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Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law. I would like to thank my parents, family, friends, and Evan for their unconditional love, support, and encouragement.

NOTES

THE FORGOTTEN PUBLIC POLICIES BEHIND THE FAMILY AND MEDICAL LEAVE ACT: BURDEN OF PROOF STRUCTURES PLACING UNNECESSARY BURDENS ON EMPLOYEES' STATUTORY ENTITLEMENT

*Lisa B. Feinstein**

INTRODUCTION

“I’m still shocked at my sudden plunge from economic self-sufficiency to dependence, all because I needed time off for family and medical needs,” testified Carmen Maya to the Subcommittee on Children, Family, Drugs and Alcoholism, during hearings on family and medical leave legislation.¹ Maya was describing to the subcommittee the troubles she faced after she took twelve weeks of leave due to her medical complications and her child’s Down’s syndrome.² Myra Guski described being forced to resign from her job to care for her dying father after her employer refused to grant a temporary family leave.³ She testified: “[M]y parents’ need shouldn’t have put my job in jeopardy.”⁴ Similarly, Thomas Riley described his termination after the death of his son.⁵ He had taken six days, which were uncompensated, to care for his terminally ill child.⁶ He testified: “I have always worked hard for a living, and taken pride in providing for my family. . . . I don’t want any, or expect any, special favors But I don’t think that parents should be forced to choose between caring for their children or keeping their jobs.”⁷

* J.D. Candidate, 2006, Fordham University School of Law. I would like to thank my parents, family, friends, and Evan for their unconditional love, support, and encouragement.

1. S. Rep. No. 103-3, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 10.

2. *Id.*

3. *Id.* at 11, *reprinted in* 1993 U.S.C.C.A.N. at 13.

4. *Id.*

5. *Id.* at 9-10, *reprinted in* 1993 U.S.C.C.A.N. at 11-12.

6. *Id.*

7. *Id.* at 10, *reprinted in* 1993 U.S.C.C.A.N. at 12.

Congress passed the Family and Medical Leave Act (“FMLA”) in 1993,⁸ to ensure that workers would no longer have to choose between

8. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat 6 (codified at scattered sections of 5 U.S.C. (2000) and 29 U.S.C. (2000)). Section 2612 describes the leave requirement as follows:

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave.

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee

29 U.S.C. § 2612. Section 2614 reads in pertinent part:

§ 2614. Employment and benefits protection

(a) Restoration to position

(1) In general

Except as provided in subsection (b), any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave —

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment

29 U.S.C. § 2614(a). Section 1615 reads in pertinent part:

§ 2615. Prohibited acts

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries.

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in an inquiry or proceeding relating to any right provided under this subchapter.

29 U.S.C. § 2615. Section 2617 reads in pertinent part:

§ 2617. Enforcement

(a) Civil action by employees

(1) Liability

work and family. However, what happens when a worker takes FMLA leave and still loses his job? The FMLA eliminates the choice between work and family, or medical obligations, only if the provisions of the Act are enforced. There must be adequate recourse for an employee whose statutory rights are violated.

To ensure that an employee's FMLA rights are safeguarded, the Act protects an employee from interference with his FMLA rights under § 2615(a)(1), from retaliation or discrimination under § 2615(a)(2), and from discrimination for participating in FMLA proceedings under § 2615(b).⁹ Thus, a plaintiff-employee can proceed under an interference theory and claim that the employment decision in question interfered with his rights under the FMLA.¹⁰ Alternatively, under the retaliation theory, the employee can allege that his employer's decision was in response to his exercise of FMLA rights.¹¹

In *Potenza v. City of New York*,¹² the U.S. Court of Appeals for the Second Circuit set forth a standard for evaluating an employee's claim that he was punished for exercising his rights under the FMLA.¹³ The employee claimed that his employer terminated his employment after

Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—

(A) for the damages equal to—

(i) the amount of—

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, 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;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and

(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii)

29 U.S.C. § 2617(a). Section 2654 states as follows:

§ 2654. Regulations

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter I of this chapter and this subchapter not later than 120 days after February 5, 1993.

29 U.S.C. § 2654.

9. See 29 U.S.C. § 2615.

10. See, e.g., *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 960-61 (10th Cir. 2002).

11. Some courts have distinguished between interference and retaliation claims within § 2615(a)(1) of the FMLA. See, e.g., *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1016-17 (7th Cir. 2000). Thus, the court analyzed the plaintiff's claim that she was illegally denied reinstatement as a retaliation claim. See *id.* For further discussion on distinguishing between interference and retaliation claims, see *infra* notes 66-67, 113-22, 215-19, 231-33 and accompanying text.

12. 365 F.3d 165 (2d Cir. 2004).

13. *Id.* at 167.

he took leave under the FMLA.¹⁴ Although the court established a standard for reviewing FMLA claims, the short opinion illustrates the confusion the circuits face in deciding these claims. The plaintiff, Potenza, worked for the Department of Transportation at the Staten Island Ferry and received many positive performance reports during his employment.¹⁵ Potenza took a one month medical leave to have knee surgery and was removed from his position as port engineer approximately two months after his return to work.¹⁶ Potenza alleged that his employer made this decision because of Potenza's absence under the FMLA.¹⁷

The Second Circuit analyzed the case under § 2615(a)(1)¹⁸ of the FMLA and classified the issue as a retaliation, rather than an interference claim.¹⁹ The court proceeded to apply a burden-shifting framework that originated with *McDonnell Douglas Corp. v. Green*²⁰

14. *Id.* at 166.

15. *Id.*

16. *Id.*; *id.* at 168.

17. *Id.* at 168.

18. 29 U.S.C. § 2615(a)(1) (2000). "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." *Id.*

19. The distinction between retaliation and interference is important in determining what the plaintiff needs to prove to establish his claim. Courts have held that plaintiffs in an interference claim do not have to prove that their employer intended to violate the FMLA. However, to establish retaliation, a plaintiff must be able to prove the employer's intent. *See Potenza*, 365 F.3d at 168 (discussing the Seventh Circuit's approach of distinguishing between cases requiring proof of an employer's intent and those cases that do not require such proof); *infra* notes 66-67, 113-22, 215-19, 231-33 and accompanying text (discussing the distinction between interference and retaliation claims under the FMLA).

20. 411 U.S. 792 (1973). In *McDonnell Douglas*, the Supreme Court established a framework for proving discrimination claims. *Id.* The importance of this case was that it created a framework by which plaintiffs can prove discrimination based on circumstantial evidence. *See* Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 Fla. St. U. L. Rev. 859, 864 (2004). In many discrimination cases there is not much evidence of discrimination; there are no incriminating documents or discriminatory statements. *Id.* Prior to *McDonnell Douglas*, plaintiffs had great difficulty in proving discrimination claims because of the "elusiveness" of proving, or disproving discrimination. *Id.* The *McDonnell Douglas* formula helps the plaintiff prove discriminatory intent. First, the plaintiff must make out a prima facie case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. Generally, the prima facie case requires the plaintiff to prove by a preponderance of the evidence that: (1) the plaintiff was in a protected class, (2) the plaintiff was qualified for a job and applied for it, (3) the employer rejected him, and (4) the position remained open and the employer continued to seek applicants. *Id.* This creates an inference of discrimination that must be refuted by the employer. The employer must offer, but not prove that there was a legitimate nondiscriminatory reason for the employment action. *See id.* at 802-03. The burden then shifts back to the plaintiff to prove that the offered reason is a pretext for discrimination. *Id.* at 804-05. Courts have applied this framework to Title VII cases to prove actual discrimination and retaliation. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981) (reaffirming the *McDonnell Douglas* framework for a discriminatory treatment case under Title VII and applying the

and was traditionally used in Title VII discrimination and retaliatory charges.²¹ The Second Circuit held that, according to the *McDonnell Douglas* framework, Potenza failed to establish the retaliatory intent necessary to show his prima facie case.²²

While the Second Circuit attempted to clarify a standard for evaluating FMLA claims, *Potenza* illustrates the overall confusion regarding this area of the law. The court failed to articulate why the plaintiff's claim under § 2615(a)(1), which prohibits interference with FMLA rights, was analyzed as a retaliation claim, which requires proof of intent under the *McDonnell Douglas* framework.²³ The Second Circuit further neglected to recognize Potenza's right to take FMLA leave and his entitlement to reinstatement.²⁴ Finally, the Second Circuit failed to discuss the Department of Labor ("DOL")

analysis to a plaintiff's claim that the employer failed to promote her and discharged her because of her sex in violation of Title VII); William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison McDonnell Douglas*, 2 Emp. Rts. & Emp. Pol'y J. 361, 363 (1998) (discussing how the *McDonnell Douglas* analysis is the "predominant method for analyzing intentional employment discrimination claims"). For an example of applying the *McDonnell Douglas* analysis to a retaliation claim under Title VII, see *Stover v. Martinez*, 382 F.3d 1064, 1070-71 (10th Cir. 2004) (holding that once an employee establishes a prima facie case of retaliation, the burden shifts to the employer pursuant to the *McDonnell Douglas* formula, and then back to the employee, leaving the ultimate burden of persuasion on the plaintiff). Additionally, courts have applied the *McDonnell Douglas* formula to discrimination claims under other federal employment statutes, such as the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (2000). See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141-42 (2000) (assuming arguendo that the *McDonnell Douglas* framework is fully applicable to ADEA cases based on various courts of appeals decisions). The Equal Employment Opportunity Commission, the agency that enforces the federal employment discrimination laws, considers the *McDonnell Douglas* proof structure applicable to claims under Title VII, the ADEA, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act of 1973. Corbett, *supra*, at 363 n.13.

21. Title VII of the Civil Rights Act of 1964 protects against discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (2000). It is also an unlawful employment practice to discriminate against an employee who has opposed a practice that is unlawful under the Act or who has participated in any proceedings under the Act. Section 2000e-3 provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

22. *Potenza*, 365 F.3d at 168.

23. See *id.* at 165.

24. See *id.*

regulations, which were implemented to carry out the FMLA provisions.²⁵

This Note highlights the areas of confusion that exist in the current FMLA jurisprudence and offers a framework to analyze FMLA claims that better reflects the policies behind Congress's passage of the FMLA. Part I outlines the different approaches used by the federal courts. It also discusses the manner in which work-family issues have supported tort claims against employers for wrongful termination and how these issues are analyzed in arbitration. Part II describes the advantages and disadvantages associated with the different analyses of FMLA claims by the various federal jurisdictions. Part II also evaluates the methods used to address the FMLA and work-family leave in other forums, both as a tort for wrongful discharge and in arbitration. Part III offers a new standard for evaluating allegations that a plaintiff suffered adverse consequences for taking FMLA leave, which compiles various elements from the current jurisprudence, as well as the alternative forums. This framework ensures the job stability that the FMLA requires.²⁶

25. *See id.*

26. This Note focuses on FMLA claims where the plaintiff alleges that his employer took an adverse employment action because the plaintiff used FMLA leave. Thus, there are many areas regarding FMLA jurisprudence that are outside the scope of this Note. Such issues include federalism and the extent of states' rights to immunity. *See, e.g.,* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act*, 112 Yale L.J. 1943, 1948-49 (2003) (using the FMLA to analyze the enforcement model for Section 5 jurisprudence). Another issue is the extent to which paid family leave exists and the interrelationship between paid leave and the FMLA. *See, e.g.,* Anne Wells, Note, *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers*, 77 S. Cal. L. Rev. 1067, 1069-77, 1091-92 (2004) (discussing emerging trends in paid family leave and employers' fears similar to their initial concerns with the FMLA). Another area of FMLA jurisprudence outside the scope of this Note is the relationship between the FMLA and the ADA. *See, e.g.,* Peggy R. Mastroianni & David K. Fram, *The Family and Medical Leave Act and the Americans with Disabilities Act: Areas of Contrast and Overlap*, 9 Lab. Law. 553, 557-59 (1993) (differentiating the between the substantive protections for employees under the two acts). Another issue regards employers right to deny leave to "key employees." *See, e.g.,* Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 Wash. U. J.L. & Pol'y 17, 38-39 (2004) (discussing how the key employee exception reinforces the view that taking leave is inconsistent with commitment to work). Notice requirements before an employee can take leave are also an area of FMLA jurisprudence outside the scope of this Note. *See, e.g.,* Richard Bales & Sarah Nefzger, *Employer Notice Requirements Under the Family and Medical Leave Act*, 67 Mo. L. Rev. 883, 884-85 (2002) (discussing the vagueness of the notice requirement under the FMLA and the DOL regulations on the issue). An additional issue not addressed by this Note concerns the benefits of the FMLA's gender-neutral treatment to family leave or the disadvantages this has for women. *See, e.g.,* Grossman, *supra* (discussing how the FMLA focuses on equality but has gendered outcomes); Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 Vill. L. Rev. 395, 396-97 (1999) (criticizing that the FMLA reinforces stereotypes by treating family leave as an issue of accommodation for women and failing to address the dual labor market); Paolo Wright-Carozza, *Organic*

I. THE POLICIES AND VARIOUS METHODS FOR DECIDING FMLA CLAIMS

Since Congress passed the FMLA in 1993, there has been confusion in the courts on how to address an employee's claim that he was punished for exercising his FMLA rights. Different approaches to the FMLA and work-family issues have developed in recent years. Part I.A addresses the policies behind the FMLA and Congress's goals in providing minimum leave and job security. Part I.B discusses the various approaches the federal courts use to address FMLA claims. Part I.C examines how the FMLA and work-family leave issues are addressed both as common law tort claims and in arbitration.

A. *Why Congress Passed the FMLA: The Policies Behind the Act*

Congress passed the FMLA in an attempt to address the difficulty workers encountered when trying to balance workplace and family needs.²⁷ The FMLA provides job security to employees who must be absent from work for illness, caring for family members, or caring for new babies. The need to provide parental leave for the birth of a child and for addressing initial child care needs was a central motivation in the passing of the FMLA.²⁸ Congress was also concerned with the potential for family crisis if an employee fell ill and lost his job as a

Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective, 81 Cal. L. Rev. 531, 570 (1993) (arguing the FMLA's gender equality offers material benefits and could transform legal discourse from a focus on discrimination).

