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VICTORELLI v. SHADYSIDE HOSPITAL—
 CHRONIC SERIOUS HEALTH CONDITIONS COVERED
 BY THE FAMILY AND MEDICAL LEAVE ACT OF 1993
 CREATE ADMINISTRATIVE HEADACHES FOR EMPLOYERS

I. INTRODUCTION

In 1993, the United States Congress passed the Family and Medical Leave Act (FMLA),¹ creating a national policy supporting families in their attempt to balance the competing demands of the workplace and the home.² Throughout the past twenty-five years, these demands have intensified as the number of women in the workplace has increased, single-parent families has grown and a growing number of households contain two working parents.³ Congress, therefore, faced the dilemma of recog-

1. 29 U.S.C. §§ 2601-2654 (1994).

2. See Allan N. Taffet, *Family Medical Leave Act Five Years Later*, N.Y.L.J., Nov. 4, 1997, at 1 (outlining circumstances surrounding enactment of Family and Medical Leave Act (FMLA) legislation). The FMLA was signed into law by President Clinton on February 5, 1993. See 29 U.S.C. § 2601. The FMLA took effect for most employees on February 5, 1993. See Jeffrey S. Klein & Nicholas J. Pappas, *Analysis of New Family Leave Regulations*, N.Y.L.J., April 3, 1995, at 3 (discussing background of FMLA's enactment and when FMLA actually took effect for America's workforce).

Prior to the FMLA's enactment, the United States was one of only a few countries in the world that had not enacted a law setting a national standard for family leave. See SENATE COMM. ON LABOR AND HUMAN RELATIONS, FAMILY AND MEDICAL LEAVE ACT OF 1993, S. REP. NO. 103-3, at 76 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3 (discussing family leave laws in other countries). Furthermore, countries such as France, Great Britain and Italy had laws requiring maternity benefits dating back to before World War I. See *id.* (comparing United States' policies to those of other industrialized countries). These major industrialized countries maintain policies with an average minimum paid leave of 12 to 14 weeks with many also providing employees the right to take unpaid, job-protected leave for at least one year. See *id.* (stating further that "the European Community Commission issued a directive requiring that all member countries provide a standard minimum of 14 weeks paid maternity leave"). Congress has emphasized that the enactment of the FMLA will close the gap between foreign leave statutes and the policies in the United States. See *id.* ("Enactment . . . will begin to close the gap between the leave statutes and policies in these countries and the United States.").

3. See *Executive Summary* (visited Jan. 27, 1998) <<http://www.dol.gov/dol/esa/public/regs/compliance/whd/fmla/summary.htm>> [hereinafter *Executive Summary*] (stating that FMLA was passed in reaction to demands of workplace and home based on "dramatic social and economic changes affecting businesses, employees and families"). According to the Department of Labor (DOL), the demands on those in the workforce have intensified over the last 25 years as dramatic social and economic changes have occurred. See *id.* (commenting that "increasing competition, technological innovation and instability" have contributed to demands for national leave policies); see also S. REP. NO. 103-3, at 67 (1993) ("The United States has experienced a demographic revolution in the composition of the workforce, with profound consequences for the lives of working men and women and their families."). A General Accounting Office (GAO) report found that over the past 40 years, the female workforce has increased by approximately one million

nizing and balancing the legitimate workplace needs of employers by establishing a minimum standard for unpaid employee leave compelled by medical exigencies.⁴

workers each year. *See id.* (finding that “[b]y 1990, nearly 57 million women were working or looking for work — more than a 200 percent increase since 1950”). Further, the Bureau of Labor Statistics has predicted that by the year 2005, the female labor force participation rate will reach 66.1%. *See id.* (forecasting trends in work force participation). The Senate also cited to a National Council on Aging estimate that 20 to 25% of American workers have some care-giving responsibilities for an older relative. *See id.* (“Two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women, the most common caregiver being a child or spouse.”).

Previously, employees had access to family and medical leave only through collective bargaining agreements or state leave statutes. *See Executive Summary, supra* (describing circumstances surrounding enactment of FMLA). These state statutes, enacted in 34 states, Puerto Rico and Washington D.C., expanded unpaid leave for some employees, particularly in the area of maternity leave, but very few were as comprehensive as the FMLA. *See id.* (discussing state statutes and observing that “[t]he amount of job-guaranteed leave that a worker could take varied widely in state law — from 16 hours to 1 year. Eligibility requirements also varied, and many of the laws applied only to state employees”). Today, the FMLA does not displace any state laws, but merely creates minimum requirements for family and medical leave; state laws may authorize greater benefits and protections to employees. *See* 29 U.S.C. § 2651(b) (“Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.”). Further, the FMLA encourages employers, as well as states, to enact more generous leave policies than provided for in the FMLA. *See id.* § 2653 (“Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.”).

4. *See* 29 U.S.C. § 2601(b)(1) (stating that one purpose of FMLA is “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 interest in preserving family integrity”); *see also* *Murray v. Red Kap Indus., Inc.*, 124 F.3d 695, 697 (5th Cir. 1997) (opining that FMLA seeks to balance needs of sick employees against workplace demands); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1024 (7th Cir. 1997) (“The FMLA was enacted to help working men and women balance the conflicting demands of work and personal life. It does so by recognizing that there will be times in a person’s life when that person is incapable of performing her work duties for medical reasons.”). Title III of the FMLA established a temporary bipartisan Commission on Leave (“Commission”) to conduct a study of existing and proposed family and medical leave policies. *See* 29 U.S.C. § 2631 (“There is established a commission to be known as the Commission on Leave . . .”). The Commission met for the first time on November 10, 1993, and delivered its final report to Congress on May 1, 1996. *See id.* This Commission was composed of 12 voting members and 4 “ex-officio” members, including 3 members chosen by then-Speaker of the House of Representatives Tom Foley (D-Wash.), then-House Minority Leader Robert Michel (R-Ill.), then-Senate Majority Leader George Mitchell (D-Maine) and then-Senate Minority Leader Robert Dole (R-Kan.). *See id.* § 2633(a)(1)(C) (discussing appointment of Commission). The four “ex-officio” members included the secretaries of the United States Departments of Labor, Health and Human Services and Commerce and the administrator of the Small Business Administration. *See id.* § 2633(a)(2) (stating that these members “serve on Commission as non-voting ex officio members”). The Commission’s power in-

Today, employers are struggling to administer this enormously complicated law.⁵ The concept behind the FMLA seemed simple enough—workers are guaranteed timeoff from their jobs for medical reasons, to take care of an ill child, spouse or parent, or to give birth or adopt a child

cluded holding hearings, taking testimony and receiving all evidence it considered appropriate. *See id.* § 2635 (listing powers invested in Commission).

The Commission's report to Congress concluded that two-thirds of the U.S. workforce worked for employers covered by the FMLA. *See Executive Summary, supra* note 3 (discussing Commission's "major research findings" and its examination of potential costs, benefits and impact on workplace productivity). Although the FMLA covers only 11% of the private sector worksites, that 11% employs over 59% of the country's private sector workers. *See id.* (finding that industries with largest worksites, such as manufacturing, have large number of FMLA-eligible employees working in small percentage of worksites). Further, the Commission found that a majority of covered employers knew of the FMLA's applicability, but few employees had knowledge of the FMLA. *See id.* (stating that 86.5% of employers knew of FMLA and only 58.2% of employees knew of FMLA).

5. *See Taffet, supra* note 2, at 1 (finding that steady increase in legislation is not surprising given broad FMLA coverage). Expansive FMLA coverage has prompted employer testimony in front of Congress regarding the FMLA's difficult administration. *See Testimony of Lynn Outwater Before the Subcomm. on Oversight and Investigations of the Comm. on Education and the Workforce, 107th Cong. (1997), available in 1997 WL 11233541* (testifying on behalf of The Society for Human Resource Management ("Society") and FMLA Corrections Coalition). In Ms. Outwater's testimony, she stated that "[e]ven though I have spent countless hours training experienced human resources executives, managers and line supervisors on the intricacies of the law, I have found that unintentional mistakes continue to be made in administering it because it is so complicated." *Id.* Further, in a survey conducted by the Society, 6 out of 10 employers have experienced significant costs because of the FMLA with relatively little benefits. *See id.* (stating that "approximately half (51%) of the survey respondents said their organizations had not experienced any benefits from complying with the FMLA"); *see also Family Leave: Employer Panel Seeks Streamlining, Modifications to FMLA and its Rules, PENSIONS & BENEFITS DAILY (BNA), June 13, 1997, at D7* [hereinafter *Family Leave*] (describing testimony regarding problems complying with and implementing FMLA). *But see Executive Summary, supra* note 3 ("Most covered employers find it relatively easy to administer the FMLA A significant majority also find other administrative responsibilities . . . to be no trouble.").

The frustration felt by employers in dealing with the FMLA has lead one commentator to describe the FMLA as a "Frustrating Maze of Legal Aggravation." *See Julie M. Buchanan, Violations List Helps With Family Leave Compliance, MILWAUKEE SENTINEL, Jan. 12, 1998, at 12* (discussing difficult administration of FMLA). Further, the FMLA has been compared to the Internal Revenue Code because of the FMLA's complicated structure and the thousands of pages of regulations, agency and court decisions and DOL opinion letters construing the FMLA. *See id.* ("Compliance [with the FMLA] has been compared to walking through a minefield."). The DOL responded to this confusion by creating a toll-free number explaining the law to those who had questions regarding its provisions. *See New Labor Department Service to Help with FMLA Rights, U.S. NEWswire, Jan. 20, 1997, at 1, available in 1997 WL 5710400* [hereinafter *Labor Department Service*] (discussing new service available to Americans to help them determine their FMLA rights). Callers will receive a brief explanation of the FMLA and may elect to get more detailed information by mail. *See id.* ("This toll-free number [1-800-959-FMLA] will provide a valuable service for workers who need information when the demands of work collide with the needs of family.").

without jeopardizing their jobs.⁶ Interpretative issues abound and the greatest challenge surrounding this leave has become determining the threshold requirement for qualifying leave—the existence of a “serious health condition” sufficient to trigger FMLA protection.⁷ Chronic serious health conditions have particularly frustrated employers who attempt to manage intermittent leave and somewhat limited notice requirements typically associated with this type of leave.⁸

Employees have routinely defeated employers’ motions for summary judgment by creating genuine issues of fact concerning the seriousness of their conditions.⁹ Primarily, this success directly results from the expan-

6. See 29 U.S.C. § 2612(a)(1) (setting forth employees’ entitlement to leave). The FMLA provides that:

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 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.

