for an employee in an instructional capacity and rules applicable to leave periods falling at the conclusion of a term). The hypothetical law school, however, does not fit § 2618's requirements because it is not an elementary or secondary school.

94. *Id.* § 2612(e)(2)(A). In addition, the language, "[e]mployees . . . must attempt to schedule their leave so as not to disrupt the employer's operations," is found in the interim regulations dealing with intermittent and reduced leave. 29 C.F.R. § 825.117 (1993).

95. 29 C.F.R. § 825.203(d) (1993).

working fifty hours per week for twelve weeks accumulates 600 hours. The interim regulations ask: "How does one determine the amount of leave used where an employee takes leave intermittently or on a reduced leave schedule?"⁹⁶ While they do not precisely respond to the inquiry regarding the employee who regularly works fifty hours a week, the responses by the interim regulations are of some assistance. They provide:

(a) If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. For example, if an employee who normally works five days a week takes off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave each week.

(b) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(c) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA), the hours worked under the new schedule are to be used for making this calculation.

(d) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.⁹⁷

From the language of the interim regulations, it appears that the key to calculating the expenditure of intermittent or reduced

96. *Id.* § 825.205.

97. *Id.* § 825.205(a)-(d).

leave is to determine the employee's normal workweek. Subsections a, b and d of section 825.205 use expressions such as "normally works,"⁹⁸ and "normal workweek."⁹⁹ Moreover, section 825.205(b) provides that "the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule."¹⁰⁰ Arguably then, an employee working fifty hours a week who uses twelve hours of FMLA leave will have exhausted only 12/50, or twenty-four percent, of a week of such leave.

A few words of caution about the above analysis are, however, in order. The employee who regularly works fifty hours a week does not meet the literal language of section 825.205(b) (an employee who "normally works a part-time schedule or variable hours")¹⁰¹ or of section 825.205(d) (an employee whose "schedule varies from week to week.")¹⁰² The hypothetical employee is neither part-time nor one whose hours of work vary. From an employer record-keeping perspective, it may simply be easier to maintain a record of the number of hours the employee uses intermittent leave and to conclude that her FMLA leave has been expended when she reaches 600 hours. Similarly, if the employee normally works thirty hours a week and takes intermittent leave, her annual twelve weeks of FMLA leave is gone after 360 hours.

C. *Compensability of Leave*

The employer need not pay the employee who is on FMLA leave.¹⁰³ The Act does provide that an employer may require the employee, or the employee may elect, to substitute accrued vacation leave or personal leave for any FMLA purpose.¹⁰⁴ In addition, "accrued paid family leave may be substituted for birth or adoption, or to care for a seriously-ill immediate family member; and, accrued paid medical or sick leave may be substituted to care for a seriously-ill immediate family member or for the employee's own serious health condition."¹⁰⁵

98. *Id.* § 825.205(a)-(b).

99. *Id.* § 825.205(d).

100. 29 C.F.R. § 825.205(b) (1993).

101. *Id.*

102. *Id.* § 825.205(d).

103. See 29 U.S.C. § 2612(c) (1988 & Supp. V 1993).

104. *Id.* § 2612(d)(2)(A)-(B); see also 29 C.F.R. § 825.207(d) (1993) (stating that paid vacation or personal leave may be substituted).

105. The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,802 (1993).

The Act imposes a limitation on the use of such substituted leave. It specifies that an employer is not required "to provide paid sick leave or paid medical leave in any situation in which [the] employer would not normally provide any such paid leave."¹⁰⁶ The Department of Labor has taken the following position concerning that language: If an employer's paid sick leave plan does not permit use of that leave to care for an ill family member, but limits its use to the employee's own ill health, the FMLA will not require that leave associated with the family member's care be paid.¹⁰⁷ Correspondingly, the Department asserts a similar limitation is imposed on family leave.¹⁰⁸ It noted that the legislative history provides:

The term "family leave" refers to "paid leave provided by the employer covering the particular circumstance for which the employee is seeking leave" for birth, adoption, or to care for a seriously ill family member. In other words, if the employer's family leave plan provides leave only for birth, it cannot be used for another purpose; or if the plan provides leave to care for a child, but not for a spouse, it cannot be used to care for a spouse.¹⁰⁹

The Department of Labor observed that there is much disagreement about the meaning of the expression "except that nothing in [the Act] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave."¹¹⁰

Several of the sponsors of the legislation and the Women's Legal Defense Fund (WLDF) contend in their comments

106. 29 U.S.C. § 2612(d)(2)(B) (1988 & Supp. V 1993).

107. 29 C.F.R. § 825.207(c)(1) (1993).

108. *Id.* § 825.207(b).

109. The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,802 (1993). Although the summary and discussion of The Family and Medical Leave Act of 1993 does not provide a citation for its reliance on legislative history, the Senate Report does contain the quoted language. See S. REP. NO. 3, *supra* note 18, at 27, *reprinted in* 1993 U.S.C.C.A.N. at 29. In *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 859 P.2d 1143 (Or. 1993), the Oregon Supreme Court interpreted Oregon's family leave statute to provide that accrued sick time can be used even when the employee is *not* sick. The Oregon statute read, "The employee seeking parental leave shall be entitled to utilize any accrued vacation leave, sick leave or other compensation leave, paid or unpaid, during the parental leave." OR. REV. STAT. § 659.360(3) (1992).

110. The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,802 (1993) (quoting 29 U.S.C.A. § 2612(d)(2)(B) (West Supp. 1993)) (alterations in original).

that the limitation was intended to apply only to use of paid sick leave for types of illnesses (i.e., medical conditions) that would otherwise be covered by the employer's plan (for example, if substance abuse treatment were excluded, paid leave could not be used for that purpose), but not to limit an employee's ability to use paid sick leave to care for an ill family member if the employer's plan does not permit such use of paid sick leave. However, the history of this provision lacks an explanation that it is so intended and cannot, therefore, overcome the clearer reading of the statutory language.¹¹¹

While the Department of Labor's decision may be mandated by the language,¹¹² it will result in real hardship. As contrasted with many industrialized nations, the FMLA's failure to require compensated leave is conspicuous.¹¹³ It may divide people by class, "helping those who can afford the three months without pay, bypassing those who can't."¹¹⁴ Even the fortunate employee who is permitted to use paid leave liberally will not be placed on a par with the well-heeled; employees with the most generous benefit packages will not typically have twelve weeks of accrued, paid leave available every year. For those poorly paid employees who have no (or limited use of) paid vacation, sick leave or family leave, the FMLA may simply be irrelevant because "[e]mployees . . . can't afford to take unpaid leave."¹¹⁵

While the concept of unpaid family leave is supported by concern for minimizing costs to employers and ensuring that such leave is not abused,¹¹⁶ the need to care for the newborn and the

111. *Id.*

112. For a thoughtful critique of the Department of Labor's position, see Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1086-89 (1994). The Federal Employees Family Friendly Leave Act, P.L. 103-388, permits certain federal employees to utilize "sick leave to care for a family member with an illness, injury or other condition that would justify the use of sick leave for the employee." *President Gets Bill On Federal Family Leave*, Daily Lab Rep. (BNA) Item 23, (Oct. 17, 1994).

113. See *supra* notes 28-29 and accompanying text.

114. Lisa Genasci, *Family Leave Law: Taking Care of Caregivers*, THE CHARLOTTE OBSERVER, Aug. 1, 1993, at 7B (quoting Marie Wilson, president of the Ms. Foundation).

115. *Family Leave: Most Firms Will Spread Absentees' Work Around*, WALL ST. J., Aug. 24, 1993, at A1 (alterations in original).