27. See H.R. Rep. No. 103-8, pt. 1, at 16-17 (1993) (expressing concern that employers have not addressed the changes in family structures). The House Report discusses the increasing number of women in the workforce and the struggle that families experience to provide emotional and physical support within this changing workforce. *Id.* Women, who were traditionally the primary caretakers in the family, are an important part of the current workforce. "[O]ur workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities." *Id.* at 17. Congress wanted to pass legislation that recognized the realities of family needs that all workers face. "The experiences of many of our companies, as well as those of some of our global competitors, show that workplaces that accommodate workers' family responsibilities have more productive employees. Workers whose family needs are accommodated at the workplace are more likely to stay, and to be productive in their jobs." *Id.* At least one student commentator suggests that the provisions that guaranteed rights to workers with serious health conditions other than pregnancy came on the "coattails" of the pregnancy-related leave. See Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 Drake L. Rev. 51, 57 (1995).

28. See H.R. Rep. No. 103-8, pt. 2, at 12-13 (discussing the inadequacy of parental leave for pregnancy in the United States as compared to other countries). Dr. Sheila Kamerman, of Columbia University School of Social Work, reported that "[a]ll Western and Eastern European countries require employers to grant [parental] leave . . . and all provide for a period of leave longer than that proposed [in this Act]." *Id.* at 12. The House Report cites expert testimony that indicates twelve weeks is the minimum time needed for a parent and child to get used to each other. *Id.*

result of illness.²⁹ Another significant motivation was to address employees' needs to care for a sick family member, including parents or children.³⁰ These policy objectives behind the FMLA can be achieved only if the job security provisions are effective.³¹

To address these concerns, the FMLA gives an employee up to twelve weeks of leave each year for a family or medical need³² and guarantees the employee reinstatement to his former, or equivalent, position if he chooses to exercise his leave rights.³³ In order to attain these goals, the FMLA prohibits any employer from interfering with, restraining, or denying an employee the right to exercise, or an attempt to exercise, a FMLA right.³⁴ It also prevents employers from discharging or discriminating against any individual for opposing any practice that is unlawful under the FMLA.³⁵ The FMLA also has an antidiscrimination provision that prohibits discrimination against any individual who has filed a charge or instituted any proceeding under the Act.³⁶

Congress modeled the FMLA after other federal labor standards that addressed problems citizens were facing and employers were not

29. See H.R. Rep. No. 103-8, pt. 1, at 24 (assessing the "devastating consequences" the loss of a job can have on an ill worker and his family). While the House Report acknowledged that a worker and his family have always had difficulties when a worker lost his job for medical reasons, the problems are exacerbated today because of the "dramatic rise in single heads of household who are predominantly women workers in low-paid jobs." *Id.*; see also Craig, *supra* note 27, at 57-58 (discussing testimony in the House Report of workers who needed medical leave for themselves or to care for a family member and the hardships they suffered without this leave).

30. See H.R. Rep. No. 103-8, pt. 1, at 23-24 (acknowledging that it is increasingly common for the primary caregiver of a sick or aging individual to be a spouse or parent); see also Comm'n of Family and Med. Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies 9-10* (1996) [hereinafter *A Workable Balance*] (citing statistics indicating that many workers take time off to care for older relatives and spouses and predicting that number to rise as the population ages); *supra* notes 1-7 (describing testimony of workers forced to choose between their jobs and their family obligations to care for their children or parents).

31. See Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 Case W. Res. L. Rev. 457, 469 (1995) (stating that the "essence of the FMLA is the concept of job security: employees may attend to familial responsibilities confident that their employment is secure").

32. 29 U.S.C. § 2612(a) (2000).

33. *Id.* § 2614(a).

34. *Id.* § 2615(a)(1).

35. *Id.* § 2615(a)(2).

36. *Id.* § 2615(b). Courts and commentators have described allegations under § 2615(a)(1) as interference claims and charges under § 2615(a)(2) and (b) as retaliation and discrimination claims. Some courts have distinguished between interference and retaliation claims within § 2615(a)(1) as well. See, e.g., *Potenza v. City of New York*, 365 F.3d 165, 167-68 (2d Cir. 2004); *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1017-18 (7th Cir. 2000). The distinction between an interference and retaliation claim proves important to the determination of what constitutes the plaintiff's case. Classifying the claim is a large source of the confusion with these FMLA claims. For further discussion on the distinction between interference and retaliation claims, see *infra* notes 66-67, 113-22, 215-19, 231-33 and accompanying text.

addressing.³⁷ Similar to child labor laws,³⁸ the minimum wage,³⁹ Social Security,⁴⁰ the safety and health laws,⁴¹ the pensions and welfare

37. Employers provided inadequate family and medical leave and thus Congress needed to act to provide minimum standards. This decision is consistent with congressional decisions to pass other federal labor standards. The House Report describes the FMLA's similarity to other federal labor laws in that the FMLA, like these other pieces of legislation, were responses to "specific problems with broad implications." See H.R. Rep. No. 103-8, pt. 1, at 22 (1993).

There is a common set of principles underlying these labor standards. In each instance, a Federal labor standard directly addressed a serious societal problem, such as the exploitation of child labor, or the exposure of workers to unsafe working conditions. Voluntary corrective actions on the part of employers had proven inadequate, with experience failing to substantiate the claim that, left alone, all employers would act responsibly. Finally, each law was enacted with the needs of employers in mind. Care was taken to establish standards that employers could meet.

It is a minority of employers who act irresponsibly. Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.

The FMLA was drafted with these principles in mind and fits squarely within the tradition of the labor standards laws that have preceded it. In the past, Congress has responded to changing economic realities by enacting labor standards that are now widely accepted. In drawing on this tradition, the FMLA proposes a minimum labor standard to address significant new developments in today's workplace.

Id.; see also S. Rep. No. 103-3, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 6 (noting that employers "failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family"); Rigler, *supra* note 31, at 461.

38. See § 212 (prohibiting employers from using "oppressive child labor" in the production, manufacturing, or dealing of goods in interstate commerce). "Children worked for long hours, under unsafe conditions, before the child labor laws were enacted." H.R. Rep. No. 103-8, pt. 1, at 22. As with the child labor laws, Congress passed the FMLA to address social concerns and help families deal with the burdens of work.

39. See § 206 (establishing a minimum hourly wage rate with which employers engaging in commerce or production of goods for commerce must comply). "The minimum wage was enacted because of the societal interest in preventing the payment of exploitative wages." H.R. Rep. No. 103-8, pt. 1, at 22. The FMLA, like minimum wage laws, was passed to provide a minimum standard that Congress deemed necessary for society.

40. See 42 U.S.C. § 402 (2000) (providing insurance benefits to those over 62). "The Social Security Act was based on the belief that workers should be assured a minimum pension at retirement." H.R. Rep. No. 103-8, pt. 1, at 22. Similarly, the FMLA ensures minimum leave for family and medical needs.

41. See 29 U.S.C. §§ 651-678 (obligating employers to follow federally mandated occupational health and safety standards). Congress intended to provide "every working man and woman . . . healthful working conditions" through new procedures and mandatory occupational safety and health standards. *Id.* § 651(b). Congress was similarly concerned with the health and welfare of employees in passing the FMLA.

benefit laws,⁴² and other labor laws that establish minimum standards for employment,⁴³ the FMLA provides a minimum labor standard for leave. Like the mentioned labor standards, the FMLA provides a floor that employers must meet.⁴⁴ However, states or employers could choose to provide greater benefits than those that are mandated by the FMLA.⁴⁵

Pursuant to the statutory language, the DOL established extensive regulations to implement and enforce the FMLA, including a description of the employees and employers covered by the Act and an explanation of employers' responsibilities under the FMLA.⁴⁶ The DOL regulations are entitled to judicial deference in the interpretation of FMLA issues.⁴⁷

42. See, e.g., Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at scattered sections of 29 U.S.C.) (providing minimum standards to ensure "the equitable character" of pension plans). Congress recognized the growth of employee benefits plans and that the economic well-being of many workers was directly affected by these plans. 29 U.S.C. § 1001(a). In the same way, Congress was concerned with the needs of workers, especially given the changes in the working population, when it created the FMLA. See *supra* notes 27, 29-30 and accompanying text.

43. See, e.g., Veterans' Reemployment Rights Act, 38 U.S.C. §§ 4301-4304, 4311-4319, 4321-4326, 4331-4333 (2000).

To address concerns about the employment rights of returning veterans, Congress enacted a labor standard that is directly analogous to [the FMLA]. The Veterans' Reemployment Rights Act, enacted in 1940, provides up to four years of job security to workers called to military duty (including Reservists and National Guard personnel called to active or inactive duty for training of drills). Returning workers as entitled to reinstatement to their previous job with full retention of seniority, status, pay, and any other benefits.

H.R. Rep. No. 103-8, pt. 1, at 22.

44. H.R. Rep. No. 103-8, pt. 1, at 22; S. Rep. No. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6 (noting that the FMLA "accommodates the important societal interest in assisting families, by establishing a minimum labor standard for leave"); see also Rigler, *supra* note 31, at 461.

45. See H.R. Rep. No. 103-8, pt. 2, at 23 (discussing that employers have the discretion to award an employee more than twelve weeks of unpaid leave).

46. See 29 C.F.R. §§ 825.100-825.118, 825.200-825.220, 825.300-825.312, 825.400-825.404, 825.500, 825.600-825.604, 825.700-825.702, 825.800 (2004). The Secretary of Labor is charged with prescribing regulations for the implementation of the FMLA. 29 U.S.C. § 2654. The Wage and Hour Division of the Department is responsible for ensuring that employers comply with the Act. See *A Workable Balance*, *supra* note 30, at 85.

47. When Congress statutorily authorizes an agency to implement and enforce a statute, the Supreme Court has held that agency interpretations of silent, ambiguous statutes are entitled to due deference. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Provided that the agency's interpretation of the statute is permissible and reasonable, the courts should follow the agency interpretation. See *id.* at 843-44. However, the agency's interpretation must be consistent with Congress's intent, as demonstrated by the statute and legislative history. See *id.* at 844; *accord* *Miller v. AT&T Corp.*, 250 F.3d 820, 833 (4th Cir. 2001) (holding that DOL regulations are entitled to deference but courts should not "rubber stamp[] regulations that are 'inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'" (internal citations omitted)).

Congress passed the FMLA to provide minimum leave for workers and to afford them the job security to attend to their medical and family obligations. Employers covered by the statute are required to provide the federally mandated leave and their employees have a guaranteed right to reinstatement following that leave.⁴⁸ When this process breaks down, the courts step in to ensure compliance with the FMLA.

B. Trouble After Employees Take FMLA Leave: The Federal Courts' Approaches

There has been much confusion among the federal circuit courts on how to decide a case in which a plaintiff alleges that his employer took a negative employment action against him in response to his taking FMLA leave. There is substantial litigation in which an employee has taken FMLA leave and is either discharged during, or shortly after, he returns to work. Three areas where courts have differed and which have created a circuit split on how a plaintiff can prove his allegations that his employer violated the FMLA are: (1) how to designate a plaintiff's claim; (2) how to allocate the burden of proof with regard to this claim; and (3) how to use the DOL regulations in deciding the case. This part discusses the federal courts' approaches for addressing these issues under the FMLA.

1. Applying the *McDonnell Douglas* Framework

Several courts have applied the *McDonnell Douglas* framework to analyze allegations of a FMLA violation when an employer imposes an adverse employment decision against an employee who is on medical leave, or shortly after his return to work.⁴⁹ The *McDonnell Douglas* formula⁵⁰ is a burden-shifting approach that the U.S. Supreme Court developed in the context of employment

The extent to which the courts should defer to the DOL regulations is beyond the scope of this Note. For a discussion of the application of *Chevron* deference to the DOL regulations on the FMLA, see Caitlyn M. Campbell, Note, *Overstepping One's Bounds: The Department of Labor and the Family and Medical Leave Act*, 84 B.U. L. Rev. 1077, 1078 (2004) (arguing that DOL regulations regarding the definition of "serious health condition," employers designation of FMLA leave, and notice requirements, violate congressional intent and thus are not entitled to *Chevron* deference).

48. See *supra* notes 31-33 and accompanying text.

49. See, e.g., *Potenza v. City of New York*, 365 F.3d 165 (2d Cir. 2004); *Brungart v. BellSouth Telecomms. Inc.*, 231 F.3d 791 (11th Cir. 2000); *Chaffin v. John H. Carter Co.*, 179 F.3d 316 (5th Cir. 1999).

50. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Supreme Court created this formula to analyze discrimination claims. It ensures that the plaintiff has the burden to prove that the employment decision in question was because of discrimination in violation of a federal statute. See *supra* note 20.

discrimination claims under Title VII of the Civil Rights Act of 1964.⁵¹ Under this approach, the plaintiff bears the burden of proof during the entire litigation.⁵² First, the plaintiff must establish a prima facie case that he was subjected to discrimination.⁵³ The employer then must introduce evidence of a legitimate nondiscriminatory reason for his employment decision.⁵⁴ The burden then shifts back to the employee to prove that the employer's offered reason was, in fact, pretext for the discriminatory reason.⁵⁵

The Seventh Circuit in *Rice v. Sunrise Express, Inc.*, illustrates the use of the *McDonnell Douglas* approach in the context of a claim that

51. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, national origin, gender, or religion. 42 U.S.C. § 2000e-2 (2000). It also prohibits retaliation against an employee who opposed a Title VII violation or participated in any Title VII investigative proceedings. *Id.* § 2000e-3. For a discussion of the development of the *McDonnell Douglas* framework in Title VII and other federal antidiscrimination laws jurisprudence, see generally Corbett, *supra* note 20.

52. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (emphasizing that under *McDonnell Douglas* the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff" (emphasis added)).

53. *McDonnell Douglas*, 411 U.S. at 802. The Court held that the plaintiff could establish a prima facie case of racial discrimination, the issue in that case, by showing that:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. The prima facie case serves to eliminate the most common nondiscriminatory reasons for the employment decision. *Id.* at 254.

54. *McDonnell Douglas*, 411 U.S. at 803 (holding that an employer can refuse to hire a person who has engaged in unlawful activity against him). The employer does not have to prove that the reason offered was in fact the actual reason for the decision, but rather just needs to provide some evidence that he had a non-discriminatory reason. See *Burdine*, 450 U.S. at 254 (describing that the employers burden is not to persuade the court that their proffered reasons were the actual motivation, but to produce enough evidence to raise a genuine issue of fact as to whether there was discrimination against the plaintiff). Courts have found various legitimate nondiscriminatory reasons to satisfy the employer's burden. See *e.g.*, *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 189 (4th Cir. 2004) (maintaining that an employer may rebut the presumption of discrimination by demonstrating that the person promoted was better qualified than the plaintiff); *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1375 (11th Cir. 1996) (holding that the employer's burden was satisfied by articulating incompetence, inefficiency, and failing to meet production standards as grounds for termination); *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1133 (7th Cir. 1994) (finding the employer's explanation for terminating an employee based on its belief that the plaintiff carried a weapon, satisfied the employer's burden).