Id.

7. See Taffet, *supra* note 2 (“Over the course of the last few years, courts have been thrust into the role of medical diagnostician in dozens of cases, examining the gravity of medical maladies . . . even though both Congress and the DOL have sought to define serious health condition.”). Employers argue that the definition of serious health condition is too expansive and has created increased absenteeism and loss of control of internal leave policies. See *Family Leave, supra* note 5, at D7 (summarizing testimony of Thomas Burns, Corporate Director of Benefits and Compensation for Nynex, in front of Congress that “basically any illness is now covered by the law”). These employers urge Congress to narrow the definition of serious health condition and require employees to choose between paid leave or unpaid FMLA leave. See *id.* (describing “technical changes” proposed by employers).

8. See *Chronic Serious Health Conditions Under the FMLA*, THE FAMILY AND MEDICAL LEAVE HANDBOOK, at 7, May 1997 (“While various aspects of the Family and Medical Leave Act . . . routinely pose administrative challenges for employers, many of these complications arise together when employees advise that they are experiencing a chronic serious health condition.”); see also *Family Leave, supra* note 5, at D7 (reiterating urging of panel of employers to streamline FMLA and alleviate administrative difficulties for employers); *Executive Summary, supra* note 3 (“Unlike other administrative activities, management of intermittent leave presents an administrative difficulty for a significant minority of worksites (39.2%), but it represents a small proportion of leave-taking overall (11.5%).”). For a discussion of chronic serious health conditions under the FMLA, see *infra* notes 47-59 and accompanying text.

9. See, e.g., *Rhoads v. Federal Deposit Ins. Corp.*, 956 F. Supp. 1239, 1254 (D. Md. 1997) (determining that employee’s chronic condition, coupled with notice employer had of employee’s condition, allowed plaintiff’s claim to proceed and not be dismissed on motion for summary judgment); *McClain v. Southwest Steel Co., Inc.*, 940 F. Supp. 295, 300 (N.D. Okla. 1996) (denying employer’s motion for

sive language, hundreds of pages of legislative history, numerous regulations and opinion letters that guide, and often complicate, the FMLA's application.¹⁰ Although Congress enacted the FMLA nearly five years ago, employers continue to grapple with its application and struggle with its administration.¹¹

The United States Court of Appeals for the Third Circuit, in a case of first impression, addressed FMLA-qualifying chronic serious health conditions in *Victorelli v. Shadyside Hospital*.¹² The court held that where an employee had been treated several times for a peptic ulcer, before and after her discharge, there was a material question of fact as to whether the peptic ulcer was a serious health condition invoking FMLA-qualifying leave.¹³ The Third Circuit, following the path forged by other circuits, precluded the employer's motion for summary judgment based on the FMLA's broad terminology and regulations.¹⁴

summary judgment where genuine issue of material fact existed as to whether plaintiff was entitled to FMLA leave and provided adequate notice of that leave); *Hendry v. GTE N. Inc.*, 896 F. Supp. 816, 827-28 (N.D. Ind. 1995) (precluding summary judgment because genuine issues of fact existed about whether migraine headaches of employee gave rise to "serious health condition" where employee was discharged for absenteeism and it was unclear whether her absences were medically necessary).

10. See Buchanan, *supra* note 5, at 12 ("The federal leave law is anything but simple. There are literally thousands of pages of court and agency decisions, fine print regulations, interpretive guidance and Labor Department opinion letters."); see also *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1434-36 (11th Cir. 1997) (citing several FMLA regulations and provisions of FMLA to determine whether plaintiff satisfied FMLA notice requirement); *Thorson v. Gemini Inc.*, 123 F.3d 1140, 1141-42 (8th Cir. 1997) (reversing summary judgment based on Dec. 12, 1996 DOL Opinion Letter stating that minor ailments could rise to serious health condition in certain circumstances).

11. See Taffet, *supra* note 2, at 1 ("[I]n 1997 alone, federal courts have issued almost 100 decisions stemming from complaints containing FMLA claims."). The DOL reports a steady increase in complaints alleging employer violations of the FMLA, with a notable increase in complaints from 1995 to 1996. See *id.* Considering the large number of employees covered by the FMLA, the number of claims is not surprising. See *id.* (discussing large number of employees having FMLA coverage and its effect on litigation). For a discussion of "eligible employees" under the FMLA, see *infra* note 24 and accompanying text.

12. 128 F.3d 184 (3d Cir. 1997).

13. See *id.* at 187 (holding that under FMLA regulations "there is a material issue as to whether Victorelli suffered from a serious health condition"). For a discussion of the Third Circuit's analysis in *Victorelli*, see *infra* notes 76-97 and accompanying text.

14. See *Victorelli*, 128 F.3d at 190 (concluding that there was sufficient evidence that plaintiff could meet regulatory standard for leave and that factfinder may reasonably find that plaintiff suffers from serious health condition); see also *Price v. City of Fort Wayne*, 117 F.3d 1022, 1027 (7th Cir. 1997) (finding that multiple diagnoses and examinations for conditions only temporarily related to each other created adequate grounds to overturn employer's award of summary judgment and order determination of whether plaintiff suffered from serious health condition); *Rhoads*, 956 F. Supp. at 1254 (holding that episodic periods of incapacity involving inability to breathe freely because of asthma and concurrent migraine headaches were sufficient to preclude summary judgment); *McClain*, 940 F. Supp.

This Casebrief considers the Third Circuit's interpretation of the FMLA and its provisions in *Victorelli*.¹⁵ First, Part II addresses the FMLA, its enactment, its accompanying Department of Labor (DOL) regulations and federal courts' interpretations of the FMLA.¹⁶ Then, Part III tracks the Third Circuit's interpretation of the FMLA's provisions and discusses the Third Circuit's advice to employers.¹⁷ Finally, Part IV discusses the implications of the Third Circuit's decision on employers administering the FMLA's provisions and suggests various ways in which employers may ease the FMLA's application.¹⁸

II. OVERVIEW OF THE FAMILY AND MEDICAL LEAVE ACT OF 1993

After much political lobbying, President Clinton signed into law the final version of the FMLA on February 5, 1993.¹⁹ Congress based the

at 298-300 (reversing grant of summary judgment where plaintiff suffered from chronic nausea, diarrhea, vomiting, severe headaches, dizziness and light-headedness, which might constitute serious health condition); *Hendry*, 896 F. Supp. at 827-28 (finding that plaintiff's migraine headaches created material issue of fact as to whether she suffered from serious health condition).

15. For a discussion of the Third Circuit's decision in *Victorelli*, see *infra* notes 76-97 and accompanying text.

16. For a discussion of the FMLA and its accompanying regulations, see *infra* notes 19-64 and accompanying text. For a discussion of how federal courts have interpreted the FMLA, see *infra* notes 65-75 and accompanying text.

17. For a discussion of the Third Circuit's analysis of the FMLA and what constitutes a serious health condition under the FMLA, see *infra* notes 76-97 and accompanying text. For a discussion of the Third Circuit's advice to employers, see *infra* notes 98-106 and accompanying text.

18. For a discussion of the FMLA and the possible effects of the *Victorelli* decision on employers, see *infra* notes 107-114 and accompanying text.

19. See Taffet, *supra* note 2, at 1 n.1 (discussing background of FMLA). President Clinton wasted no time in signing the FMLA into law — signing the bill only one day after it was passed by both the House and the Senate. See 139 CONG. REC. H445-47 (daily ed. Feb. 3, 1993) (statement of Rep. Foley) (declaring congressional approval of FMLA); 139 CONG. REC. S1349-59 (daily ed. Feb. 4, 1993) (statement of Rep. Kennedy) (same). The history of the FMLA dates back to the 102d Congress, where a bill creating family and medical leave was introduced in the United States House of Representatives by Representative William Clay of Missouri, and a companion bill was introduced in the United States Senate by Senator Christopher Dodd of Connecticut. See S. REP. NO. 103-3, at 21 (1993) (discussing history of FMLA). President Bush, however, vetoed all family leave acts presented to him and despite a Senate vote to override the veto, the House failed to vote the same. See 136 CONG. REC. H4451-52 (daily ed. July 10, 1990) (reading statement of President Bush, which described failure of prior family leave proposals); 138 CONG. REC. S14668-69 (daily ed. Sept. 22, 1992) (same). President Bush's concerns that mandating leave policies for American business would create inflexibility and stifle the country's ability to compete in the international marketplace are virtually identical to those expressed in the minority views of both the Senate and House Reports. See S. REP. NO. 103-3, at 49 (describing minority opposition to FMLA). A new administration under President Clinton supported a similar bill and the FMLA was placed high on the presidential agenda. See *id.* After an unsuccessful attempt to introduce the legislation, Senator Dodd finally introduced what would become the FMLA on January 21, 1993. See *id.* (discussing legislative action in 103d Congress). This bill was referred to the Committee on Labor and Human