116. See S. REP. NO. 3, *supra* note 18, at 43, reprinted in 1993 U.S.C.C.A.N. at 45 (stating that one purpose of the Act is "to accommodate the legitimate interests of employers"). The interim regulations also provide: "An employee who fraudulently obtains FMLA leave . . . is not protected by FMLA's job restoration or maintenance of health benefits

seriously ill, which Congress also identified,¹¹⁷ must be met by someone. The FMLA is a reflection of society's agreement that those needs are best met by family members. Employees who cannot afford to take unpaid leave will still expend enormous energy worrying about their ill children and family members, resulting in a loss of productivity.¹¹⁸ Those productivity costs might more than offset the savings realized by employers from their employees' limited ability to use sick and family leave.

D. Insurance

The on-leave employee, whether or not the leave is paid, is entitled to continued coverage under the employer's health insurance plan.¹¹⁹ During any period of FMLA authorized leave, the employer must maintain coverage under any "group health plan" . . . for the duration of such leave at the level and under the conditions coverage would have been provided if the employee continued in employment continuously for the duration of such leave."¹²⁰ To the extent the employee is normally required to pay all or a portion of health care premiums, the requirement continues during the leave.¹²¹

provisions." S. REP. NO. 3, *supra* note 18, at 43, *reprinted in* 1993 U.S.C.C.A.N. at 45. 29 C.F.R. § 825.312(g) (1993).

117. *See id.* (stating that another purpose of Act is to "entitle employees to take reasonable leave, for family or medical reasons").

118. *See id.* at 7, *reprinted in* 1993 U.S.C.C.A.N. at 9 ("[C]aregiving not only causes stress for individuals, it may be a substantial drag on national productivity.").

119. 29 U.S.C. § 2614(c)(1) (1988 & Supp. V 1993). "An employer is not required to provide health benefits unless the employer already does so." The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,803 (1993).

120. 29 U.S.C. § 2614(c)(1) (1988 & Supp. V 1993). In addition:

Some commentators asked whether government entities are subject to the requirement to maintain health benefits of eligible employees during periods of FMLA leave, because government entities are excluded from the IRS definition of "employer" under the Internal Revenue Code for purposes of imposing an excise tax on employers or employee organizations which contribute to "nonconforming" group health plans. The Internal Revenue Code subsection which excludes federal and other government entities from the definition of "group health plan" for this purpose . . . is a separate provision from that incorporated into FMLA . . . FMLA includes public agencies within its definition of covered employers. There is no indication in either the Act or its legislative history supporting a view that public agencies are not required to maintain employee's health benefits during periods of FMLA leave, and they must do so.

The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794 31,803 (1993).

121. *See* 29 U.S.C. § 2614(c)(1) (1988 & Supp. V 1993) (stating that conditions of

Once again, employees using reduced or intermittent leave present an interesting question about continuation of health care benefits. Assume an employee who normally works forty hours a week. Because of her own serious health condition she is required to reduce her hours of weekly employment to twenty. Under the terms of her employer's health care benefits plan, for which the employer pays 100% of the premium, part-time employees (defined as those who work twenty or fewer hours weekly) are excluded from coverage. To what health care coverage, if any, is the reduced leave employee entitled?

As noted earlier, if an employee uses intermittent or reduced leave, the employer may require the employee to transfer temporarily to an alternative position.¹²² The alternative position must, however, have "equivalent pay and benefits."¹²³ The interim regulations provide:

The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits For example, an employee desiring to take leave in increments of 4 hours per day could be transferred to a half-time job paying the same hourly rate as the employee's previous job and enjoying the same benefits. *The employer may not eliminate benefits which otherwise would not be provided to part-time employees*; however, an employer may proportionately reduce earned benefits, such as vacation leave, where such a reduction is normally made by an employer for its part-time employees.¹²⁴

This regulation indicates that to deny the employee health care coverage because of her temporary, part-time status would be unlawful. Could the employer, instead, insist that the employee pay a certain portion of each premium? From the employer's perspective, such an approach would not constitute an elimination of a benefit

coverage remain the same for an employee on leave); *see also* 29 C.F.R. § 825.210(a) (1993) (stating that any share of premiums paid by the employee continues to be paid by the employee during the leave). "[A]n employer's obligations to maintain health insurance coverage ceases if an employee's premium payment is more than 30 days late. All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave." *Id.* § 825.212(a).

122. *See supra* note 91 and accompanying text.

123. 29 U.S.C. § 2612(b)(2)(A) (1988 & Supp. V 1993).

124. 29 C.F.R. § 825.204(c) (1993) (emphasis added).

but rather a proportionate reduction in one. From the employee's perspective a benefit, free health care, has been eliminated.

Although normally the employer would not be required to maintain an employee's life or disability insurance coverage during the FMLA leave, the Department of Labor has cautioned that policies which require a waiting period, submission to a physical or limitations regarding a new pre-existing condition may cause difficulties for employers.¹²⁵ In order to ensure that the employee is entitled to such coverage immediately upon her return, the employer realistically may have to pay such premiums on the employee's behalf during the leave.¹²⁶

E. Notice

When the need for leave is foreseeable, the employee is required to provide the employer with notice at least thirty days before the date the leave is to begin.¹²⁷ If the date of the birth, the placement or the need for medical treatment requires leave to begin in less than thirty days, such notice "as is practicable" is required.¹²⁸ When the necessity for leave is associated with the care

125. U.S. Dep't of Labor Advisory Op., 2 Empl. Prac. Guide (CCH) § 5409 (New Developments, Nov. 2, 1993); 29 C.F.R. § 825.213(f) (1993) (stating that the employer may elect to maintain these benefits to ensure that it can meet its duties to provide an equivalent benefit for an employee who returns from leave); *see also id.* § 825.212(c) (stating that an employee does not have to satisfy coverage requirements, such as a waiting period, if the policy lapses because the employer must provide equivalent benefits to the returning employee).

126. The interim regulations provide that an employer that pays an employee's share of life insurance, disability or even health care premiums is entitled to recover from the employee the amount of premiums paid. 29 C.F.R. §§ 825.212(b), 825.213(f) (1993). The Department of Labor has advised that "it is intended the employer and employee make arrangements for repayment that do not unduly impact the employee's financial condition such as periodic payroll deductions." DOL Advisory Op., *supra* note 125. At least one group, the Service Employees International Union, has claimed that the Department of Labor has "no legal authority under the FMLA or any other law to create any remedy for recovering premiums." *FMLA Proponents Urge Liberal Interpretation*, 1 Analysis/News and Background Info. 142 Lab. Rel. Rep. (BNA) 449, 465, 467 (Apr. 19, 1993). Title III of the FMLA established a Commission on Leave which is directed specifically to study "the ability of the employers to recover, under section 2614(c)(2) of this title, the premiums described in such section." 29 U.S.C. § 2632(1)(G) (1988 & Supp. V 1993).

127. 29 U.S.C. § 2612(e)(1)(B) (1988 & Supp. V 1993). An employee who uses paid leave is only "required to comply with the requirements of the employer's leave plan, and not any more stringent requirements of FMLA (e.g., notice or certification requirements) unless the paid leave period is followed by a period of unpaid FMLA leave." 29 C.F.R. § 825.207(g) (1993).

128. 29 U.S.C. § 2612(e)(2)(B) (1988 & Supp. V 1993). "'As soon as practicable' means as soon as both possible and practical, taking into account all of the facts and

of a family member or the employee's own ill-health and the necessity for such leave is foreseeable based on planned medical treatment, a "reasonable effort" must be made to schedule the treatment so as not to disrupt unduly the operations of the employer.¹²⁹ The Act does not specify what happens when the employee fails to provide notice as directed. The interim regulations address the issue by providing the following: "If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employer may deny the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave."¹³⁰

If an employer provides an employee handbook which deals with employee benefits, "the handbook must incorporate information on FMLA rights and responsibilities and the employer's policies regarding the FMLA."¹³¹ If there is no handbook or manual, "the employer shall provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA whenever an employee requests leave under the FMLA."¹³²

When an employee provides notice of the need for FMLA leave, the employer must provide the employee with notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations.¹³³ This notice should include, as appropriate:

- (1) That the leave will be counted against their annual FMLA leave entitlement;
- (2) Any requirements for the employee to furnish medical certification of a serious health condition and the conse-

circumstances in the individual case." 29 C.F.R. § 825.302(b) (1993).

