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GAMBLING ON COURT INTERPRETATIONS OF CARE: APPROVING LEAVE FOR TRAVEL UNDER THE FMLA

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INTRODUCTION

Tom's lifelong dream is to travel through France and Italy, participating in perfumery workshops to create his own unique scents and enjoying the company of his family. However, at 59 years old, he is unable to complete most everyday activities, relying on his wife as his primary caregiver. Approximately four years ago, Tom was diagnosed with Nonalcoholic Steatohepatitis (NASH). Because of his extreme fatigue, constant pain, unexpected attacks of encephalopathy, and various other health complications, he is unable to work, drive, and otherwise live unassisted. Without a liver transplant, his quality of life will continue to diminish while his risk of infection and death climbs.¹

As one of his final wishes, Tom wants to travel internationally with his wife of 31 years, Lorna. But as a registered nurse, Lorna has

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¹ This hypothetical is loosely based around the author's personal experiences and watching her father struggle with the symptoms of NASH.

maxed out her annual vacation days to care for Tom during his encephalopathic episodes. She decides to take advantage of unpaid leave under the Family and Medical Leave Act (FMLA). She has already used some of her FMLA leave without an issue. Given the severity of Tom's condition, and the short notice of the trip, Lorna requests three weeks of FMLA leave to take care of Tom while he travels.

Immediately after submitting the leave request, Tom and Lorna set off for France and Italy. Lorna spends most of her time bathing and dressing Tom, helping feed him, ensuring he remembers to hydrate and take his handfuls of medication, wheeling him through the city in a wheelchair, and overall providing for his every comfort. However, she also spends a good portion of the trip visiting the Louvre, shopping, and eating gelato with Tom.

Following a whirlwind trip, Lorna returns to work on a Monday morning only to be contacted by Human Resources (HR) and terminated for unexcused absences. HR stated that since she accompanied Tom on a vacation, her leave was not protected under the FMLA. If Lorna decides to sue her employer in the U.S. District Court for the Northern District of Illinois, the district court and Seventh Circuit will likely rule in her favor. However, if Lorna lives in California and files a federal suit, her employer is more likely to prevail on appeal to the Ninth Circuit.

Circuit courts are currently split on defining "care" under the FMLA, especially if an employee accompanies a seriously ill family member on a trip that appears recreational in nature. Circuit splits like this are not unusual. However, the inequitable results are undeniable.

The FMLA is a federal law passed in 1993 to improve work-life balance for employees, which in turn improves business productivity because employees are happier and more loyal.² The Act protects both men and women should they decide to request unpaid leave from work for the birth of a child, adoption or fostering a child, or the care of the

² U.S. DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS (2000), *available at* <http://www.dol.gov/whd/fmla/cover-statement.pdf>.

employee or an employee's family member for a "serious health condition."³ An eligible employee is permitted to take up to twelve weeks of unpaid leave each year as long as he or she has been employed by a covered employer for at least twelve months and has worked at least 1,250 hours during that twelve-month period.⁴

Litigation arises in determining the legislature's intent when using the phrase "to care for" when an employee requests leave "to care for" a family member. The Act does not define "care," though Department of Labor (DOL) regulations attempt to provide interpretations that remain broad in nature.⁵ Because the regulations are broad in scope and only provide a few examples of what care is, courts have interpreted care differently, leading to a circuit split. Interpretations become even more disjointed when an employee requests leave to accompany a seriously ill family member on a trip that is unrelated to the family member's medical care.

Given these splits,⁶ a bright line rule should be utilized that takes into account the facts of each case relating to travel under the FMLA. A bright line rule would provide guidelines for employees and employers in determining whether accompanying a family member on a trip is protected by the FMLA. This in turn would decrease employee abuse and reduce litigation for both parties. Finally, a bright line rule would still observe the FMLA's intent to improve employee work-life balance. However, it would return the FMLA to its secondary intent—to reduce unnecessary costs for employers.

Part I will discuss the FMLA, including its history and the values that shaped the Act into what it is today. Part II analyzes the current circuit split relating to FMLA leave "to care for" family members while traveling for non-medical reasons. Part III analyzes and distinguishes these circuit splits. In Part III, this Article also argues for

³ 29 U.S.C.A. § 2612 (2009). There are also provisions for military leave, though these are not the focus of this article.

⁴ 29 U.S.C.A. § 2611(2).

⁵ 29 C.F.R. § 825.124(a) (2013) (explaining that care covered under the provision includes both physical and psychological care, comfort, and reassurance).

⁶ The current circuit splits will be discussed in depth *infra* Part II.

a bright line rule on approved travel under the FMLA and provides a draft of a suitable rule.

I. THE FAMILY MEDICAL LEAVE ACT

The FMLA was signed into law by President Bill Clinton in 1993 as a response to the work-family conflicts that had arisen with the influx of women into the workforce.⁷ However, the fight for FMLA legislation started nearly a decade earlier.

A. History of the FMLA

When Congress passed the Pregnancy Discrimination amendments in 1978, feminist groups were already aware that maternity-leave programs were inadequate.⁸ There was no national policy on maternity leave, and existing programs did not address family needs beyond periods of child birth.⁹ The turning point came in 1984 when a federal district court determined that California's maternity leave law discriminated against men.¹⁰

In *California Federal Savings & Loan Association v. Guerra*, Lillian Garland took four months of maternity leave from her job as a receptionist at the California Federal and Loan Association (Cal Fed).¹¹ However, when Garland attempted to go back to work, she was told her job had been filled.¹² Garland filed a complaint with California's Department of Fair Employment and Housing, charging

⁷ DONNA R. LENHOFF & LISSA BELL, GOVERNMENT SUPPORT FOR WORKING FAMILIES AND FOR COMMUNITIES: FAMILY AND MEDICAL LEAVE AS A CASE STUDY 1, available at <http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf> (last visited Apr. 30, 2015).

⁸ *Id.* at 3.

⁹ *Id.* at 3-4.

¹⁰ *Cal. Fed. Sav. & Loan Ass'n v. Guerra (Cal Fed)*, No. 83-4927R, 1984 WL 943, at *1 (C.D. Cal. Mar. 21, 1984), *rev'd*, 758 F.2d 390 (9th Cir. 1985), *aff'd*, 479 U.S. 272 (1987).

¹¹ *Cal Fed*, 758 F.2d at 392.

¹² *Cal Fed*, 479 U.S. at 278.

that Cal Fed had violated California's maternity leave law, which entitled every woman to up to four months unpaid leave for pregnancy and reinstatement to the same or similar job.¹³ However, before a hearing was held, Cal Fed brought an action in federal district court stating that California's maternity law was inconsistent and was preempted by Title VII.¹⁴ Cal Fed argued that the California law was a form of sex discrimination that provided preferential treatment to women as pregnancy was treated as a form of temporary disability.¹⁵ Employers were required to reinstate women to their jobs following maternity leave, but disabled men were not provided this same treatment.¹⁶

The district court found that the California law was void because it was preempted by Title VII.¹⁷ The Ninth Circuit subsequently reversed the lower court's holding, and the Supreme Court affirmed the Ninth Circuit's decision on appeal.¹⁸ However, the district court's decision precipitated a meeting between various representatives of the organized women's movement, California Congressman Howard Berman, and California state legislator Maxine Waters.¹⁹ Following the meeting, a legislative proposal was outlined which became the basis of the FMLA.²⁰

The FMLA was drafted as a "way of ensuring that women would not lose their jobs when newborns' care or other family caregiving responsibilities took them out of the workforce temporarily, and as a way to establish protections that would apply equally to women and men dealing with certain family circumstances or serious personal

¹³ *Id.* at 272.

¹⁴ *Id.* at 278.

¹⁵ *Id.* at 279.

¹⁶ Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. TIMES, July 22, 1984, <http://www.nytimes.com/1984/07/22/business/maternity-leave-is-it-leave-indeed.html>.

¹⁷ *Cal Fed*, 479 U.S. 272.

¹⁸ *Id.*

¹⁹ LENHOFF & BELL, *supra* note 7, at 4.