FMLA on analogous principles such as those contained in the child labor laws, the minimum wage laws, Social Security and other labor laws that provide minimum standards for employment.²⁰ All of these laws established minimum standards to provide leave for employees in certain family situations and protect these employees against losing their jobs as a result of demands outside of the workplace.²¹

Essentially, an employer violates the FMLA if the employer interferes with, restrains or denies the exercise of, or the attempt to exercise, any right provided to an employee under the law.²² The FMLA's terms re-

Resources, and hearings were conducted by the Subcommittee on Children, Family, Drugs and Alcoholism on January 22, 1993. *See id.* Four days later, the Committee on Labor and Human Resources ordered the bill favorably reported without amendment. *See id.*

20. *See S. REP. NO. 103-3*, at 2 ("The FMLA was drafted with [the principles of the labor standards] in mind and fits squarely within the tradition of the labor standards laws that have preceded it In drawing on this tradition, the FMLA proposes a minimum labor standard to address significant new developments in today's workplace.") Congress reiterated in the FMLA's legislative history its attempt to enact each labor standard law with the needs of the employers in mind. *See id.* ("[E]ach law was enacted with the needs of employers in mind. Care was taken to establish a standard that employers could meet."). Further, Congress enacted the civil enforcement provisions of the FMLA to mirror those of the Fair Labor Standards Act (FLSA), 28 U.S.C. §§ 201-219 (1994), which has been in effect since 1938. *See id.* ("[T]he FMLA creates no new agency or enforcement procedures, but instead relies on the time-tested FLSA procedures already established by the DOL.").

21. *See 29 U.S.C. § 2601(b)* (1994) (codifying purposes of FMLA found in Senate and House Reports accompanying FMLA). According to Congress, the purposes of the FMLA are:

- (1) 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;
- (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;
- (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;
- (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
- (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

Id.

22. *See id.* § 2615(a)(1) (describing prohibited acts under FMLA). The FMLA also includes a retaliation provision, making it unlawful to discriminate against an employee for opposing an employer's action that violates the FMLA. *See id.* § 2615(a)(2) (setting forth discrimination provision). Under the FMLA, either employees or the Secretary of Labor may bring civil actions for damages or injunctive relief against employers. *See id.* § 2617(a)-(b) (describing employer liability for violation of FMLA). FMLA penalties are extensive, and in suits brought by employees they may include lost wages, salary or employment benefits, liquidated dam-

quire private employers with fifty or more employees to provide up to twelve weeks per year of unpaid family and medical leave to eligible employees.²³ Not all employees, however, are entitled to FMLA leave; to become eligible, an employee must satisfy the law's minimum length-of-service and hours-of-work requirements.²⁴ With a few limited exceptions,

ages, prejudice interest and reasonable attorney's fees and costs. *See id.* § 2617(a)(1)-(2) (describing rights of employees who bring civil actions against employers). An employee's right to bring an action, however, terminates once the DOL files a suit for damages. *See id.* § 2617(a)(4)(A) (discussing limitations on employee's right to file suit). As a general rule, class actions may not be filed under the FMLA; however, an action may be brought by any one or more employees on behalf of themselves and other employees who are "similarly situated." *See id.* § 2617(a)(2)(B) (discussing "right of action" to recover damages or equitable relief and stating they may be brought on behalf of "the employees and other employees similarly situated.").

23. *See id.* § 2612 (addressing leave requirements). The FMLA defines "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." *Id.* § 2611(4)(A)(i). This definition of employer includes partnerships, sole proprietorships and corporations. *See id.* § 2611(4)(B) (stating that "a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce"). The FMLA contains a separate provision for civil service employees, employees of local educational agencies and congressional employees. *See id.* § 2618 (describing leave requirements for civil service employees). For a discussion of when FMLA-eligible employees may take protected leave, see *infra* note 26 and accompanying text.

24. *See* 29 U.S.C. § 2611(2) (defining "eligible employee" as any employee who has been employed for at least 12 months and who has provided at least 1250 hours of service during previous 12-month period). A determination of whether an employee has worked for his or her employer for at least 1250 hours in the past 12 months and has been employed for a total of 12 months must be made as of the date that leave begins. *See* 29 C.F.R. § 825.110(d) (1998) (stating that if employee notifies employer of need for FMLA leave before these eligibility requirements are met, employer must "confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met"). The determination of the hours-of-service requirement is based on the same legal standards established under the FLSA. *See* 29 U.S.C. § 2611(2)(C) ("For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 [of the Fair Labor Standards Act] shall apply."). Essentially, any employee who has worked for his or her employer for at least 12 months will be presumed to have worked at least 1250 hours within those 12 months, unless the employer "clearly demonstrates" that the employee did not meet the eligibility requirements. *See Rich v. Delta Air Lines*, 921 F. Supp. 767, 773 (N.D. Ga. 1996) (finding that inaccurate records of employee hours maintained by employer put burden of proving that employee worked less than 1250 hours on employer). This does not, however, relieve plaintiffs from alleging in their pleadings that they worked 1250 hours or more in the year prior to the challenged leave. *See Blidy v. Examination Management Servs.*, No. 96-C-3553, 1996 WL 568786, at *3 (N.D. Ill. Oct. 2, 1996) (noting that to be eligible employee under FMLA, employee must have worked at least 1250 hours in previous 12-month period). Employees should also be aware that the term "hours worked" does not include time spent on paid or unpaid leave, so these hours would not count toward satisfying the 1250-hour eligibility threshold. *See Robbins*

the FMLA requires employers to restore employees returning from FMLA-qualifying leave to similar positions upon return to work.²⁵

The FMLA entitles eligible employees to twelve workweeks of unpaid family medical leave per year for: (1) the birth of the employee's son or daughter and care of the infant; (2) the placement of a son or daughter with the employee for adoption or foster care; (3) the care of a spouse, son, daughter or parent of the employee if the spouse, son, daughter or parent has a serious health condition; or (4) the employee's own serious health condition that makes the employee unable to perform the functions of his or her job.²⁶ This FMLA protection applies equally to male and female employees.²⁷ Thus, both a mother and a father may take leave because of the birth or serious health condition of a child.²⁸

v. BNA, 896 F. Supp. 18, 21 (D.D.C. 1995) (explaining that employee only receives credit towards FMLA "hours of service" requirement if employee actually works during hours in question).

25. See 29 U.S.C. § 2614(a)(1)(B) (stating that employees taking FMLA leave are intended "to be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment"). According to the FMLA regulations, however, "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." 29 C.F.R. § 825.216(a). One federal court examined the reinstatement issue and concluded that the FMLA does not require employers to assure returning employees job security that they would not have been entitled to prior to taking leave. See *Lempres v. CBS Inc.*, 916 F. Supp. 15, 18-19 (D.D.C. 1996) (examining case where employee demanded permanent position upon return from leave even though she had been employed only under contract for determinable length prior to her leave). Further, courts have held that the right to reinstatement can lapse. See *Soodman v. Wildman, Harrold, Allen & Dixon*, No. 95-C-3834, 1997 U.S. Dist. LEXIS 1495, at *27 (N.D. Ill. Feb. 10, 1997) (concluding that if employee is unable to return to his or her position after taking 12 weeks of FMLA-qualifying leave, employee's FMLA protections expire); *Pert v. Value RX*, No. 96-CV-73153-DT, 1996 U.S. Dist. LEXIS 17748, at *7-*8 (E.D. Mich. Oct. 9, 1996) (holding that employees who accept leave beyond 12 weeks required by FMLA give up their right to be reinstated in their previous positions). In these situations, the right to reinstatement never arises because the employee is not eligible to return under the terms of the FMLA. See *Soodman*, 1997 U.S. Dist. LEXIS 1495, at *27 (explaining that employee who cannot perform essential functions of former position due to continued serious health condition does not have right to be placed in other positions).

26. See 29 U.S.C. § 2612 (describing leave requirements). The leave mandated by the FMLA is unpaid, although the "employee may elect, or an employer may require" that paid leave, such as vacation or personal leave, is substituted as FMLA leave. See *id.* §§ 2612(c), 2612(d)(2)(A)-(B) (describing leave substitution).

27. See S. REP. NO. 103-3, at 24 ("The right to leave applies equally to male and female employees.").

28. See 29 U.S.C. § 2612(a)(1) (stating that leave requirements apply to all eligible employees). If a husband and wife are employed by the same employer, however, and both are entitled to leave because of the birth or placement of a child or to care for a sick parent, the aggregate family leave for both is limited to 12 weeks. See S. REP. NO. 103-3, at 92 (detailing limitations on employee leave). Under this provision, the entitlement to leave expires at the end of the 12-month period commencing on the date of the birth or placement of the employee's child. See 29 U.S.C. § 2612(a)(2) (describing expiration of entitlement to leave).

The FMLA requires that an employee who foresees the need for leave notify his or her employer thirty days prior to the commencement of his or her leave.²⁹ Leave necessitated by a family member's or the employee's own serious health condition, however, may be taken on an intermittent or reduced schedule basis if "medically necessary."³⁰ Generally, if the need for leave is unforeseeable, the employee must provide "such notice as is practicable."³¹ In addition to these procedural requirements, the

29. See 29 U.S.C. § 2612(e)(1) (discussing requirement of notice for foreseeable leave). Examples of employees who can foresee the need for leave are those anticipating the birth or adoption of a child. See *id.* Employees are also required to notify their employers of leave for planned medical treatment. See *id.* § 2612(e)(2) (outlining duties of employees to employers). Not only must employees give notice under the FMLA, employers must also notify employees of their FMLA rights and obligations. See 29 C.F.R. § 825.300(a) (1998) (discussing mandatory requirement on employers to inform employees of their FMLA rights and obligations). This notice includes posting signs in conspicuous places and providing notice of the FMLA's provisions and information concerning the procedures for filing a complaint. See *id.* (requiring employers to notify employees of their FMLA rights regardless of whether employer has eligible employees). If an employer fails to satisfy this notice requirement, he or she may be assessed a fine and, more importantly, cannot take any adverse action against any employee for failing to provide the advance notice needed for FMLA leave. See *id.* § 825.300(b) (discussing ramifications to employers for failing to satisfy posting requirement); see also *id.* § 825.300(c) (requiring that employers having significant portion of non-English speaking employees provide notice in employees' literate language).