129. 29 U.S.C. § 2612(e)(2)(A) (1988 & Supp. V 1993); *see supra* text accompanying notes 93-94 (discussing whether an employer can force an employee to take reduced or intermittent leave rather than continuous leave since the continuous leave may disrupt the employer's operations).

130. 29 C.F.R. § 825.304(b) (1993). In order to delay a leave because of insufficient notice,

it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave.

Id. § 825.304(c).

131. *Id.* § 825.301(a).

132. *Id.* § 825.301(b).

133. *Id.* § 825.301(c).

quences of failing to do so;

(3) The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(4) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments;

(5) Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment;

(6) Their status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial;

(7) The employee's right to restoration to the same or an equivalent job upon return from leave; and,

(8) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.¹³⁴

In addition, employers are expected "to responsively answer questions from employees concerning their rights and responsibilities under the FMLA."¹³⁵

F. Serious Health Condition

Leaves other than those associated with child placement and childbirth are permitted for two reasons: 1) if the family member of the employee has a "serious health condition" and the employee is needed to care for the family member;¹³⁶ and 2) if the employee has a "serious health condition" that renders the employee unable to perform her job.¹³⁷ The Act defines "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."¹³⁸ The "inpatient care" aspect of the defini-

134. *Id.* § 825.301(c)(1)-(8) (citations omitted).

135. 29 C.F.R. § 825.301(d) (1993).

136. 29 U.S.C. § 2612(a)(1)(C) (1988 & Supp. V 1993).

137. *Id.* § 2612(a)(1)(D).

138. *Id.* § 2611(11). The Senate Report supports a conclusion that the following are serious health conditions:

[H]eart attacks, heart conditions requiring heart bypass or valve operations, most

tion of serious health condition should not be difficult to determine. The interim regulations specify that "in-patient care" means an overnight stay.¹³⁹ If the employee or family member spends the night in a medical facility, she has a serious health condition.

The interim regulations recognize that "voluntary or cosmetic treatments" which are not medically necessary can still qualify as "serious health conditions."¹⁴⁰ The regulations require, however, that such treatments be accompanied by "inpatient hospital care."¹⁴¹ The more open-ended aspect of the "serious health condition" definition is the part of the statute that addresses "illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider."¹⁴² The interim regulations explain that this language includes:

(2) Any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or

(3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days; or for prenatal care.¹⁴³

In essence, the employee or family member must: (i) be ill at least three days and receiving treatment from a health care provider; ii) need continuing treatment for a chronic or long-term health condition that is incurable or that, if untreated, would likely result in a period of incapacity of more than three days; or, iii) need pre-natal care.¹⁴⁴

It is obvious that not every disorder will qualify as a "serious

cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.

S. REP. NO. 3, *supra* note 18, at 29, *reprinted in* 1993 U.S.C.C.A.N. at 31.

139. 29 C.F.R. § 825.114(a)(1) (1993).

140. *Id.* § 825.114(c).

141. *Id.*

142. 29 U.S.C. § 2611(11)(B) (1988 & Supp. V 1993).

143. 29 C.F.R. § 825.114(a)(2)-(3) (1993).

144. *Id.*

health condition." Although a cold or sore throat may satisfy the requirement of incapacitation for at least three calendar days, many such illnesses will not require "continuing" treatment by a health care provider.¹⁴⁵ The concept of "continuing treatment" requires

145. If illnesses such as colds, sore throats, and the flu are accompanied by continuing treatment by a health care provider, they will be considered "serious." However, it has been suggested that such illnesses are not sufficiently debilitating to be deemed "serious health conditions." *Employers Express Concerns with Definition of Serious Health Conditions in FMLA Rules*, Daily Lab. Rep. (BNA) Item 25, (Dec. 15, 1993) (asserting that members of the Equal Employment Advisory Council were forced to provide leave for conditions such as whiplash, migraine headaches, back problems, chicken pox, a root canal, and poison ivy and contending that Congress specifically rejected covering these types of illnesses). Nevertheless, the legislative history on this point certainly can be read to support a conclusion that these illnesses are "serious." The Senate Report specifically lists maladies such as heart attacks, cancer, strokes, appendicitis, pneumonia, emphysema, and injuries from serious accidents as those which are obviously "serious." S. REP. NO. 3, *supra* note 18, at 29, *reprinted in* 1993 U.S.C.C.A.N. at 31. The report also provides, however, that the term "serious health condition" is "intended to cover conditions or illnesses that affect an employee's health to the extent he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery." *Id.* at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. at 30 (emphasis added).

The Senate Report does contribute to some unnecessary confusion regarding how "serious" the health condition must be. The discussion above regarding absence from work "for more than a few days" appears in the Senate Report's second paragraph under the heading "Meaning of Serious Health Condition." See *id.* The third paragraph under that heading provides as follows:

The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period.

Id. The third paragraph then states that "in any case where there is doubt whether coverage is provided by this act, the *general tests* set forth in this paragraph shall be determinative." *Id.* (emphasis added).

What are the "general tests"? The language "set forth in this paragraph" suggests that the "general tests" are found in the third paragraph. As noted above, the third paragraph states that "short-term conditions for which treatment and recovery are very brief" are not covered by the FMLA. S. REP. NO. 3, *supra* note 18, at 28, *reprinted in* 1993 U.S.C.C.A.N. at 30. But the more general approach to what constitutes a "serious health condition" is that found in the second paragraph, i.e., that an employee's health must be affected "to the extent that he or she must be absent from work on a recurring basis or for more than a few days." *Id.*

To add to the mystery, the fourth paragraph of the Senate Report under the heading "Meaning of Serious Health Condition" begins by providing examples of conditions which are obviously serious. See *id.* at 29, *reprinted in* 1993 U.S.C.C.A.N. at 31. It concludes the list of examples by stating the following:

All of these conditions meet the *general test* that either the underlying health condition or the treatment for it requires that the employee be absent from

being treated two or more times by a health care provider¹⁴⁶ or being treated

two or more times by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider, *or* is treated . . . by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider - for example, a course of medication or therapy - to resolve the health condition.¹⁴⁷

Also included within continuing treatment is an individual who is "under the continuing supervision of, but not necessarily being actively treated by, a health care provider due to a serious long-term or chronic condition or disability which cannot be cured."¹⁴⁸

Because the interim regulations contemplate that a single night's hospital stay will constitute a "serious health condition", there may be situations in which a shorter absence from work will be deemed subject to the FMLA's protections while a longer absence will not. For example, the FMLA would not protect an employee who stayed home five days to care for her child with the chicken pox (who was not receiving treatment from a health care provider). Her co-worker who missed a single day of work because of an overnight hospital stay in conjunction with a suspected concussion would be protected by the FMLA.

The Act grants great discretion to the Secretary of Labor with regard to the question of "health care provider." The statute defines "health care provider" as "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery" or "any other person determined by the Secretary to be capable of providing health care service."¹⁴⁹ The Secretary has sanctioned a list of providers limited to Christian Science practitioners, podiatrists, dentists, clinical

work on a recurring basis or for more than a few days for treatment or recovery. They also involve either inpatient care or continuing treatment or supervision by a health care provider, and frequently involve both.

Id. (emphasis added). It appears Congress meant the "general test" for a "serious health condition" to be that just described. Unfortunately, it used the expression "general tests" in a paragraph which contains language arguably inconsistent with the standard it wished to adopt.

146. 29 C.F.R. § 825.114(b)(1) (1993).

147. *Id.* § 825.114(b)(2).

148. *Id.* § 825.114(b)(3).