²⁰ *Id.*

health conditions.”²¹ Drafters of the Act built in gender neutrality to ensure legality.²² Women would not be the only ones taking time off from work to care for new children or ill relatives, and employers would not be able to use women’s rights “as an excuse not to hire or promote them.”²³

The initial wording of the FMLA was drafted the same year as *Cal Fed*, but there was little chance that the FMLA would be approved. At the time, Republicans were opposed to the FMLA, and the Senate was under Republican control.²⁴ Therefore, in order to gain support, proponents of the Bill educated members of Congress and the public by holding House committee hearings because the House of Representatives was under Democratic control.²⁵ However, to hold hearings, the FMLA required union support. Union support slowly increased through the organized efforts of women within unions.²⁶ Eventually, unions “began to understand work-family issues as potent organizing tools as well as a political issue[] By 1991, the FMLA had become one of the top two or three demands that the labor movement presented to Congress.”²⁷

Despite outreach programs, public education, fundraising, and media advertising focused on emphasizing the multifaceted needs of employees, the FMLA Bill could not garner enough support as long as either house of Congress was under Republican control.²⁸ Senator Chris Dodd introduced the Bill in the Senate in 1986, but no Senate

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Republicans opposed the FMLA stating it was “nothing short of Europeanization—a polite term for socialism” and that FMLA legislation would “be the demise of some [businesses],” dimming the light of freedom. Donald Cohen, *Cry Wolf: Why the Right Was Wrong about the Family Medical Leave Act*, PRWATCH.ORG (Feb. 7, 2013), <http://www.prwatch.org/news/2013/02/11973/cry-wolf-why-right-was-wrong-about-family-medical-leave-act#sthash.OA6ciFF8.dpuf>.

²⁵ LENHOFF & BELL, *supra* note 7, at 4.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 8.

hearings, markups, or other votes were scheduled until 1987 when the Democrats regained control of the Senate and Dodd became the Chairman of the Children and Families Subcommittee.²⁹ Dodd then held a series of hearings around the country on the FMLA where he included views of both proponents and opponents of the Bill.³⁰ However, it was still impossible to enact the FMLA until the Democrats held both houses and the presidency.³¹ Even with house hearings in 1985 and 1986, the FMLA did not have enough support to be brought to the House floor until 1990 or have any significant influence on elections until the 1992 presidential election.³²

B. Shaping the FMLA

Party affiliation was a large factor in shaping and passing the FMLA. In September 1992, the FMLA Bill passed both houses of Congress but was vetoed by President George H.W. Bush.³³ The Senate overrode the veto but only sixty percent of House representatives voted to override, a few votes short of the two-thirds required to override a veto.³⁴ Of the sixty percent, eighty-two percent of Democrats voted to override, while only twenty-three percent of Republicans voted to override.³⁵

The opposition's response to the vote was also a key factor in the FMLA's lengthy consideration process.³⁶ This opposition came from primarily business lobbyists including the U.S. Chamber of Commerce, the Society for Human Resource Management, and the National Federation of Independent Businesses.³⁷ These groups, as

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 8-9.

³² *Id.* at 9.

³³ *Id.* at 9.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 9.

³⁷ *Id.*

well as various trade associations, formed an alliance to quash the FMLA.³⁸ Their primary strategy was to oppose the FMLA “on principle as a government mandate—regardless of its shape, cost, or limitations.”³⁹ While compromises were made in the course of the FMLA’s path, these compromises were predominantly made by congressional sponsors to:

woo . . . more conservative colleagues, not to achieve business support. Several of these compromises were significant—notably, the increase in the threshold for coverage to fifty employees, the reduction of the number of weeks of leave to twelve for all family and medical reasons in a year, and the contraction in the family members covered to only children, parents, and spouses.⁴⁰

These compromises led to significant new support from Republicans; however, they did not change the opposition from business lobbies.⁴¹

Individual lawmakers’ motivations and experiences also shaped the FMLA process. Many highly committed politicians, including Senators Dodd and Kit Bond and Representative Marge Roukema, cosponsored the FMLA.⁴² Their efforts illustrate the factors that affected legislators’ different responses to the FMLA, “including personal ideology, personal experience, electoral politics, and gender.”⁴³ For example, Senator Dodd was not married at the time nor did he have any children; however, he believed in the importance of supporting children and families.⁴⁴ Senator Bond became a supporter of the FMLA in 1991 for several reasons.⁴⁵ First, he wanted to please those of his constituents most interested in the Bill, Missouri’s aging

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 10.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

population.⁴⁶ Second, he wanted to demonstrate his sensitivity to women's issues in the face of his potential reelection in 1992.⁴⁷

In addition, Representative Roukema's personal experience was a main motivator for his support of the bill. Before being elected to Congress, she was a stay-at-home mother and took care of her ailing mother-in-law. She empathized with those who had to choose between caring for a family member and leading a successful career.⁴⁸ Her experiences led her to cosponsor the FLMA and "to add the provisions covering workers who must take leave temporarily to care for an aging parent (spouses were added later)."⁴⁹ Roukema's support was paramount because she was the "ranking Republican on the Labor-Management Subcommittee, which had jurisdiction over the main portions of the FMLA in the House."⁵⁰

Other variables affecting the FMLA's progress and structure included changing societal beliefs on gender roles and individual states experimenting and implementing their own family and medical leave acts.⁵¹ Essentially though, these variables were the result of a demographic revolution taking place over several decades.⁵² Over a forty-year period, the female civilian labor force had increased by about a million workers each year.⁵³ Nineteen percent of women worked in 1900 compared to seventy-four percent in 1993.⁵⁴ In addition, in 1993, fifty-six percent of mothers with children under age six were actively working.⁵⁵ Single-parent households more than doubled between 1970 and 1988 leaving "millions of women to

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 7-8.

⁵² S. REP. NO. 103-3, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7.

⁵³ *Id.*

⁵⁴ *Id.* at 6.

⁵⁵ *Id.*

struggle as single heads of households to support themselves and their children.”⁵⁶

Another dramatic increase in 1993 included the aging American population with twelve percent of the population comprised of Americans aged 65 and over.⁵⁷ “Between 1980 and 1990, the number of people aged 75 or older grew by nearly one third.”⁵⁸ In 1993, the National Council on Aging estimated that “20 to 25 percent of the more than 100 million American workers have some caregiving responsibility for an older relative.”⁵⁹ In addition, a trend away from institutionalization led to an increase in disabled or elderly adults being cared for primarily by their working children or parents.⁶⁰

These demands caused enormous strains on individuals and damaged national productivity, but the “need for job protected medical leave arose long before the dramatic new changes in the workforce.”⁶¹ Workers and their families had always dealt with devastating results when a family member lost a job for medical reasons.⁶² Jobs lost for medical reasons, coupled with the demographic changes in United States’ society, left single heads of households unable to provide for their families.⁶³

All of these factors, in combination with various others, led to an extensive legislative history prior to the FMLA being signed into law by President Bill Clinton in 1993.⁶⁴ The current version of the FMLA,

⁵⁶ *Id.*

⁵⁷ *Id.* at 8.

⁵⁸ *Id.*

⁵⁹ *Id.* at 9.

⁶⁰ *Id.* at 8–9.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Sarah Jane Glynn, *The Family and Medical Leave Act at 20: Still Necessary, Still Not Enough*, ATLANTIC, Feb. 5, 2013, <http://www.theatlantic.com/saxes/archive/2013/02/the-family-and-medical-leave-act-at-20-still-necessary-still-not-enough/272605/>.

including amendments signed by President Barack Obama in 2009,⁶⁵ is intended to:

balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.⁶⁶

The Act was ultimately created to balance two fundamental interests: the needs of the American workforce and the development of businesses.⁶⁷ It balances these interests by reassuring workers they will not have to choose between themselves or their families and their employment.⁶⁸ This reassurance directly correlates with increased worker productivity and organizational success.⁶⁹

C. Provisions of the FMLA

The FMLA applies to all eligible employees⁷⁰ employed by covered employers.⁷¹ The Act provides eligible employees with two

⁶⁵ Brianne Marriott, *President Obama Signs Legislation Amending FMLA to Expand Military Families' Leave Rights*, LIEBERT CASSIDY WHITMORE (Nov. 13, 2009), <http://www.lcwlegal.com/69653>.