30. See 29 U.S.C. § 2612(b)(1) (setting forth requirements for leave taken intermittently or on reduced leave schedule). For the birth or adoption of a son or daughter, employees may take leave on an intermittent or reduced leave schedule only if both the employer and employee agree to this arrangement. See *id.* (describing parameters of intermittent leave and specifically excluding leave taken for birth or adoption of children from being taken on intermittent basis without both employer and employee consent). This intermittent leave may be taken in increments of an hour to a full day. See *id.* ("The taking of leave intermittently or on a reduced leave schedule . . . shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) of this section beyond the amount of leave actually taken.").

31. See *id.* § 2612(e)(2)(B) (excepting typical notice requirements "if the date of the treatment requires leave to begin in less than 30 days" and in this case "the employee shall provide such notice as is practicable"). The regulations provide, however, that an "employee need not expressly assert rights under the FMLA or even mention the FMLA" in his or her request for leave. 29 C.F.R. § 825.302(c). This places a heavy burden on the employer to determine what type of leave the employee is requesting and for what types of leave the employee is actually eligible (e.g., FMLA leave, paid sick leave under the employer's plan or both). See *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1435 (11th Cir. 1997) (stating that once notice is given, it is employer's duty to make further inquiry and determine whether leave is qualified for FMLA protection); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997) (stating that "FMLA does not require that an employee give notice of a desire to invoke the FMLA," but that "notice is given when the employee requests leave for a covered reason" and after this notice is given "the employer can inquire further to determine if the FMLA applies"); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995) (finding that eligible employee may implicitly invoke FMLA by notifying his or her employer of need for leave created by serious health condition).

most critical determination in evaluating FMLA-protected leave is the existence of a serious health condition, as defined under the FMLA.³²

A. FMLA-Qualifying "Serious Health Condition"

Under the fourth FMLA-qualifying condition, employees may take FMLA-protected leave for their own serious health condition.³³ The test for entitlement to this sort of leave is two-fold: first, the employee must be unable to perform the essential functions of his or her position, and second, the inability to perform those functions must be the result of a serious health condition.³⁴ A serious health condition is defined in the FMLA as "an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care in a hospital, hospice, or residential medical care facility; or . . . continuing treatment by a health care provider."³⁵ The terms of this definition are further clarified in the legislative history, the interpretive regulations and DOL letter rulings, which accompany the FMLA.

1. Congress' Definition of Serious Health Condition

In the FMLA's legislative history, Congress identified a varied list of ailments that, although not exhaustive, was intended to illustrate medical conditions warranting FMLA protection.³⁶ Through this list, Congress

32. See 29 C.F.R. § 825.114 (explaining which serious health conditions entitle employees to FMLA leave).

33. See 29 U.S.C. § 2612(a)(1)(D) (defining employee's entitlement to leave because of serious health condition).

34. See *id.*; H.R. REP. NO. 103-8 (1993) ("The test . . . is two-fold: [f]irst, is the employee 'unable to perform the functions of such employee's position?' And second, is the inability to perform those functions due to a serious health condition?"); see also *Hodgens v. General Dynamics Corp.*, 963 F. Supp. 102, 106 (D.R.I. 1997) (concluding that plaintiff was unable to show that he suffered from serious health condition because his condition did not prevent him from performing his job); *Gudenkauf v. Stauffer Comm., Inc.*, 922 F. Supp. 465, 475-76 (D. Kan. 1996) (finding where plaintiff failed to present medical evidence that condition required her to be out of work and medical evidence was contrary to such finding, that plaintiff failed, as matter of law, to prove she suffered from serious health condition); *Brannon v. OshKosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1037 (M.D. Tenn. 1995) (holding that plaintiff's condition did not rise to level of serious health condition where plaintiff's doctor never advised plaintiff to remain off from work, but simply stated that it was reasonable for plaintiff to do so).

35. 29 U.S.C. § 2611(11)(A)-(B). The FMLA regulations adopt the definitions of "physical or mental disability" that are incorporated in the Equal Employment Opportunity Commission's (EEOC) regulations that apply to the American's with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994). See RICHARD L. MARCUS, *FAMILY AND MEDICAL LEAVE: POLICIES AND PROCEDURES* 50 (1994) (discussing ADA definition of "physical or mental disability").

36. See S. REP. NO. 103-3, at 29 (1993) (listing conditions or illnesses that are considered serious health conditions and will entitle employees to FMLA leave). These illness and conditions include:

[H]eart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgi-

sought to differentiate ordinary and sporadic illnesses and conditions from more serious conditions that would qualify for FMLA protection.³⁷ Essentially, Congress protected illnesses and conditions requiring an absence from work on a recurring basis or for more than a few days for treatment or recovery.³⁸

In addition to the legislative history's definition, serious health condition is also defined in the FMLA's accompanying regulations, promulgated by the DOL.³⁹ Interim regulations were published in June 1993 and after reviewing public comments, the DOL issued final regulations, which took effect on April 6, 1995.⁴⁰ Today, these regulations are the dominant source of interpretative guidance for employers and courts administering the FMLA.⁴¹

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

Id. Congress found that all of these conditions meet a general test of requiring the employee to be absent from work "on a recurring basis or for more than a few days for treatment or recovery." *Id.*

37. *See id.* at 28 ("The term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief.").

38. *See id.* (discussing meaning of serious health condition under FMLA).

39. *See* 29 C.F.R. § 825 (1998). Congress, in Title IV of the FMLA, empowered the Secretary of Labor to prescribe regulations necessary to carry out the provisions of the FMLA. *See* 29 U.S.C. § 2654 (1994) ("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.").

40. *See* Klein & Pappas, *supra* note 2, at 62 (listing changes and clarifications made to interim regulations). The DOL changed the interim regulations following lengthy commentary by employers and commentators. *See id.* (stating that DOL changed or clarified provisions concerning definition of serious health condition). Many, however, found the final regulations to only be lengthier, more complicated and harder to apply. *See id.* ("[T]he [final] regulations certainly do not make administration of FMLA any easier for employers."). *But see* Deborah Shalowitz Cowans, *Employer Concerns Find a Voice in FMLA Regulations Conditions for Leave Clarified*, BUS. INS., Jan. 16, 1995, at 2 (quoting one commentator as saying that DOL did "a good job in responding to some of the concerns of some commentators" in defining serious health condition).

41. *See* Taffet, *supra* note 2, at 1 ("[E]ven well before their effective date, courts relied upon and cited the regulations approvingly."); Rebecca J. Wilson & William V. Hoch, *Using Case Law and Strategies to Defend Family and Medical Leave Act Claims*, 64 DEF. COUNS. J. 534, 535-46 (1997) (giving advice to defense attorneys defending FMLA cases and citing regulations as integral in interpreting FMLA); *see also* Gay v. Gilman Paper Co., 125 F.3d 1432, 1434 (11th Cir. 1997) (finding that where FMLA is silent, regulations provide guidance in defining its terms); Thorson v. Gemini, Inc., 123 F.3d 1140, 1141 (8th Cir. 1997) (citing regulatory criteria as means of interpreting FMLA provisions); Price v. Marathon Cheese Corp., 119 F.3d 330, 333-34 (5th Cir. 1997) (citing regulations to clarify terms found in FMLA's provisions); Price v. City of Fort Wayne, 117 F.3d 1022, 1023-24 (7th Cir. 1997) (citing labor regulations' definition of serious health condition as dominant means of determining whether employee is entitled to FMLA rights).

The DOL's interim regulations govern alleged FMLA violations that occurred prior to April 6, 1995.⁴² FMLA leave taken before this date is not held to the standards established by the final regulations.⁴³ Courts, however, have cited the final regulations as an interpretative aid for the interim regulations.⁴⁴ Consequently, the final regulations pertain to FMLA allegations occurring before April 6, 1995.⁴⁵ Because the interim regulations are altered by the final regulations in various significant ways, it is important to be aware of the date that the FMLA action occurred and the provisions of both regulations.⁴⁶

2. *The FMLA Regulations' Definition of Serious Health Condition*

The DOL, consistent with Congress' intention, drafted the interim regulations to provide FMLA-protected leave for a multitude of physical and mental conditions or illnesses.⁴⁷ These regulations define serious health condition as any injury, illness, impairment, or physical or mental

42. See Wilson & Hoch, *supra* note 41, at 534-35 (discussing application of interim and final regulations). The FMLA does not expressly direct which set of regulations apply in different circumstances; however, one court has noted that "[r]egulations, like statutes, cannot be applied retroactively absent express direction to do so." *Id.* at 534 (quoting Robbins v. Bureau of National Affairs, Inc., 896 F. Supp. 18, 21 (D.D.C. 1995)).