149. 29 U.S.C. § 2611(6)(A)-(B) (1988 & Supp. V 1993).

psychologists, optometrists, chiropractors, nurse practitioners, and nurse midwives.¹⁵⁰

An employer may require that a request for leave associated with ill health be "supported by a certification issued by the health care provider."¹⁵¹ A copy of such certification shall be provided to the employer in a timely manner.¹⁵² The certification must state

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) . . . a statement that the eligible employee is needed to care for the [family member] and an estimate of the amount of time such employee is needed to care for the [family member]; and

(B) . . . a statement that the employee is unable to perform the functions of the position of the employee.¹⁵³

The interim regulations specify what it means for a health care provider to certify that an employee is "needed to care for" a family member.¹⁵⁴ That provision "encompasses both physical and

150. 29 C.F.R. § 825.118(b)(1)-(3) (1993). The interim regulations apparently contemplate that individuals such as occupational, respiratory and physical therapists, social workers, and speech pathologists are not "health care providers." See *Advocacy Group Calls for Expedited Process to Handle Employee Charges Filed Under FMLA*, Daily Lab. Rep., (BNA) Item 25, (Dec. 17, 1993). To the extent that an employee or her immediate family member is required to utilize the services of such individuals, the time spent in such endeavors entitles the employee to FMLA leave only when the services provided are "under orders of, or on referral by a health care provider." *Id.*

151. 29 U.S.C. § 2613(a) (1988 & Supp. V 1993). After a medical condition has been certified, recertification may be requested by the employer at a "reasonable interval." 29 C.F.R. § 825.308 (1993).

152. 29 U.S.C. § 2613(a) (1988 & Supp. V 1993). "The employee must provide the requested certification . . . within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable . . . to do so" 29 C.F.R. § 825.305(a) (1993). A failure to provide timely certification may result in a denial of leave until the certification is provided. *Id.* § 825.311(a). The Department of Labor invited comment "regarding the appropriate timing of the certification when there is a need for an employee to care for an immediate family member with a chronic, degenerative serious health condition, and where the family member may not be under the continuing treatment of a health care provider." The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,807 (1993).

153. 29 U.S.C. § 2613(b)(1)-(4)(B) (1988 & Supp. V 1993).

154. See 29 C.F.R. § 825.116(a) (1993).

psychological care.”¹⁵⁵ It includes the following situations: “[T]he family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor.”¹⁵⁶ The concept also includes the provision of “psychological comfort and reassurance which would be beneficial to a seriously ill child or parent receiving in-patient care.”¹⁵⁷ The “needed to care” requirement is also satisfied “where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.”¹⁵⁸

When an “employer has reason to doubt the validity of the certification provided,” the employer may require, at the employer’s expense, a second opinion from a different health care provider designated by the employer.¹⁵⁹ If there is a conflict between the health care providers, the employer may require, again at the employer’s expense, the opinion of a third provider designated or approved jointly by the employer and the employee.¹⁶⁰ The third provider’s opinion shall be “final and binding.”¹⁶¹ The Act does not specify how employers and employees are to resolve disputes about the identity of the third health care provider and the Department of Labor has solicited input on the issue.¹⁶²

G. Reinstatement/Failure to Return

When the employee has exhausted the twelve weeks of leave, the employee must be reinstated to his or her prior position or an

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* § 825.116(b).

159. 29 U.S.C. § 2613(c)(1) (1988 & Supp. V 1993). Neither the Act nor the regulations address whether the doubt must be in good faith. Where the health care provider is a Christian Science practitioner, “an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner.” 29 C.F.R. § 825.118(a)(3) (1993).

160. 29 U.S.C. § 2613(d)(1) (1988 & Supp. V 1993).

161. *Id.* § 2613(d)(2).

162. *See* The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,807 (1993) (explaining what an employer can do if it questions the adequacy of a medical certification and indicating that the Department of Labor has requested comments on selecting a third health care provider). The interim regulations do require that “[t]he employer and the employee must each act in good faith to reach agreement on whom to select for the third opinion provider.” 29 C.F.R. § 825.307(c) (1993). My personal preference is that the dispute be resolved by a coin toss. It is quick, easy, impartial, and maximizes the pressure on the parties to resolve the dispute before they ever have to toss the coin.

equivalent position.¹⁶³ A relatively recent state court decision, *Kelley Co., v. Marquardt*,¹⁶⁴ interpreted a state family and medical leave statute and may be useful in determining the parameters of the concept of "equivalent position." In *Kelley*, an employee returned from leave authorized by the Wisconsin Family and Medical Leave Act.¹⁶⁵ That statute specifies that when an employee returns she is entitled to her former or "equivalent employment position."¹⁶⁶ "Equivalent employment position" means "equivalent compensation, benefits, working shift, hours of employment and other terms and conditions of employment."¹⁶⁷ In *Kelley*, Ms. Marquardt was placed in a position which had the "same pay, same benefits, and the same office as her prior position."¹⁶⁸ However, under her new position, she had fewer employees to supervise, had neither a job description nor a job title, and a considerable portion of the work was clerical.¹⁶⁹ The court focused on the statutory requirement of equivalent "terms and conditions of employment" (language identical to that of the federal FMLA)¹⁷⁰ and concluded that because Marquardt's "authority and responsibility were greatly reduced in the new position," the positions were not equivalent.¹⁷¹

The interim regulations specify that the requirement of restoration to the same or equivalent position means "the same or geographically proximate worksite."¹⁷² The regulations also provide, however, that restoration to equivalent employment "does not extend to intangible, unmeasurable aspects of the job."¹⁷³ As examples of such intangible aspects, the interim regulations suggest that

the perceived loss of potential for future promotional opportunities is not encompassed in equivalent . . . working conditions; nor would any increased possibility of being subject to a future layoff. However, restoration to a job

163. 29 U.S.C. § 2614(a)(1)(A)-(B) (1988 & Supp. V 1993).

164. 493 N.W.2d 68 (Wis. 1992).

165. *Id.* at 71 (construing Wisconsin Family and Medical Leave Act, WISC. STAT. ANN. § 103.10 (West Supp. 1993)).

166. WISC. STAT. ANN. § 103.10(8)(a)2 (West Supp. 1993).

167. *Id.*

168. *Kelley*, 493 N.W.2d at 72.

169. *Id.*

170. *See* 29 U.S.C. § 2614(a)(1)(B) (1988 & Supp. V 1993).

171. *Kelley*, 493 N.W.2d at 74.

172. 29 C.F.R. § 825.215(e)(1) (1993).

173. *Id.* § 825.215(f).

slated for layoff when the employee's original position is not would not meet the requirements of an equivalent position.¹⁷⁴

The employer must treat the returning FMLA employee as though there had been no lapse of service.¹⁷⁵ An employee may, but is not entitled to, accrue seniority or other employment benefits, such as vacation, personal leave or sick leave, during the leave.¹⁷⁶ With respect to retirement plans and pensions, the interim regulations require that "any period of FMLA leave will be treated as continued service (i.e., no break in service)."¹⁷⁷

The Act specifically permits an employer to require an employee returning to work from leave based on her own serious health condition to provide "certification from the health care provider of the employee that the employee is able to resume work."¹⁷⁸ If an employer has notified the employee of the necessity of such certification, "[a]n employer may deny restoration to employment until an employee submits a required fitness-for-duty certification."¹⁷⁹

If an employee fails to return from an authorized leave, the employer is permitted to recover from the employee any premium the employer paid for maintaining health insurance coverage.¹⁸⁰ The interim regulations provide that "[a]n employee who returns to work for at least 30 calendar days is considered to have 'returned' to work."¹⁸¹ If the employee fails to return to work because of the continuation, recurrence, or onset of the employee's serious health condition or that of an immediate family member or other circumstances beyond the control of the employee, the employer

174. *Id.*; see also *Johnson v. Goodyear Tire & Rubber Co.*, 790 F. Supp. 1516, 1522-23 (E.D. Wash. 1992) (holding that restoration of an employee returning from pregnancy leave to a "much less secure" position constitutes discrimination under the Washington sex discrimination statute).