⁶⁶ 29 C.F.R. § 825.101 (2013).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*; see also S. REP. NO. 103-3, at 12.

⁷⁰ Eligibility is not an issue under the current circuit splits. However, I have included a brief synopsis of the test for eligibility: Eligible employees are those who have been employed by an employer for at least twelve months to whom the leave request is submitted, and has worked for at least 1,250 hours during that twelve-month period. 29 U.S.C.A. § 2611(2)(A) (West 2009). The twelve months of employment does not have to be consecutive. GERALD MAYER, CONG. RESEARCH

types of leave: regular leave and military family leave.⁷² Regular leave allows an eligible employee to take up to twelve weeks of unpaid, job-protected leave⁷³ during any twelve-month period, and requires employers to maintain group health insurance benefits as if employees continued to work instead of taking leave.⁷⁴ An employee can request leave for the following reasons:

- (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.

SERV., THE FAMILY AND MEDICAL LEAVE ACT (FMLA): AN OVERVIEW 1 (Sept. 28, 2012), available at <https://www.fas.org/sgp/crs/misc/R42758.pdf>. It does not include someone who is employed by the federal government “under subchapter V of chapter 63 of Title 5.” 29 U.S.C.A. § 2611(2)(B)(i). It also does not apply to employers who employ less than fifty people at a worksite if the employer employs less than fifty people within 75 miles of the worksite. *Id.* § 2611(2)(B)(ii). There are additional rules to determine whether a flight crew meets the minimum requirements for FMLA leave. *See id.* § 2611(3).

⁷¹ Whether an employer is considered “covered” is not at issue under the current circuit splits analyzed in this Article. Therefore, a general overview follows: Both private and public sector employers are covered by the FMLA. MAYER, *supra* note 70, at 4. The Act applies to private employers engaged in commerce and who “employed 50 or more employees for at least 20 weeks in the preceding or current calendar year.” *Id.* Public agencies, including federal, state and local governments, are covered by the FMLA regardless of the number of employees. *Id.* While the FMLA covers public employers regardless of the number of employees, public employees must meet the eligibility requirements listed *supra* note 70.

⁷² MAYER, *supra* note 70, at 1. The FMLA was extended to military family leave in 2008. *Id.* at 5. The National Defense Authorization Act created “two types of military family leave: qualifying exigency leave and military caregiver leave.” *Id.* at 5–6. This article will only focus on “regular leave.”

⁷³ An employee may elect to substitute accrued paid leave for FMLA leave. 29 U.S.C.A. § 2612(d)(2). An employer may also require an employee to substitute accrued paid leave for unpaid leave. *Id.*

⁷⁴ *The Family and Medical Leave Act*, U.S. DEP’T OF LABOR WAGE & HOUR DIVISION, <http://www.dol.gov/whd/regs/compliance/1421.htm> (last visited Apr. 30, 2015).

(C) In order to care for the spouse, or a 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.

(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.⁷⁵

A “serious health condition” means an illness, injury, or physical or mental condition that involves “inpatient care at a hospital, hospice, or residential medical facility; or continued treatment by a health care provider.”⁷⁶

The FMLA allows employees to take “intermittent” leave or work a part-time schedule to care for their own “serious health condition(s)” or those of an eligible relative.⁷⁷ An employee on intermittent or part-time leave is not guaranteed his specific job.⁷⁸ Covered employers can temporarily transfer an employee on intermittent or part-time leave to a position for which they are qualified and that better accommodates

⁷⁵ 29 U.S.C.A. § 2612.

A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition.

29 C.F.R. § 825.120(a)(3) (2013).

⁷⁶ 29 U.S.C.A. § 2611(11)(A)-(B).

⁷⁷ MAYER, *supra* note 70, at 5. Intermittent leave for (A) and (B) is prohibited unless an alternative agreement is reached between employer and employee. §2612(b)(1).

⁷⁸ *Id.* § 2612(b)(2).

their changed hours.⁷⁹ However, the new position “must provide the employee with the same pay and benefits.”⁸⁰ Once an employee returns to full-time status, the employer must provide the employee with his or her previous position, or an equivalent position.⁸¹

In order to qualify for FMLA leave, an employee must notify his or her employer if he plans to take leave. If the leave is foreseeable, employees must provide at least 30 days notice before the start of the leave.⁸² For planned medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment at a time that is not disruptive to the employer’s operations.⁸³

If leave is not foreseeable, an employee must notify his employer “as soon as practicable.”⁸⁴ “As soon as practicable” is defined as: as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.⁸⁵

It is relatively easy for most employees to argue that the 30 days notice requirement does not apply to their leave request. As long as they are unaware when leave will be required to begin or there is a change in circumstances, the 30 days notice is not required.⁸⁶

⁷⁹ *Id.*

⁸⁰ MAYER, *supra* note 70, at 5.

⁸¹ *Id.*

⁸² 29 U.S.C.A. § 2612(e).

⁸³ 29 U.S.C.A. § 825.302(e) (2013).

⁸⁴ 29 U.S.C.A. § 2612(e).

⁸⁵ 29 C.F.R. § 825.302(b).

⁸⁶ 29 C.F.R. § 825.302(a).

If leave is for a “serious health condition,” either the employee’s own or an immediate family member’s, the employer may require certification from a health care provider.⁸⁷ If a certification is returned incomplete or insufficient, the employer “shall advise [the] employee . . . and shall state in writing what additional information is necessary to make the certification complete and sufficient.”⁸⁸ If deficiencies are not cured, the employer may deny the FMLA leave.⁸⁹ Failure to return a certification constitutes a failure to provide certification and the employer may also deny the leave.⁹⁰

An employer may request a recertification no more than every thirty days and “only in connection with an absence by the employee.”⁹¹ If the medical certification indicates that the duration of the “serious health condition” is longer than thirty days, then the employer must wait until that duration expires before requesting a recertification. For example, if the certification states that the “employee will be unable to work” for forty days, then the “employer must wait forty days before requesting a recertification.”⁹²

⁸⁷ 29 C.F.R. § 825.305(a).

⁸⁸ 29 C.F.R. 825.305(c). A certification is considered incomplete if one or more applicable entries have not been completed. A certification is insufficient if the information provided to the employer is vague, ambiguous or non-responsive.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Recertification*, U.S. DEP’T OF LABOR, <http://webapps.dol.gov/elaws/whd/fmla/12a5.aspx> (last visited Apr. 30, 2015).

⁹² *Id.* A recertification can be requested in less than thirty days if the employee requests an extension of his leave, circumstances have changed significantly and the previous certification no longer applies, or the employer receives information that questions the validity or reason for leave. Unless the employer provides more lax rules than the minimum requirements provided in the Act, the same certification requirements apply to recertification, including timeframes for supplying recertification, the potential denial of FMLA leave protections if recertification is not provided, and who covers the cost for recertification (the employee).

II. CIRCUIT SPLITS REGARDING CARE WHILE TRAVELING UNDER THE FMLA

Another frequently litigated area of the Act is defining “to care for”⁹³ when taking leave to care for a family member with a “serious health condition.”⁹⁴ Under DOL regulations, the FMLA encompasses both physical and psychological care of a family member with a “serious health condition.”⁹⁵ The regulation language does not purport to place limitations on this care and includes nonexclusive examples.⁹⁶ An employee may request leave if a “family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety” or to provide “psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a ‘serious health condition’ who is receiving inpatient or home care.”⁹⁷ The phrase “to care for” also encompasses situations where an employee may be needed to substitute for others who normally care for the family member, to make arrangements for changes in care, or where care responsibilities are shared with another member or a third party.⁹⁸

An employee may also “obtain . . . leave . . . to provide ‘indirect care’ in support of such a leave.”⁹⁹ Courts generally do not believe this category is included in the FMLA.¹⁰⁰ Examples of indirect care

⁹³ 29 U.S.C.A. § 2612 (West 2009).

⁹⁴ Michael D. Homans, *Primer on What the Family and Medical Leave Act Covers: Litigating FMLA Claims* 11 (4th Annual ABA Section of Labor and Employment Law Conference Paper Nov. 3-6, 2010), available at http://www.flastergreenberg.com/media/article/289_Primer_on_What_the_Family_and_Medical_Leave_Act_Covers.pdf.