43. See Victorelli v. Shadyside Hosp., 128 F.3d 184, 186 (3d Cir. 1997) ("The course of events and applicable facts in the instant case occurred before the final regulations were adopted and therefore we find that the interim final rule governs in this case."); Gay, 125 F.3d at 1434 (applying interim regulations to serious health condition and termination occurring in June 1994); *Marathon Cheese*, 119 F.3d at 334 n.12 (finding that interim regulations apply to help clarify what is meant by serious health condition where employee's claim arose before effective date of final regulations); Bauer v. Varsity Dayton-Walther Corp., 118 F.3d 1109, 1111 (6th Cir. 1997) (holding that interim regulations govern instant case); Manuel v. Westlake Polymers Corp., 66 F.3d 758, 761 n.2 (5th Cir. 1995) (applying interim regulations to dispute arising before release of final regulations).

44. See Victorelli, 128 F.3d at 186 ("[W]e will refer to the final rule . . . as an aid to interpret the interim final rule."); United States Steel Corp. v. Oravetz, 686 F.2d 197, 201 (3d Cir. 1982) (finding that claims filed before effective date of final rules should be interpreted by final rules to extent that it is appropriate).

45. See Victorelli, 128 F.3d at 186 (analyzing plaintiff's case under both interim and final regulations).

46. See Wilson & Hoch, *supra* note 41, at 534-35 (urging defense counsel to be aware of different instances where interim and final regulations would apply to FMLA action).

47. See 5 C.F.R. §§ 630 & 890 (1998) (discussing Congress' intention behind term "serious health condition"). Some commentators argue that the DOL has taken a broad view of its rule-making ability and unduly expanded FMLA coverage to circumstances it was not intended to address. See Klein & Pappas, *supra* note 2, at 1 ("The Labor Department has taken a very expansive view of this rulemaking authority in attempting to apply the FMLA to myriad circumstances not specifically addressed by Congress in the statute."). Further, this expansive interpretation may force employers to determine the effects of the regulations on employee manuals and existing company policies before the courts have the opportunity to interpret them. See *id.* (describing possible effects of expansive regulations on employers and professionals).

condition that involves either inpatient care, absence for three calendar days or continuing treatment by, or under, the supervision of a health care provider.⁴⁸ This definition mirrors the FMLA's definition.⁴⁹

The interim regulations, however, also define a serious health condition as one that requires "continuing treatment by a health care provider."⁵⁰ To satisfy the interim regulations' requirements, this condition would include either an absence for more than three calendar days or an absence for prenatal care.⁵¹ The regulations cite Alzheimer's, severe strokes or persons in the terminal stages of a disease as examples of serious health conditions.⁵² Additionally, one portion of this definition mandates that the condition be long-term, chronic or incurable.⁵³

48. See 29 C.F.R. § 825.114(a) (1998) (defining serious health condition). The interim regulations specifically define serious health condition as a condition involving:

1. Any period of incapacity or treatment in connection with or consequent to inpatient care (i.e. an overnight stay) in a hospital, hospice, or residential medical care facility;
2. Any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or
3. Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar dates; or for prenatal care.

Id.

49. Compare *id.* (defining serious health condition), with 29 U.S.C. § 2611(11) (1994) (defining serious health condition). For a discussion of the FMLA's definition, see *supra* notes 32-35 and accompanying text.

50. 29 C.F.R. § 825.114(b). The interim regulations define "continuing treatment by a health care provider" as meaning one of the following:

1. The employee or family member in question is treated two or more times for the injury or illness by a health care provider. Normally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider.
2. The employee or family member is treated for the injury or illness two or more times by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider—for example, a course of medication or therapy—to resolve the health condition.
3. The employee or family member is under the continuing supervision of, but not necessarily being actively treated by a health care provider due to a serious long-term or chronic condition or disability which cannot be cured

Id.

51. See *id.* § 825.114(a)(3) (specifying requirements for serious health condition).

52. See 29 C.F.R. § 825.114(b)(3) (citing these conditions as examples of those not necessitating active medical treatment, but still eligible for FMLA protection).

53. See *id.* (requiring that employee's condition be "serious long-term or chronic condition or disability [that] cannot be cured").

The definition of serious health condition as set forth in the interim regulations remains largely unaltered in the final regulations.⁵⁴ After considering employer criticism and recommendations, the DOL augmented conditions qualifying an employee for FMLA leave and redefined what constitutes a "chronic health condition."⁵⁵ In addition to eliminating the three day requirement for incapacity, the DOL no longer requires that the chronic condition be incurable or long-term to be considered a serious health condition.⁵⁶ Instead, the final regulations provide a list of minor ailments that would not constitute serious health conditions unless certain

54. *See id.* § 825.114 (defining serious health condition). The final regulations define a serious health condition as any illness, injury, impairment or physical or mental condition involving:

1. Inpatient care (i.e., an overnight stay) in a hospital, hospice or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or
2. Continuing treatment by a health care provider

Id.; *see Price v. City of Fort Wayne*, 117 F.3d 1022, 1024 & n.1 (7th Cir. 1997) (noting that results of employee's claim were identical under either interim or final regulations).

55. *See* 29 C.F.R. § 825.114(a)(2)(i)(B) (defining continuing treatment by health care provider). The regulations define continuing treatment by a health care provider as "[t]reatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider." *Id.* Further, the regulations provide that this definition may include "[a]ny period of incapacity or treatment for such incapacity due to a chronic serious health condition." *Id.* § 825.114(a)(2)(i)(B)(iii). The final regulations define chronic serious health condition as a condition that:

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

Id. § 825.114(a)(2)(iii). The DOL received over 900 comments from 1993 to 1995, the two years since the interim regulations governed the FMLA. *See Cowans, supra* note 40, at 2, 39-40 (describing changes in regulations). Specifically, the DOL received 88 comments regarding the definition of serious health condition, some stating the definition was too broad and others saying it was too narrow. *See id.* ("Earlier guidance on what constitutes a serious illness generated 88 comments, some of which said the definition was too broad, others that it was too restrictive.")

56. *See* 29 C.F.R. § 825.114(a)(2) (providing that asthma, diabetes or epilepsy may be examples of chronic health conditions causing episodic incapacity). The final regulations do, however, provide examples of conditions meeting certain requirements of serious health condition throughout the definition. *See id.* § 825.114(a)(2)(v) (providing that cancer, severe arthritis and kidney disease are examples of conditions requiring multiple treatments by health care provider). These health conditions cause "episodic incapacity" rather than incapacity measured by a certain number of days. *See id.* (noting that incapacity could exceed three days).

complications arose.⁵⁷ When complications do develop, those conditions may constitute FMLA-qualifying "chronic health conditions."⁵⁸ The DOL, however, did not define "complications" in the regulations.⁵⁹

3. *The DOL's Clarification of What Constitutes a Serious Health Condition*

In a recent opinion letter, the DOL opined that minor conditions may rise to the level of a serious health condition in certain circumstances.⁶⁰ On December 12, 1996, the Wage and Hour Division of the DOL pronounced that minor ailments mentioned in the final regulations may satisfy the regulatory criteria for serious health condition and, therefore, enjoy FMLA protection.⁶¹ These minor conditions include the common cold, the flu, ear aches, upset stomach and minor ulcers.⁶²

This decision is significant because it overrules an earlier determination that minor conditions could not constitute serious health conditions

57. *See id.* § 825.114(c) ("Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave."). For a discussion of the letter ruling issued interpreting this portion of the regulations, see *infra* notes 60-64 and accompanying text.

58. *See* 29 C.F.R. § 825.114(c) (noting that certain conditions are not included unless "complications develop").

59. *See id.* (providing only laundry list of minor ailments); *see also* *Victorelli v. Shadyside Hosp.*, 128 F.3d 184, 189 (3d Cir. 1997) (finding that although final regulations say that "unless complications arise" minor ulcers are not covered by FMLA, final regulations "fail[] to indicate what complications distinguish a serious ulcer from a minor one"). For a discussion of the DOL letter ruling clarifying somewhat the dispute over what complications will change a minor condition into a serious health condition, see *infra* notes 60-64 and accompanying text.

60. *See* Ltr. Rul. (FMLA-86) (Dec. 12, 1996) (answering questions regarding what constitutes serious health condition for FMLA-qualifying leave). The courts defer to DOL opinion letters when there is an issue raised in a case that the opinion addresses. *See* *Thorson v. Gemini, Inc.*, 123 F.3d 1140, 1141 (8th Cir. 1997) (deferring to Dec. 12, 1996 DOL opinion letter and giving parties additional chance to argue that plaintiff meets FMLA requirements); *see also* *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (reiterating long-standing principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" and that "understanding of the force of the statutory policy . . . has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations").

61. *See* Ltr. Rul. (FMLA-86) (discussing FMLA regulations surrounding serious health condition).

62. *See id.* (including "headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc."). These conditions would not ordinarily satisfy the requirements of serious health condition because they typically do not last for more than three consecutive days and require continuing treatment by a health care provider. *See id.* (noting that these conditions would not be expected to last longer than three days).

by satisfying regulatory criteria.⁶³ With this new letter ruling, an employee suffering from almost any condition may be afforded FMLA protection based on the regulatory requirements for serious health condition. If that employee can successfully argue that complications surrounding his or her minor ailment raise it to the level of a serious health condition, he or she will be entitled to leave under the FMLA.⁶⁴

B. Federal Courts Interpret the FMLA

Faced with inconsistent interpretations of serious health condition, employers and employees have frequently disagreed over what conditions qualify for FMLA protection.⁶⁵ A majority of FMLA claims ensue after an employer refuses to reinstate an employee after that employee takes what he or she perceives to be FMLA-protected leave.⁶⁶ This conflict has thrust the judiciary into the role of medical diagnostician, as courts attempt to determine what constitutes a serious health condition under the FMLA.⁶⁷ Included among the nonqualifying ailments are food poisoning, shortness

63. See *id.* (discussing rescinded letter expressing view that employee incapacitated for more than three days and treated at least once by health care provider, which results in regimen of continuing treatment prescribed by health care provider, may not have FMLA-qualifying serious health condition).