175. See 29 U.S.C. § 2614(a)(2)-(3)(B) (1988 & Supp. V 1993) (providing that a returning employee cannot lose benefits accrued prior to taking leave and is entitled to any right, benefit or position of employment that the employee would have had if leave had not been taken).

176. *Id.* § 2614(a)(3)(A); see also 29 C.F.R. § 825.215(d)(2) (1993) (providing that an employee is not entitled to accrue additional benefits or seniority during FMLA leave).

177. *Id.* § 825.215(d)(4).

178. 29 U.S.C. § 2614(a)(4) (1988 & Supp. V 1993).

179. 29 C.F.R. § 825.310(d) (1993).

180. *Id.* § 825.213(a). "When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance premiums for any period of FMLA leave covered by paid leave." *Id.* § 825.213.

181. *Id.* § 825.213(b).

may not recover the premiums.¹⁸² While the Act does not specify what constitutes "other circumstances beyond the control of the employee," the House Report and regulations indicate that a "highly compensated employee" denied restoration will not have to repay premiums.¹⁸³ The regulations provide other examples of circumstances which will "excuse" a failure to return to work such as transfer of a spouse, care of a family member, or lay-off during the leave.¹⁸⁴

IV. HOW THE FMLA IS ENFORCED

Employers are forbidden from interfering with, restraining or denying the exercise or attempt to exercise any right provided by the Act.¹⁸⁵ It is also unlawful for an employer to discriminate against any individual for opposing any practice made unlawful by the Act.¹⁸⁶ Enforcement of the Act is quite similar to enforcement of the federal Fair Labor Standard Act,¹⁸⁷ but there are some differences.

Like the Fair Labor Standards Act, an aggrieved employee may bring an action in state or federal court seeking lost compensation and interest as well as liquidated damages in an equal amount.¹⁸⁸ If the employee has not lost compensation, she may still recover "any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee."¹⁸⁹ As contrasted with the Fair Labor Standards Act, the FMLA provides that the individual employee may obtain "such equitable relief as may be appropriate, including employment, reinstatement, and promotion."¹⁹⁰ In addition, the FMLA permits the Secretary of Labor to seek enforcement of the Act and recover damages on

182. 29 U.S.C. § 2614(c)(2)(B)(i)-(ii) (1988 & Supp. V 1993).

183. See H.R. REP. NO. 8, *supra* note 3, at 42; 29 C.F.R. § 825.213(a)(2).

184. 29 C.F.R. § 825.213(a)(2) (1993).

185. 29 U.S.C. § 2615(a)(1) (1988 & Supp. V 1993).

186. *Id.* § 2615(a)(2).

187. 29 U.S.C. §§ 201-219 (1988 & Supp. I 1989 & Supp. II 1990 & Supp. III 1991 & Supp. IV 1992).

188. See *id.* § 216(b); 29 U.S.C. § 2617(a)(1) (1988 & Supp. V 1993). The Act contemplates the recovery of a "reasonable attorney's fee" after a "judgment awarded to the plaintiff." 29 U.S.C. § 216(a)(3) (1988). It may not be sufficient that the plaintiff was merely a prevailing party. See *Stumper v. Amalgamated Transit Union Local 24*, 27 F.3d 316 (7th Cir. 1994).

189. 29 U.S.C. § 2617(a)(1)(A)(i)(II) (1988 & Supp. V 1993).

190. *Id.* § 2617(a)(1)(B).

the employee's behalf or obtain an injunction.¹⁹¹ The Act specifically contemplates a class action.¹⁹²

Employers are required to post a notice informing employees and applicants of the pertinent provisions of the legislation and information pertaining to filing of a charge.¹⁹³ An employer who fails to post such notice may be assessed a penalty not to exceed \$100.¹⁹⁴

V. FMLA'S RELATIONSHIP TO OTHER RELEVANT LEGISLATION

A. *State and Local Leave Laws*

The FMLA is clear that the federal legislation is to serve as a minimum protection for employees. It specifically provides that if state legislation authorizes greater benefits and protections, employers in that state are required to abide by the state statutory provisions as well as the FMLA.¹⁹⁵ For example, if a state required

191. See *id.* § 2617(b) (providing for the enforcement of the FMLA and the recovery of damages); *id.* § 2617(d) (providing for injunctive relief).

192. See *id.* § 2617(a)(2)(B) (stating that an action to recover damages or equitable relief may be maintained "by any one or more employees for and in behalf of . . . the employees and other employees similarly situated").

The interim final rules have been criticized for their failure to "establish an expedited complaint procedure to handle charges that employers have unfairly denied employee requests for leave." *Advocacy Group*, *supra* note 150. The Women's Legal Defense Fund has asserted that an "expedited complaint procedure is essential because of the need for immediate resolution of employee charges that they were denied the leave guaranteed by the FMLA." *Id.* The Fund opined that an expedited procedure is "necessary to vindicate the rights of the employee." *Id.* The Fund also has pointed out that the interim rules make no reference to injunctions although the statute clearly provides that "such equitable relief as may be appropriate" is available. *Id.*

193. 29 U.S.C. § 2619(a) (1988 & Supp. V 1993). As noted earlier, whether the employer has posted notice can be critical in determining whether an employee who failed to provide appropriate notice of the necessity for leave may have her leave delayed. See *supra* notes 127-30 and accompanying text (discussing the notice requirements of the FMLA and noting that an employer may delay FMLA leave if these notice requirements are not met).

194. 29 U.S.C. § 2619(b) (1988 & Supp. V 1993). The notice provision applies to an "employer" which includes employers of 50 or more employees who have no eligible employees either because the employees have not worked the requisite number of hours or months, or the employees are employed at worksites where fewer than 50 employees work, or employers which are public agencies and which employ fewer than 50 employees. See *supra* text accompanying notes 33-43 (defining the word employer for purposes of the FMLA).

195. 29 U.S.C. § 2651(b) (1988 & Supp. V 1993). It may not be easy to determine

employers to provide twelve weeks of unpaid leave to care for a seriously ill parent-in-law, (a parent-in-law's ill health would not justify FMLA leave)¹⁹⁶ an employee would be entitled to such state-mandated leave. In addition, if, within the same year, the employee became seriously ill herself, she would be entitled to an additional twelve weeks of FMLA leave.¹⁹⁷ Although the FMLA requires thirty days (or reasonable) notice of the need for leave, an employer must allow a shorter notice period under state law "unless an employer has already provided, or the employee is requesting, more leave than required under State law."¹⁹⁸ "If State law provides for only one medical certification, no additional certifications may be required . . . unless the employer has already provided, or the employee is requesting, more leave than required under State law."¹⁹⁹

The interim regulations take the position that "[i]f leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws."²⁰⁰ Essentially, the leaves run concurrently.²⁰¹ While one could argue that an employee should be able, during a twelve-month period, to invoke separately either state or federal family leave, the legislative history is to the contrary. The Senate Report provides:

Section 401(b) [Section 2651(b)] makes it clear that state and local laws providing greater leave rights than those provided in S. 5 are not preempted by the bill or any other federal law. This applies to state and local laws in effect at the time of enactment or state and local laws enacted in the future. Thus, for example, state or local laws

whether a more generous state statute applies to an employment relationship. If an eligible employee resides in one state, works in another state, and the employer has its headquarters in a third state, what is the applicable state law for purposes of the FMLA? The state in which the employee's workplace is located. *Labor Department Fielding Family Leave Questions*, 1 Analysis/News and Background Info., 143 Lab. Rel. Rep. (BNA) 441 (Aug. 2, 1993). The workplace is not necessarily identical to the concept of "worksite" used for "determining employee eligibility for FMLA leave." See 29 C.F.R. § 825.111(a)(2) (1993).