55. *McDonnell Douglas*, 411 U.S. at 804. The plaintiff has the burden to prove that the offered reason was not the actual reason for the employment decision. This burden "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256.

an employee was terminated in violation of the FMLA.⁵⁶ In *Rice*, the employee, Rice, had surgery which necessitated her to take a leave for four weeks. Two days after Rice informed her employer of her intent to return, her employer terminated her employment. Her layoff became effective the day she intended to return to work.⁵⁷ The court described the “two categories of broad protections for employees” under the FMLA: separate substantive rights and proscriptive rights.⁵⁸ In analyzing what Rice needed to show to prove that her employer violated her FMLA rights, the court applied the *McDonnell Douglas* framework of shifting the burden. The court held that Rice’s allegations fell into the proscriptive provisions of the FMLA and thus, the employee always bears the ultimate burden of establishing the right to the benefit she claims she was illegally denied, which in *Rice* was the right to reinstatement.⁵⁹ The employer could bring forth evidence that the benefit would not have been available even if the employee did not take leave; but ultimately, the employee must show that the benefit is one that the employee would have received if he had not taken FMLA leave.⁶⁰

2. The Ninth Circuit Approach: The Negative Factor Test

The Ninth Circuit has rejected the *McDonnell Douglas* approach and applied a different analysis to FMLA claims. The Ninth Circuit established its approach in *Bachelder v. America West Airlines, Inc.*⁶¹

56. *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008 (7th Cir. 2000).

57. *Id.* at 1011.

58. *Id.* at 1016-17; *see also* *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999). The Seventh Circuit defines the substantive provisions as the right to take unpaid leave for up to twelve weeks in any twelve month period under § 2612(a), and the right to reinstatement under § 2614(a), and states that it is unlawful for any employer to interfere with, restrain, or deny the exercise of FMLA rights under § 2615(a)(1). *Id.* If an employee is alleging a denial of these guarantees, he would have to show an entitlement to the disputed leave by the preponderance of the evidence and employer’s intent is immaterial. *Id.* However, when an employee raises the issue whether the employer discriminated against an employee for exercising FMLA rights, intent is relevant. *Id.* The Seventh Circuit explained that these issues fell under the proscriptive provisions of the FMLA and are described as analogous to actions for discrimination and retaliation under Title VII. *Id.*

59. *Rice*, 209 F.3d at 1017-18.

60. *Id.* at 1018. The Seventh Circuit provided an example of how to apply the burden-shifting framework in the context of the FMLA:

[I]f the employer claims that the employee would have been discharged or that the employee’s position would have been eliminated even if the employee had not taken the leave, the employee, in order to establish the entitlement protected by § 2614(a)(1), must, in the course of establishing the right, convince the trier of fact that the contrary evidence submitted by the employer is insufficient and that the employee would not have been discharged or his position would not have been eliminated if he had not taken FMLA leave.

Id.

61. 259 F.3d 1112 (9th Cir. 2001).

There, an employee had taken FMLA leave in 1994 and 1995. In 1996, a manager discussed Bachelder's attendance record with her. Among the absences discussed were her FMLA leaves. Bachelder's employer fired her in April of 1996 for her sixteen absences, following that discussion with management.⁶² Bachelder alleged that the FMLA-protected leaves were factors used in the employment decision. The Ninth Circuit emphasized the DOL regulations, which explain that the prohibition of employer interference with the exercise of FMLA rights means that employers cannot use FMLA leave as a negative factor in employment decisions.⁶³

The Ninth Circuit also found that the FMLA's language on interference mimics the language in section 8(a)(1) of the National Labor Relations Act ("NLRA")⁶⁴ and, therefore, the NLRA can be used to clarify the FMLA provision prohibiting interference with an employee's FMLA rights.⁶⁵ Thus, the Ninth Circuit read the "interference" or "restraint" provision of the FMLA to cover employer actions that deter participation in protected activities, which would include termination or adverse actions taken because the employee used the FMLA leave.⁶⁶ The court held that Bachelder's claim did not fall within the antidiscrimination provision found in § 2615(a)(2) or the anti-retaliation provision of § 2615(b) which, by

62. *Id.* at 1121.

63. *Id.* at 1122 (citing 29 C.F.R. § 825.220(c) (2004)). Regulation 825.220(c) provides in part, "employers cannot use the taking of FMLA leave as a negative factor in employment actions." *Id.* § 825.220(c).

64. 29 U.S.C. §§ 151-169 (2000). Section 8 (codified at 29 U.S.C. § 158) provides: "It shall be an unfair labor practice for an employer - (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." *Id.* § 158(a).

65. *Bachelder*, 259 F.3d at 1123. The Ninth Circuit refers to several decisions under the NLRA where courts have held that activities such as threatening job loss, awarding preferential rights to strike replacements, and surveillance of union organizing constitute interference with employees' NLRA rights. *See id.* Under the NLRA, activity that reasonably tends to interfere with an employee's exercise of protected activity violates section 8(a)(1). *NLRB v. Hitchiner Mfg. Co.*, 634 F.2d 1110, 1113 (8th Cir. 1980); *see also United States Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004) (holding that the National Labor Relations Board does not have to find that the employer's language or acts were "coercive in actual fact" but that they had the "tendency to coerce" (internal citations omitted)); *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 180 (4th Cir. 2003) (holding that the section 8(a)(1) inquiry is whether the conduct had a "reasonable tendency in the totality of circumstances to intimidate" (internal citations omitted)); *NLRB v. Ill. Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946) (holding that the test to determine if there is a section 8(a)(1) violation does not depend on the employer's motivations but rather whether the employer engaged in conduct that may reasonably be said to "interfere with the free exercise" of employees' rights). In analyzing allegations under section 8(a)(1) of the NLRA, courts and the National Labor Relations Board ("NLRB") objectively balance the competing employee and employer interests. *See Martin H. Malin, Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 *Employee Rts. & Emp. Pol'y J.* 329, 370 (2003).

66. *Bachelder*, 259 F.3d at 1124.

their plain meaning, do not cover situations in which employees suffered negative consequences for using FMLA leave.⁶⁷ After determining that the claim should be considered under the interference provision of the FMLA, the court explained the appropriate standard for a plaintiff to prove the FMLA violation: The plaintiff must prove by a preponderance of the evidence that her taking FMLA-protected leave constituted a negative factor in the decision to terminate her.⁶⁸

3. The Tenth Circuit Approach: Employer Carries the Burden

The Tenth Circuit also rejected the burden-shifting analysis for an allegation that taking FMLA leave resulted in the denial of employment benefits. In *Smith v. Diffie Ford-Lincoln*, Smith took FMLA leave for breast cancer treatment.⁶⁹ While she was on leave, her employer found that she did not adequately train her junior employees, and she was terminated while still on leave.⁷⁰ Smith proceeded under § 2615(a)(1) based on the interference or entitlement theory; she alleged that her employer violated the interference provisions of the FMLA because she would not have been terminated if she was not on leave.⁷¹ The Tenth Circuit held that a plaintiff can prevail under an entitlement theory if the plaintiff can prove that she was denied her substantive FMLA rights for a reason connected with her leave.⁷² The court went on to say that this reason is not necessarily retaliation and, therefore, Smith was able to prove that her termination violated the FMLA under an interference/entitlement theory.⁷³

In allocating the burden of proof with an entitlement claim, the Tenth Circuit held that the proper approach is to shift the burden to the employer to prove that the employee would have been dismissed regardless of his requesting or taking the leave.⁷⁴ The Tenth Circuit found that this framework was consistent with the DOL regulations.⁷⁵

67. *Id.* at 1124-25.

68. *Id.* at 1125. The court held that the plaintiff can prove this claim using either direct or circumstantial evidence. *Id.*

69. *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 959 (10th Cir. 2002).

70. *Id.*

71. *Id.* at 960-61.

72. *Id.* at 960.

73. *Id.* at 961.

74. *Id.* at 963.

75. The Tenth Circuit relied on DOL regulation 825.216(a)(1) stating: "An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment" and "if an employee is laid off during the course of taking FMLA leave An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore would not be entitled to restoration." *Id.*; see also *O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1354 (11th Cir. 2000) (holding that an employer has the opportunity to show

The court held that the regulation was not “arbitrary, capricious, or manifestly contrary to the FMLA” and therefore was entitled to deference.⁷⁶ Thus, the burden of proof should be shifted to the employer, as required by the DOL regulations.

C. Addressing the FMLA and Work-Family Leave in Other Forums

Most claims of FMLA violations are heard in federal courts. However, claimants sometimes bring actions for violations related to family and medical leave in other forums. One alternative method for adjudicating FMLA claims is to proceed in employment arbitration.⁷⁷ Employment conflicts are increasingly pursued in an arbitral forum.⁷⁸ Thus, many actual FMLA claims are decided in arbitration rather than the traditional court forum. Even more frequently, arbitrators are faced with disciplinary cases in which an employee’s family and medical needs are central to the decision.⁷⁹ Alternatively, plaintiffs occasionally choose to pursue a wrongful termination claim as a tort, rather than proceed under the FMLA.⁸⁰ For example, while the general rule in employment relationships is employment-at-will,⁸¹ plaintiffs have attempted to bring tort claims against employers for their wrongful termination. These examples provide alternative ways to look at the FMLA and related work-family issues. Part I.C first looks at the use of wrongful termination claims to address family and medical leave issues and then examines the way these issues are addressed in arbitration.

1. Termination for Taking Family and Medical Leave: Wrongful Termination Claim

While employment-at-will is the general rule, some courts have recognized an exception if the termination is found to be a violation of public policy. Generally, violations of public policy fall into two categories: (1) an employee is required to perform an illegal act and, upon objecting, is terminated; or (2) an employee asserts his legal

that he would have discharged the employee had he not been on leave, consistent with regulation 825.216).

76. *Smith*, 298 F.3d at 963.

77. *See, e.g., Stewart v. Paul, Hastings, Janofsky & Walker, L.L.P.*, 201 F. Supp. 2d 291, 294 (S.D.N.Y. 2002) (concluding that FMLA claim could be decided in arbitration based on arbitration agreement to which plaintiff voluntarily agreed after she had opportunity to consult counsel).

78. *See infra* notes 94-95, 190 and accompanying text.

79. *See infra* notes 101-07 and accompanying text.

80. *See infra* notes 84-90 and accompanying text.

81. The doctrine of employment-at-will allows an employer to terminate an employee with or without cause at any time and the employee has an equal right to quit for any reason. Thus either party can terminate the employment relationship without cause.

rights and is terminated for doing so.⁸² Most states recognize wrongful termination in violation of public policy as constituting a tort independent of the at-will employment contract defense.⁸³ To establish a claim based on a violation of public policy, the policy must be: (1) supported by a constitutional or statutory provision; (2) for the benefit of the public rather than specific interest of the individual; (3) articulated at the time of discharge; and (4) the policy must be fundamental.⁸⁴ Some courts have applied this analysis to find that an employee can state a cause of action for wrongful discharge based on a violation of the FMLA.⁸⁵

When recognized, the tort constitutes a separate claim against an employer for violating the FMLA. For example, the California Court of Appeals in *Nelson v. United Technologies* held that a violation of the California state counterpart to the FMLA supported a public policy wrongful discharge claim.⁸⁶ In support of this finding, the court focused on the policies that the statute explicitly codified. The leave policy was stated within the statutory provision with a detailed description of employers' obligations.⁸⁷ Furthermore, the policies behind the statute benefit the public at large because they aim to promote economic security and stability in families.⁸⁸ The policies and statute were implemented and well established by the time the employer in the case made the employment decision at issue.⁸⁹ Finally, promoting stability and economic security in families is a fundamental and substantial policy.⁹⁰

For courts to recognize a tort based on a violation of the FMLA, the courts must first find that the FMLA does not completely preempt the cause of action. Courts that have recognized the tort have found that there is no evidence that Congress intended the FMLA to completely preempt common law claims or that there would be any conflict between the FMLA and a wrongful discharge claim.⁹¹ The

82. Diana P. Scott, *Emerging Trends in State Law Employment Claims*, 2004 Current Developments in Emp., AL.I.-A.B.A. Course of Study, at 487.

83. *Id.*

84. *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1137 (9th Cir. 2003) (citing *Stevenson v. Superior Court*, 941 P.2d 1157 (Cal. 1997)).

85. *See id.* at 1138; *see also Nelson v. United Techs.*, 88 Cal. Rptr. 2d 239, 245 (Cal. Ct. App. 1999) (holding that a violation of CFRA (state counterpart to FMLA) is a violation of public policy). The court emphasized in *Nelson* the need for family leave without fear of job loss, the broad implementation of the law, and the substantial and fundamental aspects of the law. *Id.* at 246-48.

86. *Nelson*, 88 Cal. Rptr. 2d at 245.

87. *Id.* at 246.

88. *Id.* at 246-47.

89. *Id.* at 247.

90. *Id.* at 247-48. The court referred to the federal FMLA and various states that have implemented family and medical leave legislation to support its finding that there are important policies behind the California legislation. *Id.*

91. *Danfelt v. Bd. of County Comm'rs*, 998 F. Supp. 606, 611 (D. Md. 1998) (discussing that a federal law completely preempts state law when Congress "evinces

FMLA provides minimum protection and, therefore, if state legislation offers greater benefits and protections, employers in that state are required to abide by the state statutory provisions as well as the FMLA.⁹² However, some courts have held that the FMLA is the exclusive remedy and refuse to recognize a tort claim.⁹³

2. Arbitration of the FMLA and Other Work-Family Issues

Like a tort action for wrongful termination, arbitration provides claimants with another alternative to federal courts for FMLA claims. Arbitration has become an increasingly popular forum to resolve employment disputes, including statutory claims.⁹⁴ Frequently, the FMLA is incorporated into a collective bargaining agreement such that the claims are decided in arbitration pursuant to the bargaining agreement.⁹⁵ Not all FMLA claims, however, are required to go to arbitration absent clear contractual language.⁹⁶ Regardless of whether the claims are required to be resolved in arbitration under a contract, arbitrators are frequently required to address grievances that deal with the struggle to balance family and employment needs. Conflicts between workers and management often lead to disputes in which

an intent to occupy completely a given field"). Arguably, Congress did not intend to "occupy completely" based on the legislative history that the FMLA was intended to act as a minimum labor standard. The House Reports discussed with approval how various states have enacted their own family and medical leave. *See, e.g.*, H.R. Rep. No. 103-8, pt. 1, at 32-33 (1993).