⁹⁵ 29 C.F.R. § 825.124(a).

⁹⁶ *Id.* The regulation uses language such as “it includes situations where, for example,” and “[t]he term also includes.” This language does not include exclusive or limiting language.

⁹⁷ *Id.*

⁹⁸ 29 C.F.R. § 825.124(b)-(c).

⁹⁹ *Id.*

¹⁰⁰ Jeff Nowak, *Did a Court Just Allow an Employee FMLA Leave to Care for Her Grandchild?*, FMLA INSIGHTS (July 11, 2014),

include an employee's presence at a hospital while a family member undergoes surgery¹⁰¹ and physical care that is too far removed from the family member's illness.¹⁰²

Drawing a line between direct and indirect care is especially difficult when an employee is traveling with a family member who requires care. This line drawing is something circuit courts have grappled with, and to date, there is no bright line rule from either the DOL or the federal courts. The remainder of this section will review and analyze the current circuit court split regarding travel under the FMLA.

A. Ninth Circuit: "To Care for" when Traveling

In 1999, the Ninth Circuit decided *Marchisheck v. San Mateo County*.¹⁰³ In *Marchisheck*, Plaintiff Fe Castro Marchisheck sued San Mateo County for violating the FMLA when it terminated Marchisheck's employment after she took a one-month leave from work to move her son to the Philippines.¹⁰⁴

Marchisheck was a senior medical technologist at San Mateo County General Hospital who was also raising her fourteen-year-old son, Shaun.¹⁰⁵ Shaun began undergoing counseling in 1991 after a shoplifting incident, and his doctor found he was mildly depressed and had poor peer relations.¹⁰⁶ Later, a psychological assistant concluded

<http://www.fmlainsights.com/did-a-court-just-allow-an-employee-fmla-leave-to-care-for-her-grandchild/>.

¹⁰¹ *Fioto v. Manhattan Woods Golf Enterprises, L.L.C.*, 270 F. Supp. 2d 401 (S.D.N.Y. 2003), *aff'd*, 123 F. App'x 26 (2d Cir. 2005) (court ruled against employee who took time off to be at the hospital for his mother's brain surgery).

¹⁰² *Lane v. Pontiac Osteopathic Hosp.*, No. 09-12634, 2010 U.S. Dist. LEXIS 61003 (E.D. Mich. June 21, 2010) (flooding in mother's basement was not direct care despite mother having hepatitis and the flooding's potential for breeding disease).

¹⁰³ 199 F.3d 1068 (9th Cir. 1999).

¹⁰⁴ *Id.* at 1070.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

he had a “parent-child relationship problem” but did not believe Shaun suffered from attention deficit disorder or post-traumatic stress disorder.¹⁰⁷

In August 1995, Shaun was assaulted by several acquaintances.¹⁰⁸ “Shaun lost consciousness during the attack and suffered a nasal contusion, two puncture burns on his back, abrasions, erythema on the right side of his neck, and a left lateral subconjunctival hemorrhage.”¹⁰⁹ Following the assault, Marchisheck decided to move Shaun to the Philippines to live with her brother.¹¹⁰ Marchisheck made a written request for approximately five weeks of vacation leave, but the request was denied as it would be impossible for the hospital to cover all of her shifts without authorizing overtime.¹¹¹ The day before the trip, she met with supervisors at the hospital to discuss her vacation request.¹¹² Marchisheck submitted a letter written by a psychiatrist from the clinic Shaun visited; however, the vacation request was still denied.¹¹³ Despite the denial, Marchisheck left the country.¹¹⁴ She was terminated in September 1995.¹¹⁵

Marchisheck filed suit and the district court granted the defendant’s motion for summary judgment based on Shaun not having a “serious health condition.”¹¹⁶ She appealed to the Ninth Circuit, and the Ninth Circuit affirmed the district court’s decision.¹¹⁷ The Ninth Circuit concluded that Shaun’s past medical history did not fall into the defined parameters of a “serious health condition.”¹¹⁸ However, the

¹⁰⁷ *Id.* at 1071.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1072.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1073.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1073-74.

court went on to explain that even if Shaun had a “serious health condition,” Marchisheck did not have FMLA protection because the leave was not “to care for” Shaun.¹¹⁹

Regulation 29 C.F.R. § 825.116(a) defines “to care for” as “both physical and psychological care.”¹²⁰ Marchisheck’s purpose in moving Shaun was to keep him safe from further beatings, not to receive medical or psychological treatment.¹²¹ Marchisheck did not have specific plans to seek medical treatment for Shaun when they reached the Philippines, and Shaun did not see a doctor for more than five months following the move.¹²² The district court concluded that “‘caring for’ a child with a ‘serious health condition’ involves some level of participation in ongoing treatment of that condition.”¹²³ However, participation in ongoing treatment was not present in Marchisheck’s case.

The Ninth Circuit also found an employee must be in “close and continuing proximity” to the ill family member.¹²⁴ In *Tellis v. Alaska Airlines, Inc.*, the court affirmed summary judgment in favor of the defendant employer because the employee took FMLA leave to care for his wife who was having difficulties with her pregnancy.¹²⁵ However, his car broke down during leave, and instead of caring for his wife, he flew from Seattle to Atlanta to pick up a car he owned there.¹²⁶ While he was driving back to Seattle, his wife gave birth to a baby girl.¹²⁷ Alaska Airlines decided to terminate him for unexcused absences and Tellis filed suit.¹²⁸ He argued that the care he provided to

¹¹⁹ *Id.* at 1076.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005) (citing *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1087-88 (9th Cir. 2002).

¹²⁵ *Id.* at 1046.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

his wife was consistent with the FMLA “because his trip to Atlanta and back to retrieve the family car provided psychological reassurance to her that she would soon have reliable transportation, and his phone calls to her while he drove back to Seattle provided moral support and psychological comfort.”¹²⁹ The court disagreed stating that providing care to a family member requires actual care, which was not present.¹³⁰ An employee must participate at some level in ongoing treatment of the “serious health condition” and be in close and continuing proximity with the ill family member.¹³¹

The Ninth Circuit outlined what is currently the definition of “close and continuing proximity” in *Scamihorn v. General Truck Drivers*. In that case, a son moved to his father’s town for a month to help him cope with depression.¹³² The son spoke with his father daily, performed household chores, and drove his father to the counselor.¹³³ The court concluded that the plaintiff “participated in the treatment through both his daily conversations with his father . . . and his constant presence in his father’s life.”¹³⁴

B. First Circuit: “To Care for” while Traveling

In *Tayag v. Lahey Clinic Hospital, Inc.*, the First Circuit affirmed summary judgment for an employer following an employee’s unapproved leave.¹³⁵ In *Tayag*, the employee requested seven weeks of leave to accompany her ailing husband on a spiritual healing

¹²⁹ *Id.* at 1046-47.

¹³⁰ *Id.* at 1047.

¹³¹ *Id.*

¹³² *Scamihorn*, 282 F.3d at 1080-81 (9th Cir. 2002).

¹³³ *Id.* at 1081.

¹³⁴ *Id.* at 1088; *see also* *Brunelle v. Cytec Plastics, Inc.*, 225 F.Supp.2d 67, 77 & n.13 (D. Me. 2002) (denying employer’s summary judgment motion when plaintiff provided care and comfort to his critically ill father); *Briones v. Genuine Parts Co.*, 225 F.Supp.2d 711, 715-16 (E.D. La. 2002) (denying employer’s summary judgment motion when employee took leave to care for healthy children while his wife cared for their hospitalized child).