196. See 29 U.S.C. § 2611(7) (1988 & Supp. V 1993) (defining the word parent for purposes of entitlement to leave under FMLA).

197. 29 C.F.R. § 825.701(a)(5) (1993).

198. *Id.* § 825.701(a)(3).

199. *Id.* § 825.701(a)(4).

200. *Id.* § 825.701(a).

201. See The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,809 (1993) ("State and FMLA-mandated leave entitlements run concurrently . . .").

that provide greater employee coverage, longer leave periods, or paid leave, are not preempted by this act to the extent that they provide leave in a manner more inclusive or more generous than that provided in S. 5.²⁰²

The assertion that, to the extent that state and local leave laws are more generous they are not preempted leads, through obversion, to the conclusion that state and local laws which are no more generous than the FMLA are preempted. Accordingly, the interim regulation's conclusion that if leave qualifies under both the FMLA and state law it is "count[ed] against the employee's entitlement under both laws"²⁰³ is correct. The interim regulations contain the following example of the principle of recognizing the more generous state provision while at the same time recognizing that the leaves will run concurrently:

If state law provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.²⁰⁴

B. Anti-Discrimination Legislation

Men and women are equally entitled to FMLA benefits. A man who wishes leave to care for a newborn or newly-placed child must be given the same opportunity as a woman for such leave, or any other kind of FMLA benefit. It has been asserted, however, that of the likely 2.5 million people taking FMLA leave annually, most will be women.²⁰⁵ Indeed, the Senate Report particularly fo-

202. S. REP. NO. 3, *supra* note 18, at 38, reprinted in 1993 U.S.C.C.A.N. at 40.

203. 29 C.F.R. § 825.701(a) (1993).

204. *Id.* § 825.701(a)(1).

205. 353 Lab. L. Rep. (CCH) 6 (June 18, 1993). Two commentators have asserted that "if all workers were entitled to medical leave, employers would find women and men taking medical leave approximately equally." Lenhoff & Becker, *supra* note 82, at 419. "Statistics on the incidence of loss of work due to medical reasons, including pregnancy-related medical reasons, show that men and women are out on medical leave approximately equally" *Id.* (citing NATIONAL CENTER FOR HEALTH STATISTICS, DISABILITY

cused on the emergence of women into the labor force.²⁰⁶ The congressional findings, specifically enumerated in the statute, assert that "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."²⁰⁷

Therefore, employers who wish to avoid or minimize FMLA obligations may very well prefer men to women when making hiring and promotion decisions. Such obvious sex discrimination would violate Title VII of the Civil Rights Act of 1964²⁰⁸ and any applicable state anti-discrimination legislation.²⁰⁹

Even absent intentional discrimination, an employer's compliance with the FMLA may not absolve it of all discrimination liability. For example, in *United States Equal Employment Opportunity Commission v. Warshawsky & Co.*,²¹⁰ an employer had a disability policy that denied paid sick leave to any employee during

DAYS, UNITED STATES, 1980 (Series 10, No. 143, DHH8 Pub. No. (PHS) 83-1571 (1983)). In addition, making family leave equally available to men and women "would not affect female and male employees very differently." *Id.* It is recognized that while it is

true that more mothers than fathers of newborns are likely to take time off from work beyond the post-childbirth period of disability, a greater percentage of working men than working women have newborns in any year. In 1985, 3.7% of working women gave birth, while 4.6% of working men had wives who gave birth. And although more women than men will be affected when other family members have serious health conditions, the number of men affected is not insubstantial. Indeed, when the number of hours that women and men lost from their jobs for *all* illnesses - their own and others' - is totalled, the average number of hours lost by women is, surprisingly, *less* than that for men.

Id. at 419-20 (citations omitted) (emphasis in original).

206. See *supra* text accompanying notes 19-21 (discussing the increase of women into the workforce since 1900).

207. 29 U.S.C. § 2601(a)(5) (1988 & Supp. V 1993).

208. See 42 U.S.C. §§ 2000e-1 to -17 (1988 & Supp. I 1989 & Supp. II 1990 & Supp. III 1991).

209. Without an express admission from the employer that the woman was disfavored because of her sex, the problem for a potential plaintiff would be how to prove such discrimination. For the Supreme Court's most recent discussion of a plaintiff's burden in a Title VII lawsuit, see *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993). Advocacy groups such as "9 to 5 National Association of Working Women, Milwaukee, and the NOW Legal Defense Fund, New York—saw a sharp increase in telephone complaints alleging pregnancy-related firings in the weeks around the [FMLA's] Aug. 5 effective date." Sue Shellenbarger, *Do Some Firms Try to Skirt Family Leave?*, WALL ST. J., Oct. 25, 1993, at B1.

210. 768 F. Supp. 647 (N.D. Ill. 1991).

the first year of employment.²¹¹ This policy was deemed to constitute sex discrimination in violation of Title VII of the Civil Rights Act of 1964 because its application had a disparate impact on women.²¹² Fifty-three employees had been discharged pursuant to the policy.²¹³ Fifty of the fifty-three were women and twenty of the fifty women were pregnant.²¹⁴

If the prediction by some is true that a greater proportion of women than men will take FMLA leave,²¹⁵ then it may be reasonable to conclude that women will be over represented in the number of people for whom twelve weeks leave is inadequate. As evidenced by *Warshawsky*, an employer's failure to recognize this fact and unwillingness to accommodate those whose absence exceeds twelve weeks may lead to a prima facie showing of a Title VII violation.²¹⁶ The employer's practice of merely complying with the FMLA requirement of twelve weeks leave may very well be unlawful unless "job related . . . and consistent with business necessity."²¹⁷ Discriminatory outcomes are not the result of compliance with the FMLA but rather the failure of employer leave programs to fully accommodate employees. Employers who grant FMLA leave in a non-discriminatory fashion may be led into a false sense of security regarding their potential legal exposure.²¹⁸

C. Fair Labor Standards Act

211. *Id.* at 650.

212. *Id.* at 655.

213. *Id.* at 650.

214. *Id.*

215. *See supra* note 203 (asserting that the majority of FMLA leave taken annually will be by women).

216. *United States Equal Employment Opportunity Commission v. Warshawsky*, 768 F. Supp. 647, 655 (N.D. Ill. 1991). Even though women may be overrepresented in terms of people for whom 12 weeks leave is inadequate, their overrepresentation may not be statistically (or legally) significant. *But cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding employer practices which had a "markedly disproportionate" impact on blacks to be in violation of Title VII).

217. 42 U.S.C. § 2000e-2(K)(1)(A)(i) (1988 & Supp. III 1991). As the court in *Warshawsky* noted, "[m]ere recitation of a policy's necessity is not sufficient to carry defendant's burden." *Warshawsky*, 768 F. Supp. at 655. The defendant in *Warshawsky* asserted its policy was a "reward" for employees who continued with the company for more than one year." *Id.* The defendant failed to produce evidence, however, that the policy actually served to reduce turnover. *Id.*

218. A similar potential for race discrimination claims exists. The Senate Report noted that "African American caregivers are especially at risk because greater percentages of black caregivers quit their jobs in order to provide care." S. REP. NO. 3, *supra* note 18, at 7, *reprinted in* 1993 U.S.C.C.A.N. at 9.

Under the federal Fair Labor Standards Act²¹⁹ (FLSA) an administrator, executive, or professional employed *on a salary basis* is excluded from entitlement to overtime pay.²²⁰ All other employees protected by the FLSA must be paid one and one-half times their regular rate of pay for hours worked in excess of forty during a workweek.²²¹ In interpreting the FLSA the Department of Labor has taken the position that if an employer docks an otherwise salaried employee's pay for absences of less than one day, the employee is no longer salaried.²²² The rationale supporting the Department of Labor's position is the notion that "[the] salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed."²²³ Thus, when an employer docks a salaried employee's pay, the employer effectively admits that the employee is compensated for the amount of time spent on the job. Because she is no longer salaried, she loses her exempt status and is therefore entitled to premium pay for hours worked in excess of forty.