92. Rigler, *supra* note 31, at 493.

93. *See, e.g.*, *Wiles v. Medina Auto Parts*, 773 N.E.2d 526, 533-34 (Ohio 2002) (discussing the adequacy of the recourse available for employees under the provisions of the FMLA and declining to recognize a tort claim); *see also infra* note 189 and accompanying text.

94. Arbitration of an employee's statutory claim can occur if: (1) the employee is covered by a collective bargaining agreement which requires just cause or good cause for dismissal and the employee claims that the discriminatory reason violates this provision; or (2) an individual employee signs a form that they will submit all workplace disputes to an arbitration system. Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 Ind. L.J. 83, 84 (2001). This latter category, non-union agreements to arbitrate, became increasingly popular in the 1980s and 1990s. *Id.* at 83-84.

95. *See, e.g.*, *Electrolux Home Prods., Inc. v. United Auto. Workers of Am., Local 442*, 343 F. Supp. 2d 747, 756 (N.D. Iowa 2004) (holding that the collective bargaining agreement incorporated the FMLA by referring to the Act in the agreement).

96. *See Rogers v. New York Univ.*, 220 F.3d 73, 76 (2d Cir. 2000) (holding that the employer could not compel plaintiff to arbitrate federal statutory claim under the FMLA because the collective bargaining agreement, which required arbitration, did not explicitly provide for all federal claims to be submitted to arbitration and the broad provisions in the contract did not sufficiently incorporate the antidiscrimination requirements). *But see Butler Mfg. Co. v. United Steelworkers*, 336 F.3d 629, 633 (7th Cir. 2003) (holding the arbitrator had authority to take the FMLA into account when the collective bargaining agreement required that employment opportunities were offered in "accordance with the provisions of law").

arbitrators must determine whether the employer had just cause⁹⁷ to discipline an employee for refusing management directives because of child care or other family obligations, or whether the employer should have accommodated the employee's needs.⁹⁸

As arbitration resolves more employment disputes, the issues of how to handle family and medical leave are increasingly necessary to address. Because arbitrations often arise as a requirement of an employment contract, arbitrators are often called upon to interpret the terms of the agreement. In following contractual language, arbitrators have upheld employees' grievances when the employment contract provided that the employer must give leave for reasonable cause.⁹⁹ However, sometimes when arbitrators strictly follow the contractual language or past practices it results in harsh outcomes and little consideration of the family's needs.¹⁰⁰

Frequently, arbitrators address whether the employer terminated an employee for just cause as required by the employment contract. Just cause is usually viewed in a framework of what a reasonable man might have done under similar circumstances. Thus, "arbitrators have made it easier for employees to harmonize their work and family responsibilities by recognizing that principles of just cause require employers to respond reasonably to employees' needs to care for their children."¹⁰¹ Therefore, if an employer terminates an employee for taking leave, an arbitrator will determine whether it was reasonable for the employee to request that leave. If the request was reasonable, the arbitrator might find that there was no just cause for the termination.¹⁰² Alternatively, an arbitrator might accept family

97. Whether an employer had just cause to terminate or discipline an employee is evaluated on a case-by-case basis; there is no precise definition of what constitutes just cause. However, the employer's decisions cannot be arbitrary and must be objectively reasonable. See 30 C.J.S. *Employer-Employee* § 60 (1992).

98. See Benjamin Wolkinson & Russell Ormiston, *The Reconciliation of Work-Family Conflicts in Arbitration*, 59 Disp. Resol. J. 84, 86 (2004).

99. In *Ironworkers Local 473*, the arbitrator held that the grievant should not have been disciplined by the "no-fault" attendance policy when she missed work to care for her sick child. The arbitrator concluded that a leave of absence should have been granted because of the contractual requirement that leave is given for "reasonable cause" and having a sick child was a reasonable basis for the request. *Iron Workers Local 473 v. Filtran Division, SPX Corp.*, 99-1 Arb, (CCH) ¶ 5533 (1999) (Eglit, Arb.); see also Wolkinson & Ormiston, *supra* note 98, at 88.

100. Wolkinson & Ormiston, *supra* note 98, at 93-94 (noting that arbitrators sometimes ignore the discretionary authority they possess). Benjamin Wolkinson and Russell Ormiston argue, however, that in most reported cases the arbitrators recognize the difficulties of family needs. *Id.* Thus, arbitrators may reduce or overturn discipline where an absence was caused by emergency medical situations involving an employee's children. *Id.* at 94.

101. *Id.*

102. See *id.* at 89.

concerns as mitigating or exonerating factors which warrant a lesser discipline.¹⁰³

When the contract language is not clear or the past practice of the employer is not evident, arbitrators may look to other factors in deciding an issue regarding family and medical leave. Arbitrators hold parties to a duty to act responsibly. Thus, an arbitrator sometimes is not sympathetic to an employee who cannot get a babysitter for his child,¹⁰⁴ but other times the arbitrator will recognize the difficulties of providing child care.¹⁰⁵ Furthermore, arbitrators might take into account the employee's cumulative attendance record. Generally, if the employee had a good attendance record, the arbitrator is more likely to consider child care needs as a mitigating factor. Finally, an arbitrator might be sympathetic to an employee who refuses to work overtime if they have a reasonable excuse, such as caring for children,¹⁰⁶ but they might be less sympathetic if the employer is confronted with operational constraints.¹⁰⁷ Arbitrators

103. *Id.* at 88 (referring to factors that could impact an arbitrator's determination, including "(1) the duty of employers and employees to act responsibly, (2) the grievant's overall attendance record, (3) emergency medical situations, and (4) the operational needs of the employer").

104. *See, e.g.*, *U.S. Steel Corp. v. United Steelworkers of Am. Local 1013*, 95 Lab. Arb. Rep. (BNA) 610 (1990) (Das & Dybek, Arb.). In that situation the arbitration panel upheld a fifteen day suspension when the grievant could not find a babysitter to replace the one that cancelled at 10pm the night before the grievant's shift. *Id.* at 613. The panel found the grievant did not do anything to try to make other arrangements; he could not "wash his hands of the entire matter by simply saying, as he in effect did, that he is too busy to exercise any responsibility for arranging for child care." *Id.*; *see also* Wolkinson & Ormiston, *supra* note 98, at 90.

105. *See, e.g.*, *Tenneco Packaging v. United Paperworkers Int'l Union, Local 231*, 112 Lab. Arb. Rep. (BNA) 761 (1999) (Kessler, Arb.). Arbitrator Frederick P. Kessler reversed the termination of a grievant who did not report to a Saturday overtime shift when the caretaker could not care for grievant's seventeen-year-old disabled son. *Id.* at 768. The arbitrator took into account the difficulties of acting as single parent for a disabled child, that the grievant was required to work on Saturday which is usually not a work day, and that the grievant was a long term employee. *Id.*; *see also* Wolkinson & Ormiston, *supra* note 98, at 90-91.

106. Wolkinson & Ormiston, *supra* note 98, at 93 (citing *Keebler Co.*, 03-1 Arb. ¶ 3481 (2003), where the arbitrator overturned attendance points against grievant who refused to work overtime because he needed to take his young daughter to the doctor).

107. If the employer is responsible for public safety, such as a police department, the arbitrator is likely to be more concerned with the employer's staffing needs to ensure that they can adequately perform their safety duties. *See, e.g.*, *Town of Stratford*, 97 Lab. Arb. Rep. (BNA) 513 (1991) (Stewart, Arb.). In that case the arbitrator upheld the suspension of an employee who was to report to work early to fulfill manpower requirement but did not show up when she could not find a babysitter for her young children under short notice. *Id.* The arbitrator emphasized the employer's needs and the military-like organization of the department. *Id.* at 514; *see also* Wolkinson & Ormiston, *supra* note 98, at 93. Arbitrators are also likely to be more deferential to an employer when the employee failed to provide notice of family needs. *Id.*; *see e.g.*, *L. A. County Servs. Dep't*, 93 Lab. Arb. Rep. (BNA) 1079, 1082 (1989) (Knowlton, Arb.) (upholding discipline of an employee who failed to

seem to recognize that an employee's family needs are often reasonable and beyond the employee's control. However, arbitrators also recognize that employers need reliable employees to adequately run a business. Thus, arbitrators look at all relevant circumstances and have used reasonable family needs to mitigate employers' disciplinary decisions against employees.

Arbitrators and the courts have applied a variety of approaches to FMLA issues. In all forums, there are inconsistent results on how to address an employee's claim that he was illegally terminated or disciplined based on his legitimate use of family or medical leave. There are advantages and disadvantages associated with these different approaches, which Part II examines.

II. PROTECTING EMPLOYEES AND ENFORCING THE FMLA'S GUARANTEE OF REINSTATEMENT—EVALUATING THE VARIOUS APPROACHES

The right to reinstatement is central to affording workers the job security that Congress intended the FMLA to provide for employees who have family and health concerns. However, security and stability can truly exist only if the FMLA's reinstatement provisions are adequately enforced. This part will examine how the various approaches to FMLA claims address the areas of confusion under the FMLA: classifying the claim, allocating the burden of proof, and the courts' reliance on the DOL regulations.

Part II.A discusses applying the *McDonnell Douglas* framework to FMLA claims. Parts II.B and II.C address and evaluate alternatives to the *McDonnell Douglas* formula as applied by the Ninth and Tenth Circuits. Part II.D focuses on FMLA claims in alternative forums. First, it examines whether the public policies behind the FMLA could support a wrongful termination claim. Second, it discusses whether employment arbitration is an adequate alternative to litigation of federal statutory claims like the FMLA.

A. *Applying the McDonnell Douglas Framework to FMLA Claims*

The *McDonnell Douglas* formula provides a structure for courts to classify the FMLA claim, allocate the burden of proof, and determine the extent to which the DOL regulations address the proof structure. Part II.A discusses the framework that *McDonnell Douglas* provides with regard to these issues.

accommodate the needs of her employer or request leave as soon as she recognized a problem).

1. Classifying the Claim: Interference, Retaliation, or Discrimination?

The FMLA protects an employee from interference with his FMLA rights under § 2615(a)(1), from retaliation or discrimination under § 2615(a)(2), and from discrimination for participating in FMLA proceedings under § 2615(b). Thus, courts need to decide what claim the plaintiff is bringing in alleging that his FMLA rights have been violated.

Courts that have applied the burden-shifting analysis have found that an employee's termination falls under the "proscriptive" provisions of the FMLA.¹⁰⁸ These courts have found that the proscriptive provisions are based on the discrimination and retaliation provisions under Title VII.¹⁰⁹ Thus, the courts analyze the claim as a discrimination claim and apply the *McDonnell Douglas* formula. By applying the *McDonnell Douglas* framework to both the FMLA and Title VII retaliation claims, a court is applying a consistent framework for all retaliation claims.¹¹⁰ The courts apply the same standard that is used for Title VII retaliatory discharge claims to establish retaliatory intent.¹¹¹ Furthermore, by following the *McDonnell Douglas* framework, a court ensures that the employee carries the burden to show a violation of the FMLA.¹¹²

However, commentators and courts have criticized equating a plaintiff's allegation that he suffered adverse action because he took FMLA leave with a discrimination claim similar to a Title VII charge. First, courts and commentators disapprove of this approach for confusing the § 2615(a)(1) interference claims with § 2615(a)(2) and § 2615(b) retaliation and discrimination claims.¹¹³ Section 2615(a)(1) has been compared to section 8(a)(1) of the NLRA, rather than Title VII.¹¹⁴ It is well established that the ban on an employer's interference with an employee's NLRA rights affords employees

108. See, e.g., *King v. Preferred Technical Group*, 166 F.3d 887, 891 (7th Cir. 1999).

109. See *supra* note 58 (discussing the Seventh Circuit's distinction between the substantive and proscriptive provisions of the FMLA).

110. See *Chaffin v. John H. Carter Co.*, 179 F.3d 316, 319 (5th Cir. 1999) (holding that "[n]othing in the FMLA landscape suggests that the teachings of *McDonnell Douglas* would be less useful" for FMLA claims). The court held that "there is no significant difference between such claims under the FMLA and similar claims under other anti-discrimination laws." *Id.*

111. *Potenza v. City of New York*, 365 F.3d 165, 168 (2d Cir. 2004).

112. See, e.g., *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1018 (7th Cir. 2000).

113. Malin, *supra* note 65, at 349 (distinguishing § 2615(a)(1) from § 2615(a)(2) and (b)); see also Amy Stutzke, Note, *Reinstatement Claims Under the Family and Medical Leave Act of 1993: Leaving Behind the Inter-Circuit Chaos and Instating a Suitable Proof Structure*, 48 N.Y.L. Sch. L. Rev. 577, 593 (2004); *supra* notes 66-67 and accompanying text (discussing the Ninth Circuit's distinction between interference and retaliation claims).

114. Malin, *supra* note 65, at 349-50; see also *supra* notes 64-65 and accompanying text (discussing the Ninth Circuit's reliance on NLRA analysis).

broader protections than the prohibition on discrimination.¹¹⁵ Thus, the courts should not read a discrimination requirement into FMLA litigation.¹¹⁶

A second criticism is that the distinction between the proscriptive and substantive rights is unclear. The courts have not explained when a claim that an employer took adverse employment action because of the plaintiff-employee's use of FMLA leave should be considered interference where the courts do not require proof of retaliatory intent and retaliation, where intent is relevant.¹¹⁷ The courts are drawing a "false dichotomy" from situations requiring discriminatory intent and those where the courts decided no intent is required.¹¹⁸ The discrimination referred to in § 2615(a)(2) is not a general protection of the exercise of FMLA rights, but rather a specific prohibition against discrimination of an employee who opposes a practice that violates the FMLA.¹¹⁹ Some courts argue that only these specific activities were intended to be covered by § 2615(a)(2) and could possibly be analyzed with the *McDonnell Douglas* framework.¹²⁰ For example, if an employee complained of an employer's policy that denied FMLA leave and alleged that the employer made a detrimental employment decision based on his complaint, the *McDonnell Douglas* formula could apply. However, in circumstances where the employment decision was based on the employee's taking FMLA-protected leave, it is a § 2615(a)(1) violation.¹²¹ Classifying the claim as an alleged violation of § 2615(a)(1) or § 2615(a)(2) has the impact of establishing two drastically different ways to handle almost identical fact situations. This problem is exacerbated by situations in which courts

115. Malin, *supra* note 65, at 349-50.

116. *Id.* at 353. Martin H. Malin argues that Congress modeled FMLA § 2615(a)(2) and (b) after the antidiscrimination provisions in Title VII but the language related to discrimination is "conspicuously" absent from § 2615(a)(1). *Id.* at 357-58.