¹³⁵ *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788 (1st Cir. 2011).

pilgrimage to the Philippines.¹³⁶ Tayag's husband suffered from "serious medical conditions, including gout, chronic liver and heart disease, rheumatoid arthritis, and kidney problems that led to a transplant in 2000."¹³⁷ These debilitating conditions left Tayag as her husband's primary care giver.¹³⁸ She transported him to medical appointments, helped him with daily activities, and provided psychological comfort.¹³⁹

Tayag worked for Lahey Clinic Hospital (Lahey) as a health management clerk and had her requests for leave consistently approved.¹⁴⁰ Leave requests usually lasted one to two days.¹⁴¹ In June 2006, Tayag submitted a vacation request form for approximately seven weeks to begin in August.¹⁴² Her supervisor stated this would leave the department with inadequate coverage, but because Tayag indicated her husband would need medical care, her supervisor provided paperwork for an FMLA leave request.¹⁴³ She later requested FMLA leave to assist her husband while he traveled, but she did not inform Lahey that the travel was for spiritual pilgrimage.¹⁴⁴

Tayag's husband underwent an angioplasty, and Tayag provided a certification from her husband's primary care physician stating that Tayag would need to receive medical leave "to accompany Mr. Tayag on any trips as he needs physical assistance on a regular basis."¹⁴⁵ However, her husband's cardiologist returned a certification the following month "stating that [her husband] was 'presently . . . not incapacitated' and that Tayag would not need leave."¹⁴⁶ Lahey sent

¹³⁶ *Id.*

¹³⁷ *Id.* at 789.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 790.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

letters to Tayag and left her phone messages to notify her that the leave for the trip was unapproved; however, Tayag did not receive the notifications because she was in the Philippines.¹⁴⁷ Receiving no response, Lahey then terminated her employment.¹⁴⁸

While in the Philippines, the Tayags “went to Mass, prayed, and spoke with the priest and other pilgrims at the Pilgrimage of Healing Ministry at St. Bartholomew's Parish.”¹⁴⁹ They also visited other churches as well as friends and family.¹⁵⁰ Mr. Tayag received no conventional medical treatment and did not see any physicians while in the Philippines.¹⁵¹ However, Tayag assisted her husband by “administering medications, helping him walk, carrying his luggage, and being present in case his illnesses incapacitated him.”¹⁵²

Several months after termination, Tayag filed suit alleging that her termination violated the FMLA.¹⁵³ The district court granted summary judgment in favor of Lahey, determining that the Tayags’ trip was not protected because it was a vacation.¹⁵⁴ On appeal, the circuit court reviewed the FMLA regulations, noting that regulations do address faith healing, but only faith healing practitioners “capable of providing health care services.”¹⁵⁵ These include Christian Science practitioners subject to certain conditions.¹⁵⁶ Tayag did not invoke the Christian Science exception, instead relying on a constitutional claim.¹⁵⁷ The circuit court concluded that the pilgrimage did not constitute “medical care” and that the FMLA definition of care did not extend to cover the

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 790-91.

¹⁵⁵ *Id.* at 791.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

potential for “psychological comfort and reassurance” on lengthy trips unrelated to medical care.¹⁵⁸

C. Seventh Circuit: “To Care for” while Traveling

1. Background

In contrast, the Seventh Circuit case, *Ballard v. Chicago Park District*, suggests that care associated with FMLA leave need not take place at home.¹⁵⁹ In *Ballard*, Beverly Ballard was a swimming instructor for the Chicago Park District and requested FMLA leave to care for her dying mother who had begun receiving hospice support.¹⁶⁰ Ballard lived with her mother and acted as her primary caregiver. Ballard’s daily responsibilities included cooking her mother’s meals, administering her insulin and other medication, draining fluids from her heart, and bathing and dressing her.¹⁶¹ A local charitable organization granted Ballard’s mother’s “make a wish” request to travel to Las Vegas.¹⁶² Ballard requested six days of FMLA leave to care for her mother during the trip but her employer denied the leave.¹⁶³ Ballard allegedly attempted to contact her supervisor several times by phone and fax to no avail.¹⁶⁴

Despite the denial, Ballard went on the trip anyway, taking care of her mother on the trip as well as “playing slots, shopping on the Strip, people-watching, and dining at restaurants.”¹⁶⁵ Ballard acknowledged that her mother was not in Las Vegas for any kind of medical care,

¹⁵⁸ *Id.* at 793.

¹⁵⁹ *Ballard v. Chic. Park Distr.*, 900 F. Supp. 2d 804, 806 (N.D. Ill. 2012), *aff’d*, 741 F.3d 838 (7th Cir. 2014)

¹⁶⁰ *Ballard*, 741 F.3d at 839.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 839-40.

¹⁶⁴ *Ballard*, 900 F. Supp. 2d at 806-07.

¹⁶⁵ *Id.* at 807.

therapy, or other treatment; it was a vacation specifically requested by her mother.¹⁶⁶

Ballard returned to work a day later than requested on her leave form because a fire had broken out at the Las Vegas hotel that Ballard and her mother were staying.¹⁶⁷ The fire prevented her from making her original flight home.¹⁶⁸ Almost two months later, Ballard was terminated for her unexcused absences related to the Las Vegas trip.¹⁶⁹ She then filed suit.¹⁷⁰

2. The District Court's Findings

The U.S. District Court for the Northern District of Illinois issued an opinion on the employer's motion for summary judgment. Ballard alleged that "the Park District willfully and intentionally interfered with her rights under the FMLA by denying her request for leave to accompany her sick mother to Las Vegas and then firing her for absences in connection with the trip."¹⁷¹ The Chicago Park District argued that the FMLA did not protect Ballard's trip because there were no plans to seek medical treatment in Las Vegas; the care "must have some connection to the family member's need for treatment itself."¹⁷²

The district court reviewed two issues, one legal and one factual: whether Ballard was entitled to leave under the FMLA "to care for" her mother while in Las Vegas and whether Ballard provided sufficient notice of her intent to take FMLA leave.¹⁷³ The court analyzed the first issue under two theories: "first, whether [Ballard] 'cared for' her

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 808.

¹⁷² *Id.*

¹⁷³ *Id.*

mother during the trip to Las Vegas; and second, in the alternative, whether the trip itself was part of her mother's 'ongoing treatment.'"¹⁷⁴

In analyzing the issue, the court reviewed the text of the FMLA, which did not set forth the limitation that the care must have a connection to the treatment.¹⁷⁵ The text of the Act entitles an eligible employee to a certain amount of leave "[i]n order to care for . . . [a] parent of the employee, if such . . . parent has a serious health condition."¹⁷⁶ To be covered by the Act, a family member must have a "serious health condition" and the leave must be used to care for the family member.¹⁷⁷ The FMLA "does not mention the employee's direct participation in medical treatment. Nor does the statute mention limiting the care to when the parent is at a particular location."¹⁷⁸ "To care for" is not explicitly defined in the Act; however, the DOL defines the phrase in 29 C.F.R. § 825.116.¹⁷⁹ The phrase is defined as:

encompass[ing] both physical and psychological care, and includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to . . . a parent with a serious health condition who is receiving inpatient or home care.¹⁸⁰

Therefore, "caring for" a family member is not dependent on a particular location or participation in medical treatment.¹⁸¹

Further, the regulations recognize that a "serious health condition" need only involve continuing treatment under the supervision of a

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 808-09.

¹⁷⁹ *Id.* at 809.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

medical provider, not active treatment.¹⁸² This is especially the case for terminally ill family members who may not be receiving active medical treatment (i.e., Alzheimer's, a severe stroke, or the terminal stages of a disease).¹⁸³

The court went on to analyze the regulations, stating that the regulations were created based on legislative history of the FMLA. The Senate Report on the FMLA even stated:

An employee could also take leave to care for a parent . . . of any age who is unable to care for his or her own basic hygienic or nutritional needs or safety. Examples include a parent or spouse whose daily living activities are impaired by such conditions as Alzheimer's disease, stroke, or clinical depression, or . . . who is in the final stages of a terminal illness.¹⁸⁴

Therefore, the court concluded, based on statutory and regulatory text, that Ballard's mother suffered from a "serious health condition" and was unable to care for her own basic needs.¹⁸⁵ In addition, the services that Ballard provided her mother constituted physical care within the meaning of the FMLA.¹⁸⁶ Logically then, Ballard also "cared for" her mother during their trip to Las Vegas as her mother's physical needs did not change.¹⁸⁷

The Park District attempted to persuade the court that there must be an "ongoing treatment" connection by citing to the cases described above, specifically the Ninth Circuit's decision in *Marchisheck*.¹⁸⁸ The court agreed that the *Marchisheck*'s decision was reasonable: "that 'caring for' must involve treatment from a medical provider when the employee is taking FMLA leave, including when the family member is

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* (citing S. REP. NO. 103-3, at 24 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 26.)