As described earlier, the FMLA expressly permits leaves of less than one day, including leaves of as short as an hour, and permits an employer to count that absence against the employee's annual twelve-week total.²²⁴ The FMLA specifies that such accounting shall not affect an employee's exemption from overtime pay.²²⁵ The FMLA and FLSA are in obvious tension on this issue since the FMLA tolerates hourly pay docking while the Department of Labor (which is charged with enforcing both statutes) asserts that such pay docking is forbidden under the FLSA.²²⁶

219. 29 U.S.C. §§ 201-219 (1988 & Supp. I 1989 & Supp. II 1990 & Supp. III 1991 & Supp. IV 1992).

220. 29 U.S.C. § 213(a)(1) (1988 & Supp. IV 1992); *see also* 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e) (1993) (stating the salary requirement for executives, administrators, and professionals for purposes of the Fair Labor Standards Act) (emphasis added).

221. 29 U.S.C. § 207(a)(1) (1988).

222. *See* 29 C.F.R. § 541.118(a)(2) (1993) (detailing permissible pay deductions for absences of a salaried employee); *see also* *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990) ("[D]eductions from the salary of an otherwise exempt employee for absences of less than a day's duration for personal reasons, or for sickness or disability, would not be in accordance with sections 541.118(a)(2) and (3).") (quoting Wage & Hour Div., U.S. Dep't of Labor, Ltr. Rul. (Jan. 15, 1986)), *cert. denied*, 498 U.S. 1068 (1991).

223. *Abshire*, 908 F.2d at 486.

224. *See supra* text accompanying notes 88-92 (detailing how to calculate intermittent leave for purposes of the FMLA).

225. 29 U.S.C. § 2612(c) (1988 & Supp. V 1993).

226. *See* The Family and Medical Leave Act of 1993, 58 Fed. Reg. 31,794, 31,802

The disparate approach under the two statutes will lead to inequities. An employer with fewer than fifty employees, not subject to the FMLA, may not dock the pay of an employee who misses two hours of work to have stitches removed after surgery without running afoul of the FLSA. The employer with fifty employees may dock the pay of a similarly situated employee. A salaried employee who visited the dentist during work time for a routine check-up could not have her pay docked without jeopardizing her exempt status while the same employee could have her pay docked for a one hour, post-operative visit to her surgeon.

Congressional approval of pay docking for intermittent FMLA leaves completely undercuts the rationale for the Department of Labor's FLSA position.²²⁷ While the literal terms of the FMLA allow the Department of Labor to have it both ways, this tension should be resolved. Congress must repeal either section 2612(c) of the FMLA or require the Department to rescind 29 C.F.R. § 541.118 and withdraw its Letter Ruling.²²⁸

D. Americans With Disabilities Act

The Americans With Disabilities Act²²⁹ (ADA) makes it unlawful for an employer to discriminate against an individual with a disability. It further requires employers to reasonably accommodate a disabled individual.²³⁰ Since the FMLA specifies that an employee is entitled to leave for her own "serious health condition",²³¹ there will be some interplay between the two statutes, particularly when the employee seeks to return to work or seeks a leave longer than the twelve weeks mandated by the FMLA.

It is the clear intent of the FMLA to treat the leave-taking employee as if she had not taken leave.²³² Therefore, if the employee becomes incapacitated but does not seek leave, the employer

(1993) ("[T]he Department [of Labor] is concerned about the tension between the effects of partial-day 'docking' under FLSA and FMLA's encouragement of more generous employment policies and adherence with more generous State laws.").

227. See *supra* text accompanying note 221 (stating that the Department of Labor does not tolerate pay docking because salaried employees are paid for the general value of services performed, not the amount of time spent on the job).

228. See *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990) (quoting Letter Ruling), *cert. denied*, 498 U.S. 1068 (1991).

229. 42 U.S.C. §§ 12101-12213 (Supp. II 1990 & Supp. III 1991).

230. *Id.* § 12112(b)(5)(A).

231. 29 U.S.C. § 2612(a)(1)(D) (1988 & Supp. V 1993).

232. See *supra* text accompanying notes 175-77 (describing how employers must treat returning employees under the FMLA).

would be required only to place the employee in a position which she could handle with reasonable accommodation, not to maintain her in her former position. Although the FMLA specifies that a seriously ill employee who takes leave is entitled to her former or an equivalent position,²³³ the employer may deny reinstatement to that position if the employee's condition is such that she is no longer able to perform the essential functions of her job.

Similarly, the disabled employee may be entitled to more than twelve weeks leave. If the employee can be reasonably accommodated by granting more than twelve weeks leave, the ADA requires the employer to do so. An employer's obligation to "reasonably accommodate" an employee's disability may mean that an employer will offer an employee an alternative work assignment or "light duty" for the duration of the disability. When the cause of the disability is a work-related accident or disease, such an assignment is a vehicle for controlling workers' compensation costs.

In an advisory opinion, the Department of Labor has taken the position that an employer may not require the employee to accept the new assignment in lieu of FMLA leave.²³⁴ This interpretation is surely correct. If an employee has a "serious health condition" she is entitled to FMLA leave; no qualifications or limitations are included in the statute. Congress obviously considered the possibility that an employee with a "serious health condition" may be capable of some work. An easy example is an individual undergoing treatment for cancer. The individual falls within Congress' contemplation of a person with a "serious health condition,"²³⁵ yet on many days may still be able to work.

The statutory provision which describes an employer's ability to require medical certification of the employee's condition clearly supports the Department of Labor's advisory opinion. It specifies that the employer may require a health care provider to state that the "employee is unable to perform the functions of the position of the employee."²³⁶ The language does not suggest a requirement that the employee be unable to perform the functions of any posi-

233. 29 U.S.C. § 2614(a)(1) (1988 & Supp. V 1993).

234. See *DOL Says FMLA Should Give Workers Choice*, 1 Analysis/News and Background Info., 144 Lab. Rel. Rep. (BNA) 400 (Nov. 29, 1993) (discussing the available alternatives for temporarily disabled workers under the FMLA).

235. See *supra* text accompanying note 138 (stating the meaning of "serious health condition" as defined by Congress).

236. 29 U.S.C. § 2613(b)(4)(B) (1988 & Supp. V 1993).

tion which the employer may offer.

Given the fact that FMLA leave need not be compensated, many employees who are capable of "light duty" will voluntarily choose to return to work. When the cause of the "serious health condition" is work-related, however, state-mandated workers' compensation benefits (frequently amounting to two-thirds of pay) may encourage the employee to take advantage of what might amount to compensated FMLA leave.²³⁷

An affliction clearly deemed a disability under the ADA will not necessarily constitute a "serious health condition" for purposes of the FMLA. Section 12102(2) of the ADA expansively defines "disability" to include an individual with "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."²³⁸ Although a significant hearing loss, for example, may substantially limit a major life activity by limiting employment opportunities, it will not constitute a "serious health condition" unless it necessitates inpatient care or continuing treatment by a health care provider.

When an employee's own serious health condition necessitates leave, the employer must be careful to segregate any information related to the health condition from the employee's personnel file and closely monitor access to the information. The ADA specifically requires that such information should be "collected and maintained on separate forms and in separate medical files and [be] treated as a confidential medical record."²³⁹

E. Employee Retirement Income Security Act

The Employee Retirement Income Security Act of 1974 (ERISA)²⁴⁰ is federal legislation which applies to a broad range

237. Whether the employee is entitled to continue to receive a workers' compensation benefit would be determined under the state workers' compensation statute. Although the Department of Labor has advised that an employee may insist on the FMLA leave rather than accept the light duty assignment, "[t]his does not mean that the employee would be entitled to continue to receive benefits under the workers' compensation program if the program is structured in such a way as to end benefits at the point at which the employee is deemed medically able to accept a light duty assignment and one is offered by the employer." U.S. Dep't of Labor Advisory Op., unpublished (Apr. 19, 1994) (on file with Wage & Hour Div., U.S. Dep't of Labor).