117. *See supra* note 58 and accompanying text (discussing the Seventh Circuit's approach to distinguishing between claims that require proof of intent and those which do not). The Seventh Circuit's approach, however, assumes that a claim of adverse action for exercising a FMLA right should not be analyzed as a denial of a substantive guarantee. *See infra* notes 215-19 and accompanying text (contending that these claims of adverse employment actions should be considered interference claims without requiring proof of intent).

118. Malin, *supra* note 65, at 358 (describing the "false dichotomy" between interference claims with no requirement of the proof of intent and retaliation claims analyzed under *McDonnell Douglas*).

119. Malin contends that § 2615(a)(2) is modeled after the opposition clause of Title VII which states that it is unlawful to discriminate against any employee who has "opposed any practice, made an unlawful employment practice" by Title VII. *Id.* The general protection of FMLA rights lies within § 2615(a)(1). *Id.* Malin argues that the courts "turned an FMLA entitlement into a prohibition on discrimination." *Id.* at 362.

120. *See supra* text accompanying note 67.

121. *See supra* notes 66-67 and accompanying text.

use the *McDonnell Douglas* framework for the entire trial, instead of only at the summary judgment phase.¹²²

2. The *McDonnell Douglas* Approach: Shifting the Burden with the Ultimate Burden of Proof on the Plaintiff

Once the claim has been classified, courts proceed by applying the *McDonnell Douglas* formula similar to the Title VII approach.¹²³ The employee bears the ultimate burden of establishing that he was entitled to an employment opportunity under the FMLA. The employer's burden is to introduce evidence of a legal reason, unrelated to the leave, for making the particular employment decision. The employee then must convince the court that the discharge or employment action would not have been made if the employee did not take the FMLA leave.¹²⁴ Consistent with Title VII jurisprudence, the employee must introduce sufficient evidence to prove the employer's intent to succeed on the claim.¹²⁵

Critics denounce the *McDonnell Douglas* method of shifting the burden for confusing the real issue of whether there was a statutory violation.¹²⁶ The *McDonnell Douglas* framework has been greatly modified and altered, leaving many commentators to question the vitality of the framework in any context, including Title VII where it originated.¹²⁷ Furthermore, it is contended that there should be no

122. Michael L. Murphy, Note, *The Federal Courts' Struggle with Burden Allocation for Reinstatement Claims Under the Family and Medical Leave Act: Breakdown of the Rigid Dual Framework*, 50 Cath. U. L. Rev. 1081, 1122-23 (2001).

123. See *supra* Part I.B.1.

124. See *supra* note 60 and accompanying text.

125. See *Potenza v. City of New York*, 365 F.3d 165, 168 (2d Cir. 2004) (holding that the employee failed to satisfy the requirement of showing retaliatory intent, especially given the two month delay between the employee's return to work and his removal).

126. See *Stutzke*, *supra* note 113, at 593-94.

127. The most significant modification of the allocation of the burden of proof in employment discrimination cases likely came from the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The Supreme Court held that in a mixed-motive case, when there are both discriminatory and nondiscriminatory motives for the employment decision, an employer is liable. *Id.* at 241. Thus under *Price Waterhouse*, a plaintiff prevails if he can prove discrimination was a motivating factor. *Id.* If the plaintiff satisfies the burden that there was a discriminatory reason, the employer bears the burden of justifying its ultimate decision. *Id.* at 246. The employer then can establish an affirmative defense by proving he would have taken the employment action without the discriminatory reason. *Id.* at 252. In the 1991 amendments to the Civil Rights Act, § 2000e-2(m) provides that there is discrimination when the plaintiff's membership in a protected class was a "motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2000). However, the damages are limited if the employer can prove that they "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-5(g)(2)(B). In *Desert Palace, Inc. v. Costa*, the Supreme Court held that a plaintiff is entitled to the mixed-motive jury instructions whether they establish the discriminatory reason by direct or

proof of intent requirement under these FMLA claims because they are not discrimination claims, but rather claims for a violation of the interference provision of the statute.¹²⁸

3. DOL Regulations: Should the Courts Defer to the DOL to Determine the Burden of Proof Structure?

The DOL regulations implemented to help enforce the FMLA are entitled to deference by courts hearing FMLA claims.¹²⁹ Therefore, in analyzing the various methods of approaching these claims, it is necessary to evaluate how these methods follow the regulations. Sometimes the courts do not explicitly rely on the regulations in their analysis.¹³⁰ One of the frequently discussed regulations in these FMLA cases is regulation 825.216.¹³¹ In interpreting this regulation,

circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-101 (2003). In light of this decision, commentators contend that there is no purpose for the *McDonnell Douglas* framework anymore. See Davis, *supra* note 20, at 888-89 (arguing that with the ability to use both circumstantial and direct evidence to support a “mixed-motive” analysis, the *McDonnell Douglas* framework is no longer justified); see also William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. Pa. J. Lab. & Emp. L. 199, 212-13 (2003) (arguing that *McDonnell Douglas* is dead after *Costa* and all future cases “will be mixed motives because that structure has a lower standard of causation than the pretext but-for standard” that was the third step in the *McDonnell Douglas* approach). The Third Circuit has applied the mixed-motive analysis to a claim under the FMLA. See *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135 (3d Cir. 2004). In *Conoshenti*, the Third Circuit held that once the employee demonstrated that the employee’s FMLA leave was a substantial factor in the decision to discharge the employee, the employer must prove that it would have fired the employee even if it had not considered the FMLA leave. *Id.* at 147-48.

128. See *supra* notes 65-67 and accompanying text.

129. See *supra* note 47.

130. In *Potenza v. City of New York*, the Second Circuit did not discuss the DOL regulations in its analysis, its classification of the claim, or its decision to apply the *McDonnell Douglas* formula. *Potenza v. City of New York*, 365 F.3d 165 (2d Cir. 2004).

131. 29 C.F.R. § 825.216 (2004). The relevant provisions of regulation 825.216 provide:

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

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer’s responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original

the Seventh Circuit in *Rice* described it as explaining the nature of the substantive right, not an explanation on the allocation of the burden of proof.¹³² The court said that rather than changing the normal allocation of burdens of proof, the regulation explains that the employer has an opportunity to demonstrate that it would have discharged the employee regardless of whether he took FMLA leave.¹³³ Thus, the burden-shifting formula, which affords the employer the chance to provide evidence showing his reasons for taking the action he did, is sufficient. The burden of proof never needs to shift to the employer.

However, commentators argue that regulation 825.216 was intended to govern the burden of proof analysis.¹³⁴ Furthermore, the language of the regulation arguably creates an affirmative defense for an employer to show that he would have terminated the employee, irrespective of the employee's FMLA leave.¹³⁵ By applying the *McDonnell Douglas* formula, the courts ignore an independent affirmative defense.¹³⁶ The *McDonnell Douglas* formula requires the employer to introduce, rather than prove, a legitimate reason for making the employment decision.

B. *The Ninth Circuit's Approach to FMLA Claims*

The Ninth Circuit rejected the application of the *McDonnell Douglas* formula and instead focused its analysis on whether the employer interfered with the FMLA under § 2615(a)(1).¹³⁷ According to the Ninth Circuit, the appropriate inquiry is whether the employee's use of FMLA leave was a negative factor in the

overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

Id.

132. *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008, 1018 (7th Cir. 2000).

133. *Id.*

134. Stutzke, *supra* note 113, at 603-04. One student commentator argues that regulation 825.216 governs the proof structures because the regulation contains the term "burden of proving" and is introduced under a heading, "Are there any limitations on an employer's obligation to reinstate an employee?" *Id.* at 603. This student commentator contends that this heading supports the position that regulation 825.216 controls the burden of proof because it addresses whether or not there was a right to reinstatement that the employer violated. *Id.*; see also Murphy, *supra* note 122, at 1114 (arguing that the Seventh Circuit should have followed regulation 825.216 in *Rice*).

135. See *supra* text accompanying notes 69-76. The *Smith* court held that the employer has this burden based on the language of DOL regulations, codified at 29 C.F.R. § 825.216(a)(1) (2004). *Smith v. Duffee Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955 (10th Cir. 2002).

136. Murphy, *supra* note 122, at 1117.

137. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001).

employment decision, which is prohibited under the DOL regulations.¹³⁸

1. Classifying the Claim as an Interference Claim Under § 2615(a)(1)

The Ninth Circuit in *Bachelder* discussed when to analyze the FMLA claim as an interference claim as compared to a discrimination claim or a retaliation claim.¹³⁹ The Ninth Circuit arguably clarified which FMLA claims fall under interference and which are discrimination.¹⁴⁰ In developing how to classify these claims, the Ninth Circuit approach advocates a broad definition of what falls into the interference category of FMLA claims. The Ninth Circuit found support under the NLRA.¹⁴¹ Given the similarity between the language of the NLRA and the FMLA,¹⁴² the *Bachelder* court looked to how courts have analyzed NLRA claims of adverse employment actions against employees who engaged in protected activity to support its argument that an interference claim under the FMLA includes termination.¹⁴³ The *Bachelder* court emphasized that both the NLRA and FMLA entitle employees to engage in specific activities.¹⁴⁴ Thus, the courts' interpretations of what constitutes interference under the NLRA should be used to clarify the "interference" terminology in the FMLA context.¹⁴⁵

However, it is not clear whether the Ninth Circuit negative factor standard applies to all interference claims or only "retaliatory"

138. *Id.* at 1124-25.

139. *Id.* at 1124.

140. Stutzke, *supra* note 113, at 600; *see supra* notes 65-67 and accompanying text (discussing how interference claims under the FMLA should include employer actions that deter participation in protected activities, including termination or adverse decisions made because an employee used FMLA leave).

141. *Bachelder*, 259 F.3d at 1123-24.

142. Section 8(a)(1) of the NLRA provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their NLRA rights. 29 U.S.C. § 158(a)(1) (2000). Similarly, FMLA § 2615(a)(1) provides that it is unlawful to "interfere with, restrain, or deny the exercise of or the attempt to exercise" any right provided under the FMLA. *Id.* § 2615(a)(1); *see also supra* notes 64-66 and accompanying text.

143. *See supra* note 65 and accompanying text. In interpreting the NLRA, courts have found a violation of section 8(a)(1) when employers engage in activities that "tend[] to chill an employee's freedom to exercise his [NLRA] rights." *Cal. Acrylic Indus., Inc. v. NLRB*, 150 F.3d 1095, 1099 (9th Cir. 1998); *see also Bachelder*, 259 F.3d at 1123. Examples of NLRA cases that the *Bachelder* court relied on to support its broad definition of interference include cases where employers were held to interfere with employees' right by awarding preferential rights to strike replacement workers, by threatening that employees will lose their jobs if they form a union, and for surveillance of meetings with union organizers outside the workplace. *Id.* at 1123-24.

144. *Bachelder*, 259 F.3d at 1123.

145. *Id.* The Ninth Circuit cites *Northcross v. Board of Education of Memphis City Schools*, 412 U.S. 427, 428 (1973), where the Supreme Court held that statutes should be interpreted in the same manner when there is similarity in the statutory language. *Bachelder*, 259 F.3d at 1123.

interference claims in which an employee alleges that he has been discriminated against for taking leave.¹⁴⁶ The question of whether the negative factor approach should be applied to all interference claims could create confusion on when, and in what manner, this test should be applied.¹⁴⁷

2. Plaintiff's Burden to Prove FMLA Leave Was a Negative Factor

In contrast to the burden-shifting formula, the Ninth Circuit simplified the analysis to focus on whether the FMLA leave was a negative factor in the employment decision.¹⁴⁸ The employee must prove that the leave was a negative factor in an employment decision.¹⁴⁹ The employee can show this element of his case by using either direct or circumstantial evidence.¹⁵⁰ This arguably simpler method of adjudicating claims improves employees' chances of winning without having to go through the complicated *McDonnell Douglas* burden-shifting process.¹⁵¹

However, this allocation of the burden does not afford an employer the opportunity to explain that the employment action in question would have been taken regardless of the leave. Thus, this approach arguably ignores the central question of whether the employee's right to reinstatement existed and was illegitimately denied.¹⁵²

3. DOL Regulations: Deference to Regulation 825.220(c)

The Ninth Circuit explicitly discussed the DOL regulations in formulating its negative factor test in *Bachelder*. The court looked to regulation 825.220(c),¹⁵³ which provides that FMLA-protected leave

146. Stutzke, *supra* note 113, at 601. In *Bachelder*, the court distinguishes interference claims from "anti-retaliation" claims under § 2615(a)(2), which prohibit discrimination against any individual for opposing any protected practices and from § 2615(b), which prohibits discrimination for participating in FMLA proceedings. *Bachelder*, 259 F.3d at 1125 n.11. The *Bachelder* court did not decide whether the *McDonnell Douglas* approach would be applicable for the claims brought under the anti-retaliation provisions of the FMLA. *Id.*

147. Stutzke, *supra* note 113, at 601.

148. See *supra* Part I.B.2 (discussing the Ninth Circuit's negative factor test).

149. See *supra* Part I.B.2 (discussing the Ninth Circuit's negative factor test).

150. *Bachelder*, 259 F.3d at 1125.

151. Stutzke, *supra* note 113, at 600. Stutzke discusses how the Ninth Circuit's "focus on the negative ramifications of FMLA-protected activity aids the court in ascertaining what really happened without requiring the plaintiff-employee to jump through the hoops of the *McDonnell Douglas* paradigm." *Id.*

152. *Id.* at 601.