64. See *Thorson*, 123 F.3d at 1141-42 (determining that employee's stomach condition may fall within FMLA coverage as result of complications surrounding it). In *Thorson*, the plaintiff left work and went to the hospital with stomach trouble, which a doctor determined to be acute gastritis and a possible peptic ulcer. See *id.* at 1140. The doctor prescribed ulcer medication and ordered Thorson to stay at home for four days. See *id.* Ultimately, after further testing, it was determined that Thorson suffered from a small hiatal hernia and mild antral gastritis, but by this time Gemini had fired Thorson for violating the company's attendance policy. See *id.* at 1140-41 (stating that according to Gemini's attendance policy, employee's tolerated absences were limited to five percent of his or her scheduled hours, including absences due to illness, and Thorson exhausted limit). For a comparison of *Thorson* to the Third Circuit's opinion in *Victorelli*, see *infra* note 82.

65. See Taffet, *supra* note 2, at 1 ("Decisions construing the FMLA have been concentrated overwhelmingly in the interpretation of a threshold requirement for qualifying leave: the existence of a serious health condition sufficient to trigger the Act's benefits."); *Family Leave*, *supra* note 5, at D7 (discussing that problem for employers lies mostly in interpretation of serious health condition).

66. See *Labor Department Service*, *supra* note 5, at 1 ("The Department of Labor's latest enforcement report found that most complaints resulted from an employer refusing to reinstate an employee to the same or equivalent job after taking time off."). The DOL, however, found that 90% of these complaints were successfully resolved with the employer's agreement to comply with the FMLA. See *id.* (stating that compliance required only simple phone call from DOL).

67. See Taffet, *supra* note 2, at 1 ("[C]ourts have been thrust into the role of medical diagnostician in dozens of cases, examining the gravity of medical maladies ranging from chicken pox to food poisoning to ingrown toenails, even though both Congress and the Department of Labor have sought to define serious health condition.").

of breath and chest pains, stomach virus, carpal tunnel syndrome, sinobronchitis, discomfort and distress.⁶⁸

The failure to establish a genuine need for continuing treatment has led many courts to rule against employees who may have an otherwise protected ailment.⁶⁹ For example, in *Seidle v. Provident Mutual Life Insurance Co.*,⁷⁰ the United States District Court for the Eastern District of Pennsylvania found that an ear infection suffered by an employee's son did not qualify the employee for FMLA leave for two reasons.⁷¹ First, the child was seen by a physician only once, and second, the child did not take any medication under the doctor's continuing supervision.⁷² The court in

68. See *Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997) (affirming summary judgment where plaintiff suffered from carpal tunnel syndrome); *Boyce v. New York City Mission Soc'y*, 963 F. Supp. 290, 299 (S.D.N.Y. 1997) (refusing to qualify shortness of breath and chest pains as serious health condition); *Kaylor v. Fannin Reg'l Hosp., Inc.*, 946 F. Supp. 988, 999 (N.D. Ga. 1996) (refusing plaintiff's claim that stomach virus was serious health condition); *Hott v. VDO Yazaki Corp.*, 922 F. Supp. 1114, 1128 (W.D. Va. 1996) (holding that sinobronchitis does not constitute serious health condition); *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, 474-76 (D. Kan. 1996) (stating that routine pregnancy discomfort is not serious health condition); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1037 (M.D. Tenn. 1995) (finding that gastroenteritis and upper respiratory tract infection did not meet requirements for serious health condition); *Oswalt v. Sara Lee Corp.*, 889 F. Supp. 253, 259 (N.D. Miss. 1995) (refusing to declare food poisoning as serious health condition), *aff'd*, 74 F.3d 91 (5th Cir. 1996). Further, the United States Court of Appeals for the Sixth Circuit recently held that rectal bleeding that did not cause a three-day absence from work or cause an employee to seek or receive inpatient care did not constitute an FMLA-qualifying serious health condition. See *Bauer v. Varsity Dayton-Walther Corp.*, 118 F.3d 1109, 1111-13 (6th Cir. 1997) (refusing to qualify plaintiff's condition as serious health condition). *But see Marathon Cheese*, 119 F.3d at 334 (acknowledging that "carpal tunnel syndrome, if sufficiently severe, can be a serious health condition"). For a discussion of when a minor ailment may rise to the level of a serious health condition, see *supra* notes 56-59 and accompanying text.

69. See *Sakellarion v. Judge & Dolph, Ltd.*, 893 F. Supp. 800, 807 (N.D. Ill. 1995) (ruling that employer did not violate FMLA by terminating employee who alleged that absences resulted from need to care for adult daughter suffering from asthma attack). In *Sakellarion*, the court found that the employee never established that her daughter required continuing treatment after she was discharged from the hospital. See *id.* (refusing to apply FMLA). From January 1993 to January 1994, the plaintiff was often absent from work without having scheduled the absences in advance. See *id.* at 803 (stating that these absences were for extended periods of time).

70. 871 F. Supp. 238 (E.D. Pa. 1994).

71. See *id.* at 243-45 (establishing that no serious health condition existed).

72. See *id.* at 246 (holding that although untreated ear infection potentially could lead to serious complications, simple ear infection was not serious health condition). The United States District Court for the Eastern District of Kentucky also found that a determination of whether the plaintiff's health condition was serious had to be made during the period in which the leave was requested. See *Bauer v. Dayton-Walther Corp.*, 910 F. Supp. 306, 311 (E.D. Ky. 1996) (refusing to apply FMLA based on potential seriousness of plaintiff's ailment), *aff'd*, 118 F.3d 1109 (6th Cir. 1997).

Seidle reasoned that including conditions that could potentially evolve into a serious health condition would conflict with the goals of the FMLA.⁷³

Although the number of cases interpreting the FMLA has increased, relatively few of these cases have involved chronic serious health conditions.⁷⁴ In those cases pertaining to chronic serious health conditions, one theme emerges—employers experience great difficulty having the cases dismissed at the summary judgment stage.⁷⁵ Although these did not constitute final judgments against the employer, each denial allowed the case to continue, representing significant victories against employers.

III. *VICTORELLI V. SHADYSIDE HOSPITAL*: THE THIRD CIRCUIT'S ANALYSIS OF CHRONIC SERIOUS HEALTH CONDITIONS

In *Victorelli*, the Third Circuit reversed a grant of summary judgment in favor of an employer, finding sufficient evidence that the plaintiff may suffer from a "chronic serious health condition."⁷⁶ According to the court, the interim regulations did not preclude Victorelli's peptic ulcer from meeting the criteria for a serious health condition.⁷⁷ Specifically, the court disagreed with the district court's narrow interpretation of the regulations and found sufficient evidence to support a finding that Victorelli's condition satisfied the portion of the regulations requiring continuing treatment by a health care provider.⁷⁸ Furthermore, the Third

73. See *Seidle*, 871 F. Supp. at 246 (determining that FMLA was not meant "to include conditions which although minor in their initial stages, could evolve into serious illnesses," as that "would bring within the protections of the statute virtually every common malady . . . which is in direct conflict with Congress' intention to exclude from the protections of the FMLA minor illnesses . . .").

74. See *Wilson & Hoch*, *supra* note 41, at 534 (acknowledging growing body of FMLA case law).

75. See *Rhoads v. Federal Deposit Ins. Corp.*, 956 F. Supp. 1239, 1255-56 (D. Md. 1997) (determining that employee's chronic condition allowed plaintiff's claim to proceed and not be dismissed on motion for summary judgment); *McClain v. Southwest Steel Co., Inc.*, 940 F. Supp. 295, 298-99 (N.D. Okla. 1996) (determining that plaintiff's claim that he suffered from chronic nausea, diarrhea, vomiting, severe headaches, dizziness and lightheadedness, coupled with continuing treatment for these conditions, precluded employer's motion for summary judgment).

76. See *Victorelli v. Shadyside Hosp.*, 128 F.3d 184, 190 (3d Cir. 1997) (noting that plaintiff may meet regulatory standard).

77. See *id.* (commenting on intent of FMLA). The Third Circuit refused to deny FMLA benefits if "the doctor was able to mitigate the frequency of [plaintiff's] pain." *Id.* Therefore, this included sufferers of occasional and continual incapacity within FMLA protection. See *id.* (opining that FMLA protection should not be withheld simply because medication is available to ease employee's pain).

78. See *id.* at 187 (disagreeing with district court's narrow construction of regulations). The district court read the interim regulations as having only two plausible readings of the term serious health condition—one that included Victorelli's condition and one that did not. See *id.* (discussing two interpretations of serious health condition). Therefore, finding the statute ambiguous, the district court relied on the legislative history and the final regulations for guidance. See *id.* (analyzing FMLA and its history). The court interpreted Victorelli's ulcer as the type of

Circuit concluded that the same result would occur under both the interim and final regulations of the FMLA.⁷⁹

A. *The Third Circuit's Interpretation of the FMLA Regulations*

In *Victorelli*, the Third Circuit thoroughly analyzed the FMLA's interim regulations as they applied to the plaintiff's alleged FMLA-protected leave.⁸⁰ The court correctly followed the district court in applying the interim regulations, not the final regulations, to *Victorelli's* case.⁸¹ After applying the interim regulations, the court found that *Victorelli's* condition was not "minor" as a matter of law and thus refused to grant the employer summary judgment.⁸²

condition that Congress intended to be exempt from FMLA coverage and "treated pursuant to an employer's sick leave policy." *See id.* (finding it more appropriate to apply sick leave).