¹⁸⁵ *Id.* at 810.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

traveling away from home.”¹⁸⁹ However, the district court refused to follow the Ninth Circuit’s decision because it was not based on the statutory and regulatory text.¹⁹⁰ Further, the limitation adopted by the Ninth Circuit—some level of participation in ongoing treatment is required for FMLA leave protections—is not grounded in the regulatory text.¹⁹¹ The regulation gives two examples of “caring for” a family member:

(1) “where . . . the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor”; and (2) “providing psychological comfort and reassurance which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.” . . . Nothing in these examples suggest that “care” must itself be part of ongoing medical treatment.¹⁹²

The district court went on to review a case, which the Ninth Circuit analyzed more in depth, *Gradilla v. Ruskin Manufacturing*.¹⁹³ In *Gradilla*, Gradilla accompanied his wife to Mexico to attend her father’s funeral.¹⁹⁴ He was his wife’s primary care giver, and he was responsible for administering her medication for a serious heart condition as well as ensuring she did not exacerbate her condition under stressful events.¹⁹⁵ Ruskin fired Gradilla, and Gradilla filed suit under the California Family Rights Act (analogous to the FMLA).¹⁹⁶ Citing *Marchisheck*, the Ninth Circuit:

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 811.

¹⁹³ *Id.* The *Gradilla* case opinion was withdrawn.

¹⁹⁴ *Id.* (citing *Gradilla v. Ruskin Mfg.*, 320 F.3d 951 (9th Cir. 2003), *withdrawn per stipulation of parties by Gradilla v. Ruskin Mfg.*, 328 F.3d 1107 (9th Cir. 2003).

¹⁹⁵ *Id.* (citing *Gradilla*, 320 F.3d at 954).

¹⁹⁶ *Id.*

held that under the CFRA, ‘an employee who leaves work to travel with and care for a family member with a serious health condition is not entitled to leave when the family member decides, in spite of her serious medical condition, to travel away from her home for reasons unrelated to her medical treatment.’¹⁹⁷

The Ninth Circuit’s opinion placed “a geographic restriction on where ‘care’ must be administered, at least when the trip away from home does not have a medical-treatment purpose.”¹⁹⁸

Gradilla relied on the same regulation at issue as all the above-stated cases, 29 C.F.R. § 825.116, to create a geographic limitation. However, the rule only provides examples of care that would qualify and does “not purport to limit where ‘care’ can take place.”¹⁹⁹ The District Court concluded that it would be a mistake to use a list of non-exclusive examples within the regulation to place limitations on the broad definition.²⁰⁰ As long as the employee provides care to the family member, the location of the care has no bearing on whether the employee receives FMLA protections.²⁰¹

The District Court then reviewed the issue of Ballard’s entitlement to FMLA leave under an alternative theory: whether Ballard provided sufficient evidence for a fact finder to conclude that the trip served a medical purpose.²⁰² Ballard provided both a letter from Horizon Hospice stating that it had helped to arrange her mother’s end-of-life trip as well as an affidavit from an employee at Horizon Hospice.²⁰³ However, the court concluded that Ballard could not use the letter as evidence because it was a letter written seven months following the trip and was inadmissible hearsay. In addition, the affidavit could not

¹⁹⁷ *Id.* (quoting *Gradilla*, 320 F.3d at 953) (emphasis omitted).

¹⁹⁸ *Id.* at 811.

¹⁹⁹ *Id.* at 811-12.

²⁰⁰ *Id.* at 812.

²⁰¹ *Id.*

²⁰² *Id.* at 812-13.

²⁰³ *Id.*

be used because it did not adequately set forth facts demonstrating the trip was in connection with ongoing treatment at Horizon Hospice.²⁰⁴

Finally, the court analyzed whether Ballard provided sufficient notice of her intent to take leave. The court quickly determined that 30 days notice is only required when the leave is foreseeable.²⁰⁵ If Ballard was held to this heavier burden, Ballard alleged sufficient facts to meet the requirement—she stated that she approached her supervisor over a month before the leave was to begin.²⁰⁶ The Park District argued that Ballard’s notice was insufficient because it failed to comply with the Park District’s internal procedures for requesting leave.²⁰⁷ However, even if true, “‘failure to follow . . . internal employer procedures will not permit an employer to disallow or delay an employee’s taking leave if the employee gives timely verbal or other notice.’”²⁰⁸

3. The Seventh Circuit’s Decision

The Park District moved for an interlocutory appeal to the Seventh Circuit. The Seventh Circuit affirmed the district court’s decision, noting that it did not matter *where* Ballard provided the care, as long as she was providing care to her mother.²⁰⁹ The Seventh Circuit rejected the Park District’s argument that an employee should only be able to invoke the FMLA protections if an away-from-home trip is for services provided in connection with ongoing medical treatment.²¹⁰ The court based its opinion on a literal reading of the text of the statute.²¹¹ First, 29 U.S.C. § 2612(a)(1)(C) uses the word “care,” not “treatment” when describing leave to take care of a family member

²⁰⁴ *Id.* at 813.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* (quoting 29 C.F.R. § 825.302(d) (2013)).

²⁰⁹ *Ballard*, 741 F.3d at 843.

²¹⁰ *Id.* at 840.

²¹¹ *Id.*

with a “serious health condition.”²¹² Second, the Park District did not explain why participation in ongoing treatment was required for away-from-home care versus at-home care.²¹³ The text of the FMLA does not restrict care geographically (i.e., it does not say that “an employee is entitled to time off ‘to care at home for’ a family member”).²¹⁴ Its only limitation is that a family member must have a “serious health condition” for an employee to be able to take advantage of FMLA protections.²¹⁵

The court went on to state that the FMLA does not define care, and therefore, it must review DOL regulations.²¹⁶ Since there are no regulations interpreting 29 U.S.C. § 2612(a)(1)(C), the court looked to the regulations interpreting 29 U.S.C. § 2613(b)(4)(A) regarding health-care provider certification.²¹⁷ The court found nothing in the regulations supporting the Park District’s argument.²¹⁸ The regulations define care expansively and without any geographic limitation. The “only part of the regulations suggesting that the location of care might make a difference is the statement that psychological care ‘includes providing psychological comfort and reassurance to [a family member] . . . who is receiving inpatient or home care.’”²¹⁹ However, as the district court observed, the examples provided in the regulations are not purported to be exclusive. In addition, the example regarding a potential geographic location only related to psychological care and did not include physical care.²²⁰ Therefore, the court concluded that Ballard’s mother’s basic physical needs did not change while in Las

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 841.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* (quoting 29 C.F.R. § 825.116(a) (2008)).

²²⁰ *Id.*

Vegas and Ballard's care was actually quite important when a fire at the hotel made it impossible to reach their room.²²¹

The Park District cited a series of circuit court cases to support its claims; however, the Seventh Circuit rejected these cases because they are not grounded in the text of the statute or regulations.²²² It did review the *Marchisheck* case, as the district court did, agreeing that the *Marchisheck* court's conclusion did not make sense.²²³ The Seventh Circuit stated:

The relevant rule says that, so long as the employee attends to a family member's basic medical, hygienic, or nutritional needs, that employee is caring for the family member, even if that care is not part of ongoing treatment of the condition. Furthermore, none of the cases explain why certain services provided to a family member at home should be considered "care," but those same services provided away from home should not be. Again, we see no basis for that distinction in either the statute or the regulations.²²⁴

Finally, the Park District expressed concern over the court's decision should it find in favor of Ballard.²²⁵ If the court ruled in Ballard's favor, the Park District stated, it would be setting a precedent where employees could help themselves to unpaid FMLA leave in order to take personal vacations by bringing seriously ill family members along.²²⁶ The court concluded that this concern was unwarranted because this case's circumstances fell under hospice and palliative care.²²⁷ In addition, employers concerned about abuse could require certification by the family member's health care provider, who would certify that the family member needs physical or emotional

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 842-43.