153. 29 C.F.R. § 825.220(c) (2004). This regulation provides:

An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in

cannot be a negative factor in an employment decision.¹⁵⁴ Thus, the *Bachelder* court deferred to the agency interpretation as required by *Chevron U.S.A., Inc. v. Natural Resource Defense Council*.¹⁵⁵

However, the Ninth Circuit arguably relied on the wrong regulation when it deferred to regulation 825.220. Regulation 825.220 does not specifically address burdens of proof or the limits to the right of reinstatement, but instead speaks to other types of interference such as transferring or reducing hours.¹⁵⁶ Furthermore, the *Bachelder* court did not consider regulation 825.216, which does discuss the allocation of the burden of proof.¹⁵⁷ Therefore, the negative factor test arguably does not afford an employer the opportunity to defend himself via an affirmative defense, as required by the DOL regulations.¹⁵⁸

C. The Tenth Circuit's Approach to FMLA Claims

Like the Ninth Circuit, the Tenth Circuit did not apply the *McDonnell Douglas* formula to FMLA claims. The Tenth Circuit allowed the plaintiff to allege that her termination interfered with her FMLA rights under an interference/entitlement theory but the court shifted the burden of proof to the employer, consistent with the DOL regulations.¹⁵⁹

1. Did the Tenth Circuit Determine How to Distinguish Between Claims?

The Tenth Circuit recognized that there are both interference/entitlement claims and retaliation/discrimination claims.¹⁶⁰ The court held that the employee was permitted to pursue her claim under an entitlement theory by showing that she was denied her substantive rights under the FMLA for a reason connected with her leave.¹⁶¹ Thus, the court proceeded with an interference claim without requiring proof of intent.¹⁶² This framework is consistent with courts' treatment of interference claims arising under the NLRA.

employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

Id.

154. See *supra* note 63 and accompanying text.

155. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984); *supra* note 47.

156. See *Murphy*, *supra* note 122, at 1114; *Stutzke*, *supra* note 113, at 603-04.

157. See *supra* note 134 and accompanying text.

158. *Stutzke*, *supra* note 113, at 601.

159. *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 961-63 (10th Cir. 2002).

160. *Id.* at 960.

161. *Id.* at 961.

162. *Id.* at 960.

Following the NLRA is warranted because of the similarities in the language of the two statutes.¹⁶³

Arguably, however, the Tenth Circuit did not actively classify the claim as an interference claim, but allowed the plaintiff to pursue her claim under the interference rather than retaliation theory.¹⁶⁴ The court admitted that it did not “explore[] the entire range of reasons for dismissal that would support recovery under the interference/entitlement theory.”¹⁶⁵ Thus, it is not clear how the Tenth Circuit would analyze a claim that alleged both an interference/entitlement and a retaliation/discrimination theory.

2. The Employer Carries the Ultimate Burden

The Tenth Circuit’s approach shifts the ultimate burden of persuasion to the employer.¹⁶⁶ Under this standard, the employer must prove its legitimate reason for terminating the employee.¹⁶⁷ This requirement arguably places the burden on the party that holds the evidence, which helps balance the uneven power between employers and employees.¹⁶⁸ Thus, it is more in line with public policy.¹⁶⁹ Furthermore, employees who are challenging an employment decision arguably receive more favorable outcomes when the burden is placed on the employer.¹⁷⁰

However, at least one commentator has criticized this approach for not sufficiently allowing the employee to challenge the employer’s reasons.¹⁷¹ This lapse could enable employers to escape their obligation to reinstate an employee who has taken FMLA leave.¹⁷² Although an employee does not have to prove intent to establish a right to reinstatement, it is plausible that employees should have the opportunity to do so.¹⁷³

163. See *supra* notes 142-45 and accompanying text.

164. *Smith*, 298 F.3d at 961 (holding that “Smith’s decision not to pursue her claim under the retaliation theory is thus not fatal to her case”).

165. *Id.* at 961.

166. *Id.* at 963.

167. *Id.*

168. Stutzke, *supra* note 113, at 611.

169. *Id.*

170. See Stacy A. Hickox, *The Elusive Right to Reinstatement Under the Family Medical Leave Act*, 91 Ky. L.J. 477, 485-86 (2003) (discussing cases where summary judgment was denied to the employer because they were unable to carry the burden of proof).

171. *Id.* at 479. Stacy A. Hickox argues that the Tenth Circuit “c[a]me closer” to examining employer’s intent by looking at evidence that Smith provided on her years of service, the employer’s failure to discipline her prior to her leave, and the lack of emphasis on training before her leave. *Id.* at 493.

172. *Id.* at 479.

173. *Id.* at 492. Hickox argues that the burden of proof should be structured like that of the Equal Pay Act, where the plaintiff has the opportunity to show that the affirmative evidence that the employer offered is pretextual, although they are not required to prove intent. *Id.* at 498-99.

3. DOL Regulations: Deference to Regulation 825.216

Commentators have commended the Tenth Circuit approach for its deference to the DOL regulations.¹⁷⁴ It relies on the language of the regulations to support the idea that the burden of proof should be placed on an employer, instead of an employee. Unlike the *McDonnell Douglas* formula, an employer must prove its defense rather than just offer evidence that it did not illegally rely on the FMLA leave in making an employment decision.¹⁷⁵

However, the *Smith* court did not discuss the negative factor regulation that the *Bachelor* court relied upon.¹⁷⁶ In relying on regulation 825.216, the negative factor regulation, the *Bachelor* court suggested that an employer may not have the opportunity to show that it would have terminated the employee regardless of his taking leave, once the plaintiff satisfies his burden of proving that the FMLA leave was a negative factor in the decision.¹⁷⁷ On the contrary, the *Smith* court affirmed a jury instruction that the employer had the burden to prove that it would have terminated the plaintiff even if he was not on FMLA leave.¹⁷⁸ Thus, the Tenth Circuit's failure to discuss regulation 825.216 has a significant impact on the outcome of a FMLA case: the Tenth Circuit affords the employer the opportunity to raise a defense that an employer might not be able to introduce if the court follows regulation 825.216 as interpreted by the Ninth Circuit.

The outcome of a FMLA case will depend in large part on which framework the court applies to address the claim. As discussed in this part, there are advantages and disadvantages associated with the various approaches the federal circuit courts apply. Claims under the FMLA and work-family issues are also addressed outside of the federal courts as tort claims and in arbitration. These alternatives provide a comparison to the federal jurisprudence.

D. Addressing FMLA Claims in Alternative Forums

Claims under the FMLA are most frequently brought in federal courts. However, FMLA claims are also addressed as wrongful termination claims based on a public policy violation, and in arbitration. Part II.D evaluates the advantages and disadvantages of addressing FMLA claims in these alternative forums.

174. See Stutzke, *supra* note 113, at 608. One student commentator praises the Tenth Circuit's reliance on DOL regulation 825.216, which specifically contains the terms "the employer must be able to show" and "an employer would have the burden of proving." *Id.*; see also Hickox, *supra* note 170, at 478, 486 (discussing the importance of placing the burden on the employer pursuant to the DOL regulations).

175. See Stutzke, *supra* note 113, at 610.

176. *Id.* at 608.

177. Malin, *supra* note 65, at 353 n.109.

178. *Id.*

1. Claims for Wrongful Termination

Congress passed the FMLA to better meet the demands of the current worker and his family.¹⁷⁹ Given the strong public policy concerns motivating the passing of the FMLA,¹⁸⁰ courts have found that the FMLA can support a wrongful termination claim based on a public policy violation.¹⁸¹

Although the wrongful termination tort based on a public policy exception limits employment-at-will, the employment-at-will doctrine is a rule of contract law and arguably should not govern the decision of whether there should be judicial recognition of a tort.¹⁸² The doctrine did not develop as a "conscious determination that the absence of job security for employees was a socially beneficial state of affairs."¹⁸³ Arguably, an extension of the public policy exception to account for work-family needs is both consistent with the FMLA and a benefit to society.¹⁸⁴ Plaintiffs are eligible for wider remedies in a tort claim than are available under the FMLA.¹⁸⁵

Commentators have challenged the expansion of wrongful termination based on a public policy exception. They warn that this exception to employment-at-will could swallow the rule.¹⁸⁶ Courts are hesitant to recognize or expand the concept because of the flexibility

179. See *supra* notes 27-30 and accompanying text.

180. Some of these important policy concerns include inadequate parental leave for a parent and child to form the proper bond, the devastating effect that a job loss due to illness could have on a family, and the increasing role workers serve as the primary caretaker for their family members. See *supra* notes 1-7, 27-30 and accompanying text.

181. See, e.g., *Nelson v. United Techs.*, 88 Cal. Rptr. 2d 239, 245-48 (Cal. Ct. App. 1999) (holding that a violation of the state counterpart to the FMLA is a violation of a fundamental public policy which can support a tort claim).

182. William J. Holloway & Michael J. Leech, *Employment Termination: Rights and Remedies* 137 (2d ed. 1993).

183. *Id.*

184. See Kelly A. Timmerman, Note, *Accommodating for the Work/Family Conflict: A Proposed Public Policy Exception*, 8 J. Gender Race & Just. 281, 285 (2004) (arguing that a public policy exception at the state level is necessary to ensure parents can complete their parental obligation with an effective method of relief if they suffer a job loss).

185. A plaintiff claiming wrongful discharge can seek to recover lost wages, lost profits, and compensatory and punitive damages. See Holloway & Leech, *supra* note 182, at 713. Under the FMLA, a successful plaintiff can collect wages, salary, benefits, liquidated damages, and equitable remedies, but there is no explicit provision for compensatory or punitive damages. See 29 U.S.C. § 2617(a)(1)(A) (2000).

186. See, e.g., Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 Am. Bus. L.J. 653, 656 (2000) (commenting that the wrongful discharge cause of action based on public policy claims represents the most significant limitation on the employment-at-will doctrine). Deborah A. Ballam indicates that court recognition of a public policy exception to employment-at-will developed in the mid-twentieth century with the recognition that there are emotional and social ramifications, beyond the economic effects of losing a job. *Id.* at 657.

and vagueness of what constitutes a “public policy.”¹⁸⁷ For example, if the FMLA supports a tort claim, it is providing job security for an employee with family or medical needs, which is the fundamental policy that supports the claim. If work-family issues are deemed a fundamental policy to support a tort action, the courts will need to decide how to handle the case of a plaintiff-employee discharged for taking family or medical related leave from an employer who had too few employees to be liable under the FMLA.¹⁸⁸ Furthermore, the FMLA provides its own safeguards and some courts have found that the FMLA remedies are adequate protection and refuse to recognize a FMLA violation as a public policy sufficient to support a wrongful termination claim.¹⁸⁹

2. Arbitration: An Adequate Alternative to Litigation of the FMLA and Work-Family Issues?

Arbitration has become an increasingly common forum for the resolution of employment decisions, including statutory claims.¹⁹⁰

187. See *id.* at 662 (discussing that the vagueness of the concept of public policy requires courts to be cautious in making public policy determinations).

188. See *id.* at 678-79. In *Kerrigan v. Magnum Entertainment, Inc.*, the court recognized a common law cause of action when the employer was too small to be charged under the ADEA for age discrimination. *Kerrigan v. Magnum Entm't, Inc.*, 804 F. Supp. 733, 736 (D. Md. 1992). It held that the exemption for small businesses did not give the employer a “charter to discriminate.” *Id.* However, Ballam disagrees with this decision and contends that if the legislatures intended to exempt small businesses only in limited circumstances, they would have so specified. Ballam, *supra* note 186, at 679.

189. See, e.g., *Hamros v. Bethany Homes & Methodist Hosp.*, 894 F. Supp. 1176, 1178-79 (N.D. Ill. 1995) (rejecting a state law claim of retaliatory discharge brought by a plaintiff fired for exercising his rights under the FMLA since the FMLA already prohibits retaliation); *Wiles v. Medina Auto Parts*, 773 N.E.2d 526, 534 (Ohio 2002) (holding that the FMLA remedies are broad enough to compensate an aggrieved employee).

190. Arbitration traditionally was used in the union setting and it grew out of the “peaceful labor relations” that were agreed to during World War II. See Laura J. Cooper, Remarks at the 2001 Annual Meeting, Association of American Law Schools Section on Employment Discrimination Law, in 5 *Employee Rts. & Emp. Pol’y J.* 604, 606 (2001). Since the 1960s arbitration and alternative dispute resolution substantively grew into employment law, including discrimination and disability law. *Id.* at 610. There was also a growth of employment arbitration in the 1980s and 1990s as non-union employers implemented arbitration agreements. See St. Antoine, *supra* note 94, at 83-84. The expansion of employment arbitration was also enhanced by the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Robert Gilmer, a broker, signed an agreement to arbitrate all employment disputes when he registered as a securities representative. *Id.* at 23. Upon his discharge, he brought suit in federal court alleging a violation of the ADEA. *Id.* at 23-24. The Supreme Court held that the employer could compel Gilmer to arbitrate his ADEA claim. *Id.* at 23. This expanded the use of arbitration for the resolution of federal statutory claims. There has been extensive discussion on the benefits and disadvantages of *Gilmer* and its progeny. See, e.g., Michael A. Landrum & Dean A. Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 *Wm. Mitchell L. Rev.* 345, 365-70 (1998).

Arbitration is generally a faster, cheaper forum than litigating a claim in court.¹⁹¹ There are extensive costs and difficulties in obtaining counsel to proceed in court.¹⁹² Given that arbitration is typically a faster process, a claimant would have to pay attorney's fees for a shorter period of time or could represent himself in the less formal forum of arbitration.¹⁹³ Furthermore, even if a plaintiff proceeds in court, his claim is likely to settle out of court before the conclusion of trial.¹⁹⁴ Arbitration provides a forum for an out of court settlement.¹⁹⁵ Additionally, arbitrators have the flexibility of determining whether an employer acted reasonably in light of the circumstances, which has helped balance the work-family needs of employees.¹⁹⁶

However, commentators criticize the arbitration of statutory claims, especially if arbitration is mandated by the employer.¹⁹⁷ Critics contend that an individual employee should not be forced to choose between his statutory rights or signing an employment agreement to get a job. They contend that an agreement that is signed before a dispute arises and is necessary to get or maintain a job cannot be a voluntary agreement to submit the claim to arbitration.¹⁹⁸ Critics also question arbitrators' knowledge of the claims they are handling.¹⁹⁹

It is unclear whether the arbitrators or the courts formulated standards that adequately protect an individual's FMLA rights. The

191. See St. Antoine, *supra* note 94, at 92 (discussing the prevalence of backlogged court dockets and acknowledging the devastating effect delay in resolving a claim could have on a fired worker who is without a job or with a reduced income).

192. *Id.* at 91-92.

193. *Id.* at 91. Avoiding some of these costs might be even more important to a plaintiff who has a FMLA claim. This person is likely to have medical expenses for himself or a family member and the extra costs of litigation, as well as the loss of income, could be devastating.

194. Sara Adler, Remarks at the 2001 Annual Meeting, Association of American Law Schools Section on Employment Discrimination Law, in 5 *Employee Rts. & Emp. Pol'y J.* 622, 624 (2001) (citing that approximately ninety to ninety-five percent of all cases of any kind filed in court are resolved before trial).