238. 42 U.S.C. § 12102(2) (1988).

239. *Id.* § 12112(d)(3)(B); *see also* 29 C.F.R. § 825.500(e) (1993) (stating what records must be kept to comply with the FMLA and how these records must be maintained).

240. 29 U.S.C. §§ 1101-1461 (1988 & Supp. I 1989 & Supp. II 1990 & Supp. III 1991

of employer-provided benefits. Compliance with ERISA holds important consequences for the federal income tax liability of employers and employees. The Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA)²⁴¹ amended ERISA to provide that upon the occurrence of a "qualifying event," including termination of employment, the employee must be provided with the opportunity to continue as part of the employer's group health insurance plan with the premiums paid by the former employee.²⁴² The former employee may continue such health insurance coverage for at least eighteen months after termination of employment.²⁴³ When an employee takes FMLA leave and decides not to return to work (or is a key employee and is denied restoration) the employment relationship is clearly terminated. When does the period for calculating COBRA benefit eligibility begin? Is it the date leave begins, the date the employee is scheduled to return and fails to do so, the date the employee advises the employer she will not return to work or some other date?

The interim regulations assert that "[i]f an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease."²⁴⁴ It is only in this context that the FMLA regulations make reference to the COBRA question.

The minority report of the House Committee on Labor and Education considered the COBRA issue and opined:

[I]t is the apparent intention of the proponents of H.R. 1 that the 18- to 36-month continuation of health care coverage requirements under Title X of the Consolidated Omnibus Budget Reconciliation Act (COBRA) would not begin until after it is clear that the employee would not be returning to work, rather than to allow computation of the continued coverage period from the time leave began.²⁴⁵

& Supp. IV 1992).

241. 29 U.S.C. §§ 1161-1168 (1988 & Supp. I 1989 & Supp. II 1990 & Supp. III 1991 & Supp. IV 1992).

242. 29 U.S.C. § 1161 (1988 & Supp. IV 1992).

243. 29 U.S.C. § 1162(2)(A)(i) (1988).

244. 29 C.F.R. § 825.309(b) (1993); *see also id.* § 825.209(f) ("[A]n employer's obligation to maintain health benefits under FMLA ceases if and when an employee informs the employer of his or her intent not to return from leave . . .").

245. H.R. REP. NO. 8, *supra* note 3, at 71-72.

A Republican amendment which would have started the clock running from the date leave began was defeated.²⁴⁶

The Senate Report asserted

[l]eave taken under this act does not constitute a qualifying event . . . under . . . COBRA. However, a qualifying event triggering COBRA coverage may occur when it becomes known that an employee is not returning to employment and therefore ceases to be entitled to leave under this act. The purpose of this Act is to provide leave to eligible employees . . . and is not to be construed by employees as a means of delaying a qualifying event.²⁴⁷

Despite these views expressed in the legislative history, unfortunately the FMLA itself is silent on the issue.

In the FMLA context, a COBRA "qualifying event" may occur when there is "any . . . [termination or reduction in hours] which, but for the continuation coverage required under this part, would result in the loss of coverage of a qualified beneficiary."²⁴⁸ An employee enjoying FMLA leave has obviously experienced a "reduction of hours" and it might be concluded that the beginning of FMLA leave is such a "qualifying event." Because the FMLA requires an employer to continue health insurance coverage during the leave,²⁴⁹ the employee's reduction in hours will not coincide with a "loss of coverage" under the employer's plan.

In *Gaskell v. Harvard Cooperative Society*, which did not involve the FMLA, the U.S. District Court for the District of Massachusetts, took the position that the COBRA qualifying event is the point at which the employee "experienced a loss of coverage as a consequence of that reduction in hours."²⁵⁰ Using the approach of the district court in *Gaskell*, since the employee on FMLA leave does not experience a loss of health insurance coverage until she asserts that she will not return to work or does not in fact return, the COBRA "qualifying event" would not occur until then. The First Circuit vacated the district court's opinion in *Gaskell*, however, asserting that "an employee's eighteen month period of con-

246. *Id.* at 76.

247. S. REP. NO. 3, *supra* note 18, at 32, reprinted in 1993 U.S.C.C.A.N. at 34.

248. 29 U.S.C. § 1163 (1988).

249. See *supra* notes 117-19 and accompanying text (explaining an employer's obligation to continue health insurance coverage for an employee on leave under the FMLA).

250. 762 F. Supp. 1539, 1543 (D. Mass. 1991), *vacated, remanded* 3 F.3d 495 (1st Cir. 1993).

tinuation coverage . . . commence[s] with the event leading, under the terms of the plan, to loss of coverage, rather than upon the loss of coverage itself."²⁵¹

The First Circuit, after recognizing that COBRA's language did not clearly resolve the issue, relied on the statute's legislative history and the proposed regulations of the Treasury Department for its conclusion that the qualifying event may occur before coverage is actually lost.²⁵² Nevertheless, the court concluded that the terms of the employer's health insurance plan are critical to an analysis of the qualifying event. It stated that a "reduction in hours is not a 'qualifying event' if it is not so designated in the plan, even if it *might have been* designated as such, and regardless of the fact that it may ultimately have *led to* the eventual occurrence of a 'qualifying event' which was so designated."²⁵³

Applying the First Circuit's *Gaskell* analysis to an FMLA scenario leads to the conclusion that COBRA's eighteen-month continuation coverage period is triggered by the onset of FMLA leave if the employer's health insurance plan designates such a reduction in hours as a "qualifying event". Under such a plan an employee who decides she will not return to work at the end of her twelve weeks of FMLA leave and notifies the employer of this decision at the end of the twelve weeks is entitled to eighteen months less twelve weeks of COBRA coverage. If the employer's plan does not designate a reduction in hours as a "qualifying event" (and presumably does designate termination as a "qualifying event"), then the FMLA-leave employee who chooses not to return will have COBRA coverage for a full eighteen months after she notifies the employer of her intention.²⁵⁴

VI. CONCLUSION

The Family and Medical Leave Act alters the way employers are required to look at their workforces. It mandates consideration of employees as members of families, not merely widget makers,

251. *Gaskell v. Harvard Coop. Soc'y*, 3 F.3d 495, 499 (1st Cir. 1993) (emphasis added).

252. *Id.*

253. *Id.* (emphasis added).

254. The IRS has recently asserted that "the taking of leave under FMLA does not constitute a qualifying event for COBRA purposes under Section 4980B of the Internal Revenue Code." *IRS Issues Guidance on Coordination of COBRA Coverage with FMLA Rules*, Daily Lab. Rep. (BNA) Item 14, (Dec. 7, 1994).

secretaries or law professors.²⁵⁵ That is a healthy change in the way the American labor force is perceived. Surely a workplace where compassion for the trials and tribulations which befall all of us will improve morale and understanding.

Nevertheless, the FMLA has shortcomings. For many poorly compensated employees, its promises will be hollow. Women may find their employment opportunities limited. Productivity and efficiency may occasionally be less than an employer desires. Employers will have greater administrative and recordkeeping burdens. These costs and difficulties, however, are not significant enough to outweigh the lasting benefits associated with more humane workplaces. Not only will workplaces ultimately be better places to work, but fewer community resources will have to be expended on those needs which are truly familial responsibilities. Congress has taken an important and appropriate step toward an enhanced quality of work life.

255. "[T]he law caused . . . companies to enhance existing policies and increased awareness about the need for 'family-type' programs." *FMLA Has Had Limited Impact On Most Employers*, Daily Lab. Rep. (BNA) Item 10, (Aug. 22, 1994).