²²⁵ *Id.* at 843.

²²⁶ *Id.*

²²⁷ *Id.*

assistance and thus the employer should allow employee leave protected by the FMLA.²²⁸

III. CREATING A BRIGHT-LINE RULE ON TRAVELING UNDER THE FMLA

The Seventh Circuit's decision focused on the absurdity of the Chicago Park District's, as well as the First and Ninth Circuits', interpretations of "to care for." If Ballard had requested leave to care for her mother in Chicago, or if her mother lived in Las Vegas and she was traveling there to care for her, Ballard's request would have fallen within the scope of the FMLA.²²⁹ Yet, under the Park District's contentions, because Ballard traveled *with* her terminally-ill mother, on a trip that did not include ongoing medical treatment, she used her FMLA leave illicitly.²³⁰

The only case that is factually similar to *Ballard*, is *Tayag* in the First Circuit. Both family members suffered from "serious health conditions"; the employees accompanied the family member on a trip, taking care of their physical and psychological needs; and the trips were not for, and did not include, medical treatment.²³¹ However, the defining characteristic between the two court's decisions is that Ballard's mother was receiving palliative and hospice care outside of the trip, while Tayag's husband was not terminally ill.

In contrast, *Marchisheck* appropriately denied relief because the plaintiff's trip was to accompany her teenage son in moving him to the Philippines.²³² He did not have a "serious health condition"; however, what is relevant here is the court's decision to analyze the case as if plaintiff's son had a "serious health condition."²³³ Regulation 29 C.F.R. § 825.116(a) defines "to care for" as "both physical and

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 840.

²³¹ Compare *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788, 788-89 (1st Cir. 2011), with *Ballard*, 741 F.3d at 839.

²³² *Marchisheck v. San Mateo Cty.*, 199 F.3d 1068, 1070 (9th Cir. 1999).

²³³ *Id.* at 1076.

psychological care.”²³⁴ From a reading of the *Marchisheck* facts, plaintiff’s physical and psychological care of her adult son, if he had a “serious health condition,” should have been enough under the Seventh Circuit’s analysis. Plaintiff’s purpose in traveling with her minor son was to move him to the Philippines. If her care during the trip included day-to-day care, then this case should have fallen well within the FMLA according to the Seventh Circuit as day-to-day care of as seriously ill family member is sufficient. Yet, the court still concluded that the controlling factor was that care required some level of participation in ongoing treatment.²³⁵

Similarly, *Tellis* appropriately denied relief. Allowing a man to travel to pick up a car while his pregnant wife remained home would drastically expand the definition of “to care for.”²³⁶ Psychological reassurance from afar is not the same as actual care while traveling with a family member who has a “serious health condition.”²³⁷

Despite these distinctions, a circuit split remains—one that may widen as additional circuits are required to interpret the FMLA when an eligible employee travels with a seriously ill family member. A bright line rule, drafted to account for the factual circumstances in each case discussed above, yet preventing too broad of an interpretation as in *Ballard*, would reduce litigation and further the legislative intent of the FMLA.

A. Drafting Language to Resolve the Circuit Split

When drafting language to resolve the current circuit split, current case law should be taken into consideration, including factual distinctions between *Ballard*, *Tayag*, *Marchisheck*, and *Tellis*. For example, the proposed language below modifies 29 C.F.R. § 825.116 and takes into consideration the various conclusions of the First, Seventh, and Ninth Circuits:

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1047 (9th Cir. 2005).

²³⁷ *Id.*

Needed to care for a family member or covered servicemember while traveling

(A) An employee must provide direct, in-person care for a seriously ill family member when traveling in order for leave to come under the protections of the FMLA.

(B) Traveling with a seriously ill family member or covered servicemember receiving medical care is protected by the Act.

(C) In addition to meeting the requirements of section (A), in order to fall under the protections of the Act, travel for other reasons must meet the following criteria:

a. Travel must be primarily organized by (1) hospice or palliative care; (2) a social worker or medical professional; (3) a 501(c)(3) or 501(c)(4) organization that specifically organizes trips for seriously ill individuals; and

b. A physician must provide, to the employer, as detailed in subsection (D), information related to the physical and/or psychological care the employee would be providing to the seriously ill family member or covered servicemember while traveling. Examples of physical and psychological care include:

- i. Providing psychological support when an individual is receiving hospice or palliative care;
- ii. Providing physical help with feeding, bathing, dressing, transportation and other daily activities;

(D) Certification for travel under the FMLA must include the following:

a. An explanation of the trip and a statement that the employee will be providing physical or psychological care to the seriously ill family member, including attestation that the trip is primarily being organized by a social worker, medical professional, or authorized representative from a hospice or palliative center or not-for-profit organization that specifically organizes trips for seriously

ill individuals, accompanied by the signature and contact information of an authorized person listed under subsection (C)a

b. In addition to the requirements of certification under 29 U.S.C.A. § 2613 and 29 C.F.R. §825.306, a physician must also include the following information in the certification

- i. Location of travel
- ii. Specific examples of physical or psychological care required during travel

Subsection (a) specifically addresses the litigation in *Tellis*. If in-person care were required for protection under the Act, an employee would not be able to argue that his or her travel is protected by the Act simply by providing psychological care and reassurance over the phone to a seriously ill family member. Subsection (b) understandably falls under “to care for” a family member as it relates to ongoing medical treatment of a serious illness. The circuits have all concluded that ongoing medical treatment is an appropriate reason for traveling under the FMLA.²³⁸ However, for clarification reasons, it is still included in the proposed rule.

Subsection (c) takes into account the need for direct, in-person care but then provides additional elements that an employee must meet in order to travel under the FMLA. These requirements are incorporated to reduce employee abuse resulting from a broad interpretation under *Ballard*. For example, an employee’s trip, regardless if it is a vacation, would be protected under the FMLA only if a social worker or organization, like Make-A-Wish, organized the trip on behalf of the employee or seriously ill family member.

²³⁸ The *Ballard* court stated that active treatment is not a prerequisite, but this infers that active treatment would in fact fall under the FMLA. 741 F.3d 838, 842 (7th Cir. 2014). See also *Tellis*, 414 F.3d at 1047 (citing *Marchisheck*, 199 F.3d at 1076). The *Tayag* court did not address the concept of ongoing medical care, though Tayag’s employer had consistently approved FMLA leave for medical care in the past. 632 F.3d 788, 789 (1st Cir. 2011).

However, travel to accompany a relatively healthy minor child, like in *Marchisheck*, would not meet the rule's requirements.

Applying these criteria would have resulted in the same outcome in each of the circuits, though for different reasons than the courts' initial opinions. *Tayag*, *Marchisheck*, and *Tellis* would have denied relief to the employee because the employee did not organize travel through an appropriate channel. However, the Seventh Circuit opinion would have been proper because the Las Vegas trip was organized through a hospice care program.²³⁹ In addition, as long as Ballard followed the proposed certification procedures, she would have provided sufficient care to her mother to fall under the FMLA's protection.²⁴⁰

B. Preventing Employee Abuse

Despite a potential solution to allowing travel under the FMLA, the argument remains that employees will find some way to defraud the system. The Chicago Park District in *Ballard* used this argument throughout its briefs.²⁴¹ If traveling under the FMLA were allowed, employees could potentially take up to twelve weeks of unpaid vacation leave annually by simply bringing a seriously ill family member along on the vacation.²⁴²

To prevent further abuse, employers must implement their own procedures while maintaining compliance with the Act's requirements. Employers should also take advantage of all protections that the Act already provides, such as the need for a completed medical certification form. The current FMLA certification provision does not require an employer to request a certification every time before

²³⁹ *Ballard*, 741 F.3d at 843 (“[A]ny worries about opportunistic leave-taking in this case should be tempered by the fact that this dispute arises out of the hospice and palliative care context.”).

²⁴⁰ *Id.* at 839.

²⁴¹ Brief of Defendant-Appellant at 27, *Ballard v. Chic. Park Dist.*, 741 F.3d 838 (No. 13-1445).

²⁴² *Ballard*, 741 F.3d at 843.

granting FMLA leave to an employee.²⁴³ However, an employee should take advantage of this provision and *always* ask for a certification before granting FMLA leave.