195. Adler contends that arbitration is a "more humane and less expensive way of getting to where the parties are going to get to anyway." *Id.* She argues: "It's not that they are not going to resolve the case outside of court. They are going to resolve it outside of court. [Arbitration and other forms of alternative dispute resolution are] just a better way of doing it." *Id.*

196. See *supra* Part I.C.2 (discussing how work-family issues and medical leave are handled in arbitration).

197. See, e.g., Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 *U. Pa. J. Lab. & Emp. L.* 1, 2-3 (2003) (describing mandatory arbitration as "antithetical" to arbitration's history as a voluntary undertaking and in tension with a "policy against discrimination"). Other criticisms include absence of discovery, employers' superior knowledge of the arbitrators who specialize in employment arbitration, denial of a right to a jury (which could result in a larger award), and the private nature of arbitration. *Id.* at 22 (internal citations omitted).

198. See St. Antoine, *supra* note 94, at 90-91.

199. *Id.* at 91. Thus, an arbitrator might not have a strong background in the FMLA and the nuances of the Act before the claim is to be decided.

analysis used should ensure that the policies behind the FMLA are realized. This Note offers a new framework for the analysis of FMLA claims which compiles various elements from the standards described in the previous two parts.

III. A NEW APPROACH TO FMLA CLAIMS THAT BETTER REFLECTS PUBLIC POLICY AND THE FMLA'S REINSTATEMENT GUARANTEE

Congress passed the FMLA to address the dilemmas workers faced when they needed to choose between their personal or family needs and their jobs.²⁰⁰ The legislative history reflects a concern with an employee's inability to attend to their parental responsibilities upon the birth of a child, the increased burden on individuals as a primary caregiver for elder parents and children, and the potential for an employee's illness to be exacerbated by the loss of his job.²⁰¹ The FMLA created a right for an employee to take up to a twelve week leave for a family or medical need.²⁰² Upon the completion of the FMLA leave, an employer must restore an employee to the same, or equivalent, position to the one he had when he took the leave.²⁰³

The purpose of the FMLA and these provisions is to create job security for employees who need to take leave for family or medical reasons.²⁰⁴ To ensure the effectiveness of these provisions, Congress included sections that prohibit an employer from interfering with the exercise of FMLA leave,²⁰⁵ from discharging or discriminating against any individual for opposing a practice that is unlawful under the FMLA,²⁰⁶ and from discriminating against an employee who participates in FMLA proceedings or inquiries.²⁰⁷ These provisions ensure that employees faced with serious medical and family constraints are able to take leave with the assurance that their job will be available upon their return.²⁰⁸

However, the current jurisprudence has weakened the FMLA by failing to treat the right to reinstatement as a statutory entitlement. The approaches that the courts apply fail to adequately address the policies behind the FMLA, which sought to ensure that employees could take family leave with the assurance that they could return to

200. See *supra* notes 1-7, 27-30 and accompanying text.

201. See *supra* notes 27-30.

202. 29 U.S.C. § 2612 (2000).

203. *Id.* § 2614(a)(1)(A).

204. See *supra* note 31 and accompanying text. Congress intended to ease the burdens that workers faced when they were forced to decide between their family obligations and their job security. For a discussion of testimony from workers placed in this bind before the passage of the FMLA, see *supra* text accompanying notes 1-7.

205. § 2615(a)(1).

206. *Id.* § 2615(a)(2).

207. *Id.* § 2615(b).

208. See Rigler, *supra* note 31, at 469 (noting the importance of job security to the FMLA).

work. When a plaintiff claims that he was terminated because of his taking FMLA leave, courts have applied complicated burden of proof structures which act as barriers for an employee who attempted to exercise a statutory right.²⁰⁹ An employer is prohibited from using the fact that an employee took FMLA leave to the employee's detriment.²¹⁰ An employee should not have to justify his use of family and medical leave; the justification exists with the enactment of the FMLA. If a plaintiff proves that FMLA leave was a motivating factor in an adverse employment action, the employer should be liable for the FMLA violations.²¹¹ The employer should, however, have the opportunity to limit his liability by proving that the employment decision would have been made regardless of the FMLA activities.²¹²

Part III.A asserts that a claim that FMLA leave was the reason for an employee's termination should be classified as an interference claim. Part III.B argues that the courts should apply a balancing test to determine if the employer's action violated the FMLA. Next, Part III.C advocates for a partial affirmative defense, which offers employers the opportunity to limit their liability. Finally, Part III.D identifies the lessons that the federal courts could take from other forums which address the FMLA and work-family issues.

209. See, e.g., *Potenza v. City of New York*, 365 F.3d 165 (2d Cir. 2004); *Rice v. Sunrise Express, Inc.*, 209 F.3d 1008 (7th Cir. 2000).

210. See § 2615. Thus to effectuate these protections, the Ninth Circuit held that a plaintiff must demonstrate by a preponderance of the evidence that his taking FMLA-protected leave was a negative factor in the decision to terminate. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1122, 1125 (9th Cir. 2001); see *supra* notes 63, 68 and accompanying text.

211. This is consistent with the *Bachelder* holding that an employer is liable if a plaintiff proves that his exercise of FMLA rights was a negative factor in an employment decision. See *Bachelder*, 259 F.3d at 1125; see also *supra* notes 63, 68 and accompanying text. This also conforms to DOL regulation 825.220(c), which provides that FMLA leave cannot be used as a negative factor in employment action. See *supra* notes 153-55 and accompanying text.

212. The Tenth Circuit in *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, placed the burden on the employer to prove that the employee would have been dismissed regardless of the request or taking the leave. *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963 (10th Cir. 2002); see *supra* notes 73-76 and accompanying text. Under the Tenth Circuit approach, an employer could totally escape liability if it proves the decision would have been made regardless of the leave. See *Smith*, 298 F.3d at 963. However, if the plaintiff can show that his FMLA-protected leave was a motivation for the employment decision, the employer should not be absolved of liability. This situation is analogous to a mixed-motive case under Title VII. If a plaintiff could show in a Title VII mixed-motive case that the discriminatory reason was a motivating factor, the employer is liable. However, liability could be limited if the employer proves that the same decision would have been made in the absence of the impermissible factor. See *supra* note 127.

A. *Classifying the Claim as “Interference”*

The FMLA is not the first piece of legislation of its kind.²¹³ The courts should follow the analysis that they used with similar pieces of legislation. The legislative history and the terminology of the statute indicate that Congress intended the FMLA to act as a statutory minimum labor law.²¹⁴ Congress followed the language of section 8(a)(1) of the NLRA in drafting FMLA § 2615(a)(1).²¹⁵ Thus, “interference” should be interpreted in FMLA jurisprudence as it is in NLRA cases, to include termination and adverse employment actions that would tend to deter an employee from making use of a statutory guarantee.²¹⁶ Congress intended FMLA § 2615(a)(1) to provide the general protection for FMLA rights, while § 2615(a)(2) and (b) specifically prohibit discrimination against employees who oppose a practice that is unlawful under the FMLA or proceed with FMLA claims.²¹⁷

Once classified under FMLA § 2615(a)(1), the court should not apply the same analysis as it does with Title VII discrimination claims. Given the similarity of the language of § 2615(a)(1) to section 8(a)(1) of the NLRA,²¹⁸ the courts should find guidance in the NLRA, not Title VII jurisprudence.²¹⁹

B. *Balancing the Competing Interests to Determine FMLA Violations*

Courts and the National Labor Relations Board objectively balance the competing interest of employees and employers in analyzing a section 8(a)(1) claim under the NLRA.²²⁰ For example, an employer can restrict the distribution of union literature in working areas because of the interest in minimizing litter from discarded materials, but the employees’ interests in providing the information outweighs the litter concerns when the distribution occurs off company

213. See *supra* notes 37-44 and accompanying text.

214. See *supra* notes 44-45 and accompanying text.

215. See *supra* notes 65, 114-15 and accompanying text.

216. This is consistent with the Ninth Circuit’s broad interpretation of the interference provisions of the FMLA. See *Bachelder*, 259 F.3d at 1124. By looking to courts’ interpretations of NLRA interference, the Ninth Circuit held that activities which tend to deter employees from exercising their statutory rights constitute interference. *Id.* at 1123-24. Thus, termination of an employee supports an interference claim. *Id.* at 1123; see also Malin, *supra* note 65, at 363 (describing the NLRA as the “appropriate analogy” for the FMLA interference provisions); *supra* notes 65, 141-43. Courts should not assume that claims alleging adverse employment decisions because of FMLA leave are not interference claims. See *supra* note 58 (describing the Seventh Circuit’s use of this distinction), 117-21 and accompanying text (discussing criticisms of this distinction).

217. See *supra* notes 113-21 and accompanying text.

218. See *supra* notes 142, 145 and accompanying text.

219. A discrimination requirement should not be read into FMLA § 2615(a)(1). See *supra* note 116 and accompanying text.

220. See Malin, *supra* note 65, at 369-70.

property.²²¹ A similar balancing should be applied to FMLA § 2615(a)(1) interference claims.²²²

The use of a balancing test to determine if an interference violation occurred is compatible with the Ninth Circuit's negative factor approach to FMLA claims. If, for example, an employer terminated an employee for excessive absences, but used the FMLA-protected leave as a negative factor in this decision, the employee's interest in taking protected leave should outweigh the employer's legitimate interest in ensuring good attendance. In this example, the employer's use of the FMLA-protected leave was a burden on the employee's FMLA entitlement.²²³ If, however, the employer's decision was based

221. See *id.* at 369. Other examples of balancing under section 8(a)(1) of the NLRA, which Malin discusses, include: employees have the right to wear union support buttons, but this could be outweighed by an employer's interest in workplace safety; employers have the right to poll employees regarding their union interest, but they cannot use subtle coercion or interference. *Id.* at 369-70.

222. *Id.* at 370. Malin argues the FMLA offers similar opportunities to balance the competing employee-employer interests as the NLRA. For example, in *Hammond v. Interstate Brands Corp.*, the court applied a discrimination analysis to a FMLA claim and granted summary judgment for the employer. *Id.* (citing *Hammond v. Interstate Brands Corp.*, No. IP01-0066-CM/S, 2002 WL 31093603 (S.D. Ind. Aug. 28, 2002)). The employer offered a nondiscriminatory reason for discharging the plaintiff because he failed to call in to work for three consecutive days in violation of company policy. Because the plaintiff did not prove that this reason was pretextual, the third step under the *McDonnell Douglas* analysis, the court granted summary judgment. Malin does not disagree with the court's decision to reject the plaintiff's claims, but contends that the analysis was incorrect. *Id.* He argues that the court should have objectively balanced the competing interests regarding the call-in requirement. *Id.* Malin contends that the employer's legitimate interest in periodic communication from an employee regarding his status while he was on leave did not interfere with FMLA § 2615(a)(1). *Id.* Similarly, Malin agreed with the court's grant of summary judgment to the employer in *Pharakhone v. Nissan North America, Inc.*, where the employer fired an employee for violating its policy prohibiting employment for personal financial gain while on leave. *Id.* (citing *Pharakhone v. Nissan N. Am., Inc.*, 324 F.3d 405 (6th Cir. 2003)). Malin contends that the employer's policy was not interference because it did not burden the right to take leave, and the employer had a legitimate interest in ensuring leave is only taken for valid purposes. *Id.* However, if the employer reduced the benefits or eligibility for bonuses, this would interfere with the FMLA rights and constitute a § 2615(a)(1) violation. *Id.* at 371.

223. Malin offers the example of an employer who has a no fault attendance system, under which points are assessed for absences, tardy arrivals, and early departures. See *id.* at 374. A particular employee was one point under termination according to the attendance system. *Id.* The employee received a call at work that his child was in an accident and was taken to the hospital emergency room. *Id.* The employee left work early to be with the child. *Id.* Malin presents one scenario based on this example, in which the employee needed to take leave; he notified his supervisor and called in every day. *Id.* at 374-75. Upon his return, he was terminated for violating the no fault attendance policy. Malin contends that under a balancing approach, this employee's FMLA rights were violated. *Id.* at 375. If the employee did not take the FMLA leave, he would have remained employed with his previous attendance record of one point shy of termination. Thus, Malin argues, "the burden that the assessment of the attendance points places on the exercise of FMLA rights outweighs the employer's interests in enforcing its attendance plan and the discharge will unlawfully interfere with the employee's right to take leave." *Id.* This is

on a violation of an employment policy, such as a requirement that an employee contacts a supervisor to advise the supervisor of his status while on leave, the FMLA leave was not a negative factor in the employment decision. Furthermore, the policy does not interfere with the employee's right to take his FMLA leave, but rather gives employers an opportunity to regulate employees on leave, which is a legitimate employer interest.²²⁴

Analysis that applies a balancing of the competing interests of employers and employees is also used in arbitration. Arbitrators frequently address grievances regarding family and medical leave, either as an explicit FMLA claim or as a grievance that the employer's decision was not made with reasonable or just cause.²²⁵ When deciding whether the employer's decision was reasonable, the arbitrator will often look to the reasonableness of the employee's request for leave.²²⁶ Arbitrators have found that an employee's necessity to take leave for family or medical reasons is a reasonable request and an employer should grant the leave.²²⁷ Arbitrators have the discretion to take into account various family and medical concerns, as well as the employee's overall attendance and performance record, in determining the reasonableness of the employment action.²²⁸ However, arbitrators still hold both parties to act reasonably and responsibly.²²⁹ Thus, like NLRA analysis, arbitrators balance the reasonableness of an employer's and employee's actions to determine if the employer's actions were

consistent with the Ninth Circuit's negative factor approach because the employee's FMLA-protected leave to care for his sick child was a negative factor in the employer's decision to terminate. In a second scenario, the employee did not attempt to notify his supervisor that he was leaving early or the reason for his leaving; he also did not call in to report his absence on the subsequent days. *Id.* The employee was terminated for violating the workplace rule that requires an employee to report to a supervisor if he is leaving before a shift ends and to call in absences before the shift starts. *Id.* Malin contends that these requirements do not significantly burden the exercise of FMLA rights and the employer has a substantial interest in receiving notice. *Id.* at 374-75. The plaintiff-employee in this second scenario would likely have difficulty meeting the Ninth Circuit's negative factor test as well because it is unlikely that he would be able to prove by a preponderance of the evidence that the leave was a negative factor in the decision to terminate. *See* *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001). A court would likely find that the employee's failure to notify, and not his taking leave, was the reason for the termination.

224. *See supra* note 223 (discussing Malin's second scenario where there was no interference).

225. *See supra* notes 95-98 and accompanying text.

226. *See* *Wolkinson & Ormiston, supra* note 98, at 89.