79. *See id.* at 189 ("After comparing the interim and the final rules, we note that the standard for continuing treatment has remained unchanged."). Other circuits have also concluded that the threshold requirements for leave are the same under the interim and final regulations. *See, e.g., Price v. City of Fort Wayne*, 117 F.3d 1022, 1024 n.1 (7th Cir. 1997) (analyzing only interim regulations to avoid repeating what would be same analysis under final regulations). This determination by the Third Circuit is pertinent to employers because the final regulations would apply to alleged FMLA violations occurring after the enactment of the final regulations. *See Victorelli*, 128 F.3d at 186 (finding that course of events occurring before final regulations were released are governed by interim regulations and those occurring after enactment of final regulations are governed by those regulations). For a discussion of the interim and final regulations, see *supra* notes 39-59 and accompanying text.

80. *See Victorelli*, 128 F.3d at 186 (reiterating definition of serious health condition under interim regulations); *see also Thorson v. Gemini, Inc.*, 123 F.3d 1140, 1141 (8th Cir. 1997) (deferring to legislature and DOL and deciding it would be prudent to reverse grant of summary judgment because employee's minor ailment could rise to level of serious health condition under DOL regulations). For a discussion of how the interim regulations define serious health conditions, see *supra* notes 47-53 and accompanying text.

81. *See Victorelli*, 128 F.3d at 186 ("The course of events and applicable facts in the instant case occurred before the final regulations were adopted and therefore we find that the interim final rule governs this case."). The parties in *Victorelli* did not dispute the application of the interim regulations to the case. *See id.* (agreeing with district court's application of interim regulations); *see also Bauer v. Varsity Dayton-Walther Corp.*, 118 F.3d 1109, 1111 (6th Cir. 1997) (applying interim regulations to disputes occurring before release of final regulations); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 761 n.2 (5th Cir. 1995) (analyzing plaintiff's claim under interim regulations as defendant's decision to suspend plaintiff occurred prior to issuance of final regulations). The Third Circuit did, however, use the final regulations as an aid in interpreting the interim regulations. *See Victorelli*, 128 F.3d at 186 (applying final regulations for comparison). For a discussion of when the interim and final regulations apply in FMLA cases, see *supra* notes 42-46 and accompanying text.

82. *See Victorelli*, 128 F.3d at 188 (finding it premature to award summary judgment to Shadyside because of evidence in record to support conclusion that *Victorelli* suffered from long-term, chronic or incurable condition). In its decision, the Third Circuit did not rely on the DOL's letter ruling, which was relied on by the Eighth Circuit in *Thorson*. *Compare id.* at 187-91 (using only FMLA's legisla-

Both the Third Circuit and the district court agreed that Victorelli was an eligible employee under the FMLA.⁸³ Therefore, the FMLA entitled Victorelli to protected leave for her own serious health condition.⁸⁴ The Third Circuit concluded that Victorelli's peptic ulcer might qualify for FMLA-protected leave based on the interim regulations' three-part definition of serious health condition.⁸⁵ Specifically, the court determined that Victorelli's condition could involve continuing treatment by a health care provider.⁸⁶

In the interim regulations, "continuing treatment by a health care provider" requires in part that the employee be treated two or more times for his or her condition by a health care provider.⁸⁷ The Third Circuit found that Victorelli's condition satisfied this requirement because she was treated by her doctor twice, in addition to treatment subsequent to her termination.⁸⁸

tive history and accompanying regulations to determine whether plaintiff suffered from serious health condition), *with Thorson*, 123 F.3d at 1141 (relying on December 12, 1996 letter ruling to support conclusion that employee's illness may constitute serious health condition even though it is commonly considered minor in nature). It is interesting to note that the plaintiff in *Thorson* suffered from a condition similar to Victorelli's. *Compare id.* at 1140-41 (discussing Thorson's original diagnosis of peptic ulcer and final diagnosis of small hiatal hernia and mild antral gastritis and duodenitis), *with Victorelli*, 128 F.3d at 188 (discussing Victorelli's visits to doctor for gastritis and symptoms of peptic ulcer disease).

83. *See Victorelli*, 128 F.3d at 187 (agreeing with district court that Victorelli was eligible employee according to terms of FMLA).

84. *See id.* at 186 (finding that under FMLA, "eligible" employees are allowed to take up to 12 weeks of leave and that FMLA applies when employee's own serious health condition makes him or her unable to perform functions of his or her job); *see also* 29 U.S.C. § 2612(a)(1)(D) (1994) (detailing when employee may take leave for his or her own serious health condition); 29 C.F.R. § 825.100 (1998) (defining entitlement to leave for eligible employees). For a discussion of the qualifications and characteristics of FMLA leave, *see supra* notes 33-59 and accompanying text.

85. *See Victorelli*, 128 F.3d at 187 (stating that "construction of the interim final rule convince[d] [the court] that there [was] a material issue as to whether Victorelli suffered from a serious health condition").

86. *See id.* at 188-89 (finding evidence suggesting that Victorelli's condition satisfied three-part definition of "continuing treatment").

87. *See* 29 C.F.R. § 825.114(b)(1) (1993) ("The employee or family member in question is treated two or more times for the injury or illness by a health care provider.") The regulation goes on to say that "[n]ormally this would require visits to the health care provider or to a nurse or physician's assistant under direct supervision of the health care provider." *Id.*

88. *See Victorelli*, 128 F.3d at 187-88 (discussing requirements of section 825.114(b)(1) of interim regulations' definition of "continuing treatment by a health care provider"). Victorelli began seeing a doctor for her ulcer on March 16, 1988. *See id.* at 185. In March of 1990, she was diagnosed with gastritis and began treatment for her recurring stomach pain. *See id.* Victorelli saw the same doctor again twice in 1992 due to stomach pain and additional symptoms of nausea and vomiting. *See id.* During this time, she was diagnosed with a peptic ulcer and was prescribed Zantac for her condition. *See id.* Victorelli's doctor treated her on June 23, 1993, August 2, 1994, May 30, 1995 and November 16, 1995, after finding that the prescription was not controlling the ulcer. *See id.*

The second portion of this definition requires treatment for the condition on at least one occasion, as well as “continuing treatment” by the health care provider.⁸⁹ Because continuing treatment, as defined by the regulations, includes “a course of medication or therapy,” the Third Circuit found that Victorelli’s prescription for medicine written by her doctor and her several visits to his office fulfilled this portion of the definition.⁹⁰

Finally, the Third Circuit discussed the third portion of the interim regulations’ definition not addressed by the district court.⁹¹ This section requires that the employee be under the continuing supervision of a health care provider for an incurable serious long-term or chronic condition.⁹² The Third Circuit found that Victorelli’s repeated visits to her doctor, coupled with his determination that Victorelli’s condition was incurable, although manageable with medication, provided evidence that her condition may satisfy this portion of the regulation.⁹³ Therefore, the court found that Victorelli demonstrated a material issue of fact as to whether her peptic ulcer was an FMLA-qualifying serious health condition.⁹⁴

89. See 29 C.F.R. § 825.114(b)(2) (requiring that employee be “treated for the injury or illness by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider . . . to resolve the health condition”). Examples of continuing treatment by a health care provider cited in the interim regulations include participating in a course of medication or therapy. See *id.* (citing physical therapy as example).

90. See *Victorelli*, 128 F.3d at 188 (“Victorelli’s condition satisfies (b)(2), because she was treated by Dr. Adoki on at least one occasion and subsequently received continuing treatment by medication for her condition.”). The Third Circuit determined that this conclusion did not require an expansive reading of the FMLA interim regulations, as suggested by the district court. See *id.* (disagreeing with district court’s interpretation of FMLA regulations). Rather, the court concluded that the district court “construed the requirements of the interim final rule too narrowly.” *Id.* at 187.

91. See *id.* at 188 (finding its construction of interim regulations to be “neither improper nor unduly expansive”). The district court did not even reach analysis of this portion of the interim regulations because it found that Victorelli’s condition failed to satisfy (b)(1) and (b)(2) of the definition of continuing treatment by a health care provider. See *id.* (noting that “the district court at no time addressed whether subsection (b)(3) applied to Victorelli’s condition”). The district court based its findings on the final regulations and the legislative history of the FMLA. See *id.* at 186-90 (citing regulations as main source of interpretive guidance for cases involving FMLA).

92. See 29 C.F.R. § 825.114(b)(3) (providing that requirement does not necessarily require active treatment by health care provider). The regulations cite Alzheimer’s, persons suffering a severe stroke or persons in terminal stages of a disease who may not be receiving active medical treatment as examples of this requirement. See *id.* (noting that active treatment is not mandatory).

93. See *Victorelli*, 128 F.3d at 188 (“There is evidence that Victorelli’s peptic ulcer disease appears to be a long-term or chronic condition.”).

94. See *id.* (concluding that it was “premature to award summary judgment to Shadyside on Victorelli’s FMLA claim”). The court did not, however, determine the issue of whether Victorelli was terminated for taking FMLA protected leave. See *id.* at 186 (stating that two issues required attention: first, whether Victorelli suffered from serious health condition under FMLA, and second, whether she was

In making this determination, the court opined that the FMLA protects not only those conditions that cause continual incapacity, but also those conditions creating periods of occasional incapacity.⁹⁵ Such chronic conditions are expressly included in the FMLA regulations' definition of serious health condition and are thus afforded FMLA protection.⁹⁶ Therefore, although chronic conditions may provide limited notice of an employee's absence to employers, the Third Circuit includes those conditions within FMLA coverage.⁹⁷

B. *The Third Circuit's Advice to Employers*

Throughout its decision, the Third Circuit noted several inadequacies in the employer's administration of the employee's requested leave.⁹⁸ First, the court found that the employer never certified the employee's condition, in the form of second or third medical opinions.⁹⁹ Pursuant to the FMLA, employers may clarify and authenticate the employee's request by requiring the employee to undergo a physical examination by a health care provider representing the employer.¹⁰⁰ Although Shadyside con-

terminated for taking FMLA-protected leave). The Third Circuit remanded the case, instructing the district court to determine whether Victorelli's absence was FMLA leave and whether her termination violated the FMLA. *See id.* at 190-91 (determining, however, that record indicates that "had it not been for her July 29 absence, Victorelli would not have been terminated" and inferring that if district court determines that she suffered from serious health condition, Shadyside is liable under FMLA).