In addition, the DOL must revise the current medical certification form to include required information for the proposed new rule. The form should request information related to who is organizing the trip, including contact information and the reason for the trip (i.e., last wishes of the seriously ill family member). The form should also include a section for a physician to comment on travel plans. This section should require very specific information related to how the employee will be providing care, as well as where the care will take place. This is necessary for two reasons: (1) a description of the employee's responsibilities while traveling with the family member will help the employer determine whether the travel falls under the traveling regulation; and (2) practically speaking, an employer will be able to determine how accessible the employee will be for business purposes should an issue arise and the employer must contact the employee.

Potential employee abuse is inevitable, even with additional regulations. However, the above-proposed rule takes significant guesswork out of whether travel will be protected by the FMLA. It also imposes obstacles, which an employee must overcome before receiving FMLA protection, more obstacles than were previously in place.

C. Furthering Legislative Intent

The FMLA was passed to provide emotional and financial security to employees in an ever-changing demographic environment.²⁴⁴ The Act's legislative history focused on allowing employees unpaid leave to take care of family members who suffer from a "serious health condition" and concentrated on traditional

²⁴³ 29 U.S.C.A. § 2613(a) (2009) ("An employer may require that a request for leave . . . be supported by a certification . . .").

²⁴⁴ See H.R. REP. NO. 103-8, pt. 1, at 26 (1993).

values that make up American life. Families have traditionally cared for their disabled elderly, and marriages are created “in sickness and in health.”²⁴⁵

Though the FMLA is employee-focused, the Act attempts to also account for employer needs. Congressional intent behind the FMLA was to not only reduce stress for employees attempting to balance family and career, but also to improve business and national productivity.²⁴⁶ For example, during congressional hearings, Jeanne Kardos, Director of Employee Benefits for the Southern New England Telephone Co. (SNET), testified that the company’s current leave policies were “considered an asset by management and workers alike.”²⁴⁷ Specifically, the women hired at SNET were highly trained and had a tremendous amount of job experience.²⁴⁸ The company invested a lot into their employees, and therefore, the company believed the FMLA would be cost-effective rather than costly.²⁴⁹ Those highly skilled and trained employees stay at a company that provides flexibility and contribute to business productivity.²⁵⁰

Similarly, the 1989 General Accounting Office (GAO) studied legislation similar to the FMLA and concluded that there would be “no measurable net costs to business from replacing workers or lost productivity.”²⁵¹ In fact, the cost to employers nationally would be less than \$236 million annually, primarily to account for health insurance coverage for employees on leave.²⁵² A 1992 study by the Families and Work Institute also concluded that providing leave is more cost-effective for employers.²⁵³ The study found that accommodating leave averages 20% of the employee’s annual salary as compared to 150%

²⁴⁵ *Id.* at 16, 17.

²⁴⁶ S. REP. NO. 103-3, at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 9.

²⁴⁷ *Id.* at 13.

²⁴⁸ *Id.* at 14.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 42.

²⁵² *Id.*

²⁵³ *Id.* at 17.

of the employee's salary in locating, training, and permanently replacing an employee.²⁵⁴

In reality, employees have continued to reap the benefits of the FMLA while employers are left to carry the burden of increased costs. What the GAO estimated to be a \$236 million annual cost has magnified to over \$21 billion in 2005 according to the Employment Policy Foundation (EPF).²⁵⁵ Even with these numbers, proponents of a broad rule, like the rule applied in *Ballard*, may state that providing leave is more cost-effective for employers than permanently replacing employees who need leave, regardless of whether the leave is for home care or travel care.

This argument may ring true²⁵⁶ but with more employees taking leave, indirect costs outweigh the benefits. The EPF's survey found that FMLA costs primarily consisted of those costs Congress believed would be negligible. The \$21 billion consisted primarily of decreased profits from lost productivity, group health care benefits (which Congress originally believed would be the only employer expense), and costs associated with employee replacement, including additional wages of those working additional hours to replace employees on

²⁵⁴ *Id.*

²⁵⁵ D. Michael Henthorne, *FMLA May Cost Employers \$21 Billion*, LUCAS COLLEGE & GRADUATE SCH. OF BUSINESS, http://www.cob.sjsu.edu/malos_s/FMLA%20may%20cost%20employers%20Billion%207-29-05.htm (last visited Apr. 30, 2015). Even more concerning are the various studies demonstrating the negligible or neutral effects that the Act has had on businesses. For example, in 2000, the DOL reported that a majority of businesses found the FMLA had no noticeable effect on their establishments' productivity, profitability, and growth. *Administering Family and Medical Leave by Covered Establishments*, U.S. DEP'T OF LABOR (2000), <http://www.dol.gov/whd/fmla/chapter6.htm>.

²⁵⁶ "Research suggests that direct replacement costs can reach as high as 50%-60% of an employee's annual salary, with total costs associated with turnover ranging from 90% to 200% of annual salary." David G. Allen, *Retaining Talent*, SHRM FOUND. (2008), *available at* <http://www.shrm.org/about/foundation/research/documents/retaining%20talent-%20final.pdf>.

leave.²⁵⁷ The \$21 billion did not include “‘the added administrative burden employers face in tracking and complying with FMLA leave’ or ‘the secondary economic impact of declining profitability on economic activity.’”²⁵⁸

In addition, under the current circuit split, lack of clear guidance on the permissibility of traveling “to care for” a family member under the FMLA encourages employees to explore limits. This requires employers—as a means of minimizing their risk exposure for noncompliance—to adopt policies and processes that in some instances exceed that which Congress had in mind when it passed the FMLA. Regulatory uncertainty, as well as broad interpretations of the Act, provide occasions for employee behavior that may add substantial indirect costs. These costs include worker resentment of coworkers taking unfair, but legal, leave; increased absenteeism; increased administrative and personnel costs; scheduling difficulties; costs of “filling” in for employees on leave; training potential substitutes for employees on leave; and overtime pay.²⁵⁹ Further, with the average defense of an FMLA lawsuit estimated at around \$78,000, and successful suits awarding \$87,500 to \$450,000 in damages,²⁶⁰ a clearer rule for approving FMLA leave for travel would reduce unnecessary litigation expenses for employers. Providing a rule to guide employers and employees in submitting and approving travel requests may not return the FMLA to its dual intent—improving employee work-life balance while increasing employer productivity—but it will prevent further increased costs to employers.

Should an elderly dependent adult wish to take a vacation but require the assistance of his adult daughter, an employee should be

²⁵⁷ Henthorne, *supra* note 255.

²⁵⁸ *Id.*

²⁵⁹ Larry F. Darby & Joseph P. Fuhr, *Benefits and Costs of the Family and Medical Leave Act of 1993: A Consumer Welfare Perspective*, DARBY ASSOC. (2007), available at http://www.protectfamilyleave.org/research/darby_fmmla.pdf.

²⁶⁰ Allan Compagnon, *Presagia’s FMLA Guide: How Well do You Understand the Intricacies of Compliance?*, PRESAGIA (2011), available at <http://www.presagia.com/wp-content/uploads/2012/01/Whitepaper-Presagia-FMLA-Guide.pdf>.

able to attend to her father's needs. Caregiving responsibilities are constant, regardless if an employee is at home or thousands of miles away from home. An employee cannot carry out these responsibilities without an employer's understanding and time off work. However, if the father wishes to travel once per month, then requests for his daughter to accompany him places an inevitable strain on the daughter's employer. Regardless of the costs to employers, a consistent theme within the Act and its history is a need for emotional and financial support of both the employee and his family. The proposed rule fulfills this support role while enhancing employer protections, thereby reducing costs. As long as the employee meets the rule requirements, she is still able to request FMLA leave to accompany her father on his trip.

CONCLUSION

Under the FMLA, further regulations must be provided defining "to care for" specifically related to traveling with a seriously ill family member. An explicit bright line rule, similar to the one proposed, would reduce ambiguities for employers and employees, prevent broad interpretations of the Act akin to the Seventh Circuit's decision in *Ballard v. Chicago Park District*, and reconcile the FMLA with its past legislative intent.