227. *See supra* note 99 and accompanying text (discussing an arbitrator's decision that the grievant should not have been disciplined because her child's sickness was a reasonable basis to request leave).

228. Arbitrators have taken into consideration child care needs, employee's past attendance record, the adequacy and timeliness of the request for leave, whether there were emergency medical conditions, and the employer's operational needs. *See* *Wolkinson & Ormiston, supra* note 98, at 88-93.

229. *See supra* notes 104-07 and accompanying text.

warranted. While arbitration should not replace litigation of FMLA claims, the use of an analysis of the reasonableness of both parties' actions could be beneficial to the judicial forum.

C. Employer's Partial Affirmative Defense

Courts need to recognize that the right to reinstatement is a statutory entitlement, and they should allocate the burden of proof structure accordingly. The proof requirements placed on employees should not be as rigid as the *McDonnell Douglas* formula.²³⁰ The interference provision contained in § 2615(a)(1) of the FMLA is modeled after the NLRA and should follow a similar analysis.²³¹ By applying the *McDonnell Douglas* formula to § 2615(a)(1) claims, the courts are reading a discrimination requirement into a provision of which it was not intended to be a part.²³² The plaintiff should have to prove that his FMLA-protected leave was a negative factor in the employment decision and therefore the employer unreasonably interfered with his FMLA entitlement.²³³ Placing this lighter burden on a plaintiff would be the most effective way to enforce the FMLA in light of the policy concerns that motivated Congress, and many state legislatures, to pass the legislation.²³⁴ An employee who has a qualifying medical or family need is entitled to take FMLA leave with the protection of reinstatement.²³⁵ Thus, any employment action that was detrimental to the employee's position because of his taking leave should be actionable under the FMLA.

However, to be consistent with the policies behind the FMLA, it is also necessary to recognize the needs of employers in having efficient and reliable employees. Thus, employers should have an affirmative defense if they could prove that they did not take the employment action because of the FMLA leave, but rather because of a legitimate business reason.²³⁶ Unlike the *McDonnell Douglas* approach, the employer should be required to prove this defense, not just present it to the court.²³⁷ Nevertheless, the employer should not be completely absolved of liability if the plaintiff proves that the FMLA leave was a

230. See, e.g., Hickox, *supra* note 170, at 478 (advocating for employers to carry the burden of proof and for employees to have the right to offer evidence that the employer's proffered evidence is pretext).

231. See *supra* Parts III.A-B.

232. See *supra* notes 113-21 and accompanying text.

233. See *supra* Part III.B.

234. See *supra* notes 1-7, 27-31, 37 and accompanying text (describing the policies and legislative history behind the FMLA).

235. See 29 U.S.C. §§ 2612, 2614(a) (2000).

236. See *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 963 (10th Cir. 2002).

237. Under the *McDonnell Douglas* framework, the plaintiff bears the burden of proof during the entire litigation and the employer's burden is limited to offering, not proving, a nondiscriminatory reason. See *supra* notes 20, 54 and accompanying text.

factor in the employment decision. If the employer can prove that, despite using the FMLA-protected leave as a negative factor in the employment decision, the same employment decision would have been made based on legal factors, the employer's liability should be limited.²³⁸

Thus, the policies of job security and an entitlement to restoration are best effectuated by a simplified proof structure which affords both employees and employers adequate protections. First, as Part III.B describes, the plaintiff must prove by a preponderance of the evidence that his FMLA leave was a negative factor in an employment decision; thus the employer unreasonably interfered with his FMLA rights under § 2615(a)(1). The employer can attempt to refute that the leave was a negative factor by offering evidence that the leave was irrelevant and the employment decision was based solely on a legal factor. The court should apply a balancing test to determine if there was a violation of the FMLA. If the plaintiff satisfies this burden, the employer is liable. The employer's liability could be limited if he could prove that the same decision would be made absent the illegal factor. However, even if the employer proves this defense, he should still be partially liable because the employer illegally relied on the employee's use of FMLA leave as a motivation for his decision.

D. Deference to DOL Regulations 825.216 and 825.220(c)

The DOL regulations are entitled to deference in determining the proper standard and burden of proof allocation for FMLA claims.²³⁹ The proof structure just expressed is consistent with all of the relevant regulations. First, it is consistent with regulation 825.220(c) because it prohibits FMLA-protected leave from being used as a negative factor in employment.²⁴⁰ The Ninth Circuit's approach is governed in large part by this regulation.²⁴¹ The proof structure this Note advocates, like the Ninth Circuit approach, holds an employer liable if he uses FMLA leave to the employee's detriment as required by regulation 825.220(c).

The framework this Note suggests is also consistent with regulation 825.216, which requires that the employer demonstrate that the employee would not otherwise have been employed regardless of his taking FMLA leave.²⁴² Based on this regulation, an employer can deny restoration to an employee only if he could show that at the time reinstatement was requested, the employee would not have been

238. This is comparable to the *Price Waterhouse* mixed-motive proof structure that amended Title VII in 1991. See *supra* notes 127, 212 and accompanying text.

239. See *supra* note 47 and accompanying text.

240. See *supra* notes 63, 153-54 and accompanying text.

241. See *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001).

242. See *supra* notes 74-76, 131, 134-36 and accompanying text.

employed.²⁴³ If the employer did not take into account the FMLA leave in deciding to terminate the employee, the plaintiff did not prove his claim.²⁴⁴ If, however, the plaintiff satisfied his burden, regulation 825.216 creates an affirmative defense for employers.²⁴⁵ The defense should not completely absolve the employer of liability because that would contradict regulation 825.220. Instead, the employer's liability should be limited if the employer unlawfully relied on FMLA leave but can show that there were legal motives for the employment decision as well. Thus, like mixed-motive cases under other federal legislation,²⁴⁶ a partial affirmative defense helps resolve the tension between the DOL regulations and balances the employees' and employers' respective interests.

E. *The FMLA in Other Forums: The Lessons to Be Learned*

The courts have neglected to adjudicate FMLA claims in a way that reflects the importance of providing employees with the assurance that taking leave will not have an adverse effect on their employment.²⁴⁷ The complicated burden of proof structures that many courts have applied have hindered employees from holding an employer liable for denying them their FMLA entitlement.²⁴⁸ Thus, employees have sought other forums to resolve their work-family issues. Some plaintiffs have attempted to pursue a termination claim under the concept of wrongful termination based on a public policy violation.²⁴⁹ Although public policy torts have been criticized as ignoring common law principles of employment-at-will,²⁵⁰ the focus on policy forces the court to recognize the employees' needs that the statute was implemented to address.²⁵¹

There are drawbacks to the recognition of a tort claim based on FMLA violations. What constitutes a "public policy" to support a tort claim is vague and there is concern that employment-at-will could become the exception rather than the rule.²⁵² Furthermore, commentators contend that Congress prohibited specific acts within the FMLA and made conscious decisions regarding what is actionable

243. See 29 C.F.R. § 825.216(a) (2004).

244. See *supra* notes 222-24 and accompanying text.

245. See *supra* note 157-58, 174-75 and accompanying text.

246. See *supra* notes 127, 212 and accompanying text.

247. See Rigler, *supra* note 31, at 469 (emphasizing the central importance of job security to the FMLA).

248. See, e.g., *Potenza v. City of New York*, 365 F.3d 165, 168 (2d Cir. 2004) (denying the plaintiff's claim that the employer violated § 2615(a)(1) because the plaintiff failed to prove retaliatory intent).

249. See *supra* notes 84-90 and accompanying text.

250. See *supra* notes 186-87.

251. See, e.g., *Nelson v. United Techs.*, 88 Cal. Rptr. 2d 239, 247-48 (Cal. Ct. App. 1999) (discussing the fundamental and substantial policy of promoting stability and economic security in families).

252. See *supra* notes 186-87 and accompanying text.

and the remedies available. Courts should not judicially expand the FMLA protections.²⁵³

If courts shift their focus from complicated burden of proof structures to a focus on the FMLA entitlements, there would be no need for judicial expansion of tort principles to protect employees from employment decisions made on the basis of family and medical leave. When courts analyze FMLA claims there should be recognition of the importance of economic security and stability for families as the courts have recognized in the tort actions.²⁵⁴

Arbitration is another forum in which employees attempt to resolve their FMLA claims. There are significant benefits in settling a dispute outside of the litigation process.²⁵⁵ The advantages of getting a faster and less expensive resolution are very valuable to an employee out of work.²⁵⁶ However, arbitration decisions and the analysis that arbitrators apply should not be determinative in FMLA jurisprudence. There are several important distinctions between arbitration and federal litigation, including the types of issues that are addressed in the different forums. Arbitrators do not always address FMLA claims when they analyze work-family issues in arbitration.²⁵⁷ Furthermore, the extent to which arbitrators have a working knowledge of federal statutes is not always clear.²⁵⁸ Unlike courts, arbitrations do not establish precedents and are not bound by precedents. Arbitration decisions are generally private and, therefore, are not subject to public approval.²⁵⁹ Moreover, many arbitration decisions are not published. Thus, any study of those that are published might not be representative of all arbitration decisions.²⁶⁰

253. *See supra* note 188 and accompanying text (discussing a critique of the expansion of federal employment law through common law causes of action).

254. *See supra* note 251 and accompanying text.

255. *See supra* notes 191-96 and accompanying text.

256. *See supra* notes 191-96 and accompanying text.

257. For example, the inability to get child care for a child that is not suffering from any medical ailments is not protected under the FMLA. Nevertheless, arbitrators have examined child care constraints in just cause analysis. *See supra* notes 104-05 and accompanying text. However, child care concerns that arise out of a child's medical needs could be entitled to FMLA protection.

258. *See supra* note 199 and accompanying text.

259. *See* St. Antoine, *supra* note 94, at 91 (discussing the lack of public accountability of private arbitrators). The shift of civil rights cases from courts to arbitration decreases the number of published court decisions, which could be detrimental to the development of law itself. *Id.*

260. The arbitration decisions relied on in this Note came primarily from the Wolkinson and Ormiston article. Wolkinson & Ormiston, *supra* note 98. Their research was based on a review of discipline arbitrations reported by the Bureau of National Affairs and Commerce Clearing House between 1985 and 2003. *Id.* at 86.

While arbitration can be an excellent forum for settling employment disputes,²⁶¹ mandatory arbitration agreements are a cause for concern.²⁶² When an employee signs an agreement to arbitrate employment disputes, it is frequently before any dispute arises and is a condition to getting, or keeping, a job.²⁶³ Especially given the unexpected conditions that could cause an employee to need FMLA leave, these pre-dispute agreements are arguably involuntary. An employee should not be compelled to bring a claim arising out of his FMLA entitlement in a forum that could produce a less favorable outcome than the resolution that could be received in court.²⁶⁴

Arbitration should not be a mandatory forum for an employee to resolve FMLA claims.²⁶⁵ If the arbitration is properly structured, an employee could voluntarily choose that forum and take advantage of the flexibility of arbitration.²⁶⁶ Arbitrators are not constrained by rigid proof structures that could dominate judicial litigation. Regardless of the extent of the use of arbitration for resolving FMLA claims, the lessons of balancing the employees' and employers' interests to determine if the employment decision was reasonable could be adapted for the judicial forum.

CONCLUSION

In handling FMLA claims, courts have focused on complicated burden of proof structures at the expense of the public policies behind the enactment of the FMLA. Congress wanted to ensure that employees were not forced to choose between attending to their family or medical needs and their jobs. Thus, the FMLA provides an entitlement to reinstatement and prohibits employers from interfering with employees' FMLA rights.²⁶⁷ However, courts have failed to treat the FMLA leave as a statutory right and many courts have placed

261. There are many benefits to arbitration including lower costs than those associated with litigation, faster resolution of cases, and the existence of a structured forum for out of court settlements. *See supra* notes 191-95 and accompanying text.

262. *See supra* notes 197-98 and accompanying text.

263. *See supra* notes 197-98 and accompanying text.

264. *See supra* notes 197-98 and accompanying text (criticizing mandatory arbitration for forcing an individual employee to decide between his getting or keeping a job and his statutory rights). Reginald Alleyne argues that Theodore St. Antoine and other commentators who support arbitration presuppose that the mandatory arbitration processes are "properly designed." *See Alleyne, supra* note 197, at 23. He contends that commentators and the courts avoid the discussion of "whether Congress intended to permit the enforcement of mandatory-arbitration agreements covering federal statutory claims." *Id.* at 27. Alleyne concludes that by avoiding this discussion, the "perceptions of the beneficial consequences of mandatory arbitration [are] largely irrelevant." *Id.*

265. *See supra* notes 197-98 and accompanying text.

266. *See supra* text accompanying notes 225-29 (describing arbitrators' focus on the reasonableness of the actions in light of all of the relevant circumstances).

267. *See supra* Part I.A.

onerous burdens of proof on employees. As the Second Circuit's opinion in *Potenza v. City of New York*²⁶⁸ demonstrates, courts are unclear on how to designate a FMLA claim, they apply complicated proof structures which unnecessarily burden plaintiff-employees, and they fail to adequately defer to the DOL regulations.²⁶⁹

This Note suggests that courts could simplify their analysis and simultaneously improve their commitment to the public policy and legislative history behind the FMLA. Courts should (1) recognize that the general protection of FMLA rights exists in § 2615(a)(1),²⁷⁰ (2) balance the interests of an employer and an employee to determine if an employer is liable for interfering with FMLA leave,²⁷¹ and (3) afford an employer the opportunity to limit his liability if he can show that, despite his reliance on FMLA-protected leave, he would have made the same employment decision based on other factors.²⁷²

This framework is consistent with other federal labor standards, namely the NLRA.²⁷³ Furthermore, it adequately defers to the DOL regulations.²⁷⁴ Most importantly, this analysis reduces the burden that courts have placed on plaintiffs to ensure that an employee's right to take leave, and the corresponding entitlement to reinstatement, are protected to reflect the public policies that motivated Congress to enact the FMLA.²⁷⁵

268. 365 F.3d 165 (2d Cir. 2004).

269. See *supra* notes 12-25 and accompanying text.

270. See *supra* Part III.A.

271. See *supra* Part III.B.

272. See *supra* Part III.C.

273. See *supra* Parts III.A-B (discussing how courts should follow the NLRA in defining and interpreting interference claims in the FMLA jurisprudence).

274. See *supra* Part III.D.

275. See *supra* notes 27-30 and accompanying text (discussing the need for sick leave, parental leave for the birth of a child, and leave to care for a sick family member as reasons for Congress's enactment of the FMLA).

Notes & Observations