95. *See id.* at 190 ("The intent of the FMLA is not simply to protect those whose condition causes continual incapacity. It is intended to protect those who are occasionally incapacitated by an ongoing medical problem."). Victorelli's condition was an example of one creating occasional incapacity, as her peptic ulcer could flare up at any time, although it could generally be controlled by medication. *See id.* at 185 (describing Victorelli's condition).

96. *See* 29 C.F.R. § 825.114(a)(3) (1993) (including chronic conditions in definition of continuing treatment by health care provider); *id.* § 825.114(a)(2)(iii)(C) (1998) (expanding definition of chronic serious health condition and stating that this condition "[m]ay cause episodic rather than a continuing period of incapacity"). Victorelli's condition, the court determined, exemplified episodic incapacity, which may have been a result of her ongoing course of medication. *See Victorelli*, 128 F.3d at 189 n.6 (describing how Victorelli's condition fit within final regulations' definitions).

97. *See Victorelli*, 128 F.3d at 188 (describing plaintiff's condition as chronic).

98. *See id.* (reversing lower court's grant of summary judgment for Shadyside and stating reasoning for decision). The Third Circuit qualified its decision, stating it did not mean that Victorelli satisfied the requirements of the FMLA. *See id.* at 191 ("[W]e agree with the district court that Victorelli has not met her burden of persuading us that she deserves to prevail as a matter of law.").

99. *See id.* at 188 (describing Shadyside's reliance on Victorelli's doctor's diagnosis that her condition was incurable).

100. *See* 29 C.F.R. § 825.307(a) (1998) (presenting what employers may do if they question adequacy of employee's medical certification). The regulations provide that if an employer has reason to doubt the validity of an employee's medical certification, they may require second and even third opinions of the employee's condition. *See id.* § 825.307(a)(2) (allowing employers to obtain second and third

tested Victorelli's condition, the hospital failed to verify her visits to the doctor or the doctor's diagnosis of her condition, as is the employer's right under the FMLA.¹⁰¹ Second, the court also found that Victorelli's supervisor took no steps to find out whether Victorelli actually suffered from a peptic ulcer condition.¹⁰² Third, Shadyside did not provide any evidence or testimony challenging the medical adequacy of Victorelli's claim.¹⁰³

The Third Circuit's suggestions and criticisms exemplify various ways in which employers can regulate chronic serious health conditions.¹⁰⁴ Based upon its advice to Shadyside in *Victorelli*, the Third Circuit appears to be warning employers to take every precaution available to them under the FMLA to ensure that the employee requesting FMLA leave is actually suffering from a serious health condition. These precautionary measures, however, augment an employer's administrative duties when an employee requests FMLA leave. Further, based on the FMLA's broad scope of application, it is likely that courts may not dismiss employees' claims on summary judgment motions.¹⁰⁵ Therefore, if an employee is apparently suffering from a minor condition, it is imperative for employers to review and utilize the FMLA and its regulations to determine whether the condition may qualify for FMLA-protected leave.¹⁰⁶

opinions). The only drawback for employers is that the opinion is obtained at their own expense. *See id.* (putting expense of additional medical opinions on employers). Further, pending these opinions, the employee is "provisionally entitled to the benefits of the [FMLA]." *Id.*

101. *See Victorelli*, 128 F.3d at 188 (describing what Shadyside failed to do in evaluating Victorelli's condition).

102. *See id.* at 185 (stating that Victorelli's supervisor believed Victorelli was sick when she reported that she could not come to work). The Third Circuit cited a decision by the Pennsylvania Unemployment Compensation Board of Review, which found that Victorelli "had not participated in any willful misconduct relative to her absences and had offered ample justification for her sick leave . . ." *Id.* at 185 n.3. The Third Circuit did not, however, address whether Victorelli provided Shadyside with adequate notice of her intention to take leave or whether notice was even required under the FMLA's provisions. *See id.* at 185 (stating only that, with one exception, Victorelli had provided Shadyside with doctor's excuse for her illness, but not that she notified Shadyside prior to taking leave).

103. *See id.* at 188 (finding that, based on record that included no medical evidence from Shadyside, reasonable jury could conclude that Victorelli suffered from serious health condition).

104. *See Wilson & Hoch, supra* note 41, at 540-42 (outlining ways in which employers may challenge FMLA claims). Employers also need to be aware of their duties under the FMLA, such as providing employees with notice of their FMLA rights. *See id.* at 542 (discussing requirement that employers inform employees of their FMLA rights "by publicly posting information concerning the act at the work-site"). For a discussion of an employer's notice requirement under the FMLA, see *supra* note 29 and accompanying text.

105. *See Victorelli*, 128 F.3d at 191 (reversing grant of summary judgment against plaintiff, but noting that summary judgment in favor of plaintiff would also be inappropriate).

106. *See id.* at 187 (reviewing FMLA and its provisions and stating that plaintiff's condition is not minor as matter of law).

IV. CONCLUSION

The FMLA's implementation in the workplace is extremely complicated.¹⁰⁷ Although the regulations purport to assist employers and practitioners in the FMLA's administration, they also provide a myriad of detail, confusing and often frustrating employers.¹⁰⁸ *Victorelli* exemplifies how the FMLA's expansive definitions and terminology may qualify a large number of conditions for FMLA leave.¹⁰⁹ Furthermore, as the Third Circuit's analysis suggests, chronic serious health conditions create distinct challenges to employers as they typically involve intermittent leave and limited notice requirements.¹¹⁰

Overall, the Third Circuit's careful analysis of Victorelli's potential chronic health condition is an example of the close scrutiny applied by courts struggling with FMLA claims.¹¹¹ Currently, employers are urging Congress to revise the FMLA and, more specifically, to streamline the definition of serious health condition and ease the FMLA's application in the workplace.¹¹² If the FMLA is not revised, however, employers should take note of the Third Circuit's suggestions and approach potential FMLA leave requests from a procedural rather than a substantive viewpoint—

107. See Wilson & Hoch, *supra* note 41, at 540 (noting that there is no bright line determination of when conditions will satisfy FMLA provisions and regulations); Buchanan, *supra* note 5, at 12d (discussing frustrations experienced by employers attempting to administer FMLA and its cumbersome regulations and provisions); see also Klein & Pappas, *supra* note 2, at 2 (analyzing family leave regulations and expansive view taken by DOL in changing these regulations).

108. See Klein & Pappas, *supra* note 2, at 15 (discussing implementation of final regulations and stating that "the regulations have become lengthier, more complicated and, in many instances, more difficult to apply"); Wilson & Hoch, *supra* note 41, at 535 (observing that definition of serious health condition in regulations "encompasses a myriad of situations" and that each case warrants individual review) (footnote omitted).

109. See *Victorelli*, 128 F.3d at 187 (discussing in detail lengthy definitions in FMLA and stating that they are not to be interpreted narrowly).

110. See *id.* at 185 (describing limited notice Victorelli provided to employer because of unexpected "flare-up" of her peptic ulcer condition); see also McClain v. Southwest Steel Co., Inc., 940 F. Supp. 295, 297 (N.D. Okla. 1996) (describing employee's absence because of reoccurring health condition).

111. See Wilson & Hoch, *supra* note 41, at 546 (discussing careful judicial review of FMLA claims and fact that courts "have scrutinized FMLA claims closely to ensure that the claim is one that, in fact, deserves protection of the statute"). For this reason, one commentator suggested that defense counsel argue that not every need for leave is protected by the FMLA, "no matter how sympathetically a court might view it." *Id.*

112. See *Family Leave*, *supra* note 5, at D1 (describing employers' urging to revise FMLA and ease administrative problems). The Subcommittee on Employer-Employee Relations plans to hear additional testimony on the FMLA and to look more closely at the FMLA to address employer concerns. See *id.* (describing assurances of Subcommittee Chairman Representative Peter Hoekstra (R-Mich) and Representative Harris Fawell (R-Ill)). For a discussion of employers' reactions to the FMLA and its provisions, see *supra* note 5 and accompanying text.

employers should take advantage of the medical certification and notice requirements.¹¹³

Employers who receive notification of an employee's leave for a perceived minor ailment should take precautionary measures, review the circumstances and determine whether any employer obligations exist under the FMLA.¹¹⁴ Thus, taking precautions early to administer and verify employee leave may preclude future claims of alleged FMLA violations against employers. Utilizing the Third Circuit's guidance, employers might ease the headaches created by attempting to administer the FMLA.

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113. See *Victorelli*, 128 F.3d at 188 (advising employers by example of Shady-side's failures); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1025 (7th Cir. 1997) (stating that because employer did not rebut plaintiff's claim through medical testimony, "it remains for the trier-of-fact to decide if . . . [plaintiff's] multiple diagnoses taken together created a serious health condition").

114. See *Price*, 117 F.3d at 1025 (stating that it is important to consider whether plaintiff satisfied requisite period of incapacity under FMLA and if her treatment satisfied requirements of regulations). Further, employers should require medical certification in cases where they doubt FMLA coverage and require that employees provide adequate notice in the applicable instances. See *Buchanan*, *supra* note 5, at 12d (detailing potential complaints against employers and finding that employers often fail to request medical certification in writing and fail to give employees at least 15 days to obtain this certification).