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ELIGIBILITY FOR MEDICAL LEAVE UNDER THE FMLA¹

I. INTRODUCTION

A. *Personal Medical Leave*

The Family and Medical Leave Act of 1993 (FMLA) permits eligible workers to take up to 12 weeks per year of unpaid leave for medical reasons—either their own or those of an immediate family member.² In the case of personal medical leave, an employee is entitled to leave for medical conditions that constitute “**serious health conditions**” and that make an employee **unable to perform the functions of his or her position**. The FMLA statute defines “serious health condition” as: “**an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.**” The statute does not further define “inpatient care” or “continuing treatment.” Nor does the statute further define the phrase “unable to perform the functions of the position.”³

B. *Medical Leave to Care for a Family Member*

In the case of medical leave taken to care for a family member, an employee is entitled to leave to **care for** a spouse, son, daughter or parent with a “**serious health condition.**” The definition of “serious health condition” is the same: “an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.” The statute requires no further limitation on the part of the family member—that is, there is no equivalent requirement in the *statute* that the serious health condition causes the family member to be “unable to work” or to be unable to perform daily activities.

The **legislative history** of the FMLA explains that medical leave is limited to “serious health conditions” that make an employee unable to work because “short term conditions for which treatment and recovery are very brief” were presumed to be covered under “even the most modest sick leave policies.”⁴ In the committee reports accompanying the FMLA, the committees laid out a **general test** that “[w]ith respect to an employee, the term ‘serious health condition’ is intended to cover **conditions or illnesses that affect an**

¹ In referring to “medical leave,” this memorandum covers both leave for an employee’s own needs due to a qualifying medical condition and leave to care for a family member with a qualifying medical condition. While the latter type of leave often is referred to as “family leave,” this memorandum will consider both types as “medical leave,” since both depend on the demonstrated existence of a qualifying “serious health condition.”

² 29 U.S.C. § 2612(a)(1). Title II of the FMLA, governing most federal employees, is not discussed here, nor are any special FMLA provisions governing employees of local education agencies.

³ 29 U.S.C. § 2611(11).

⁴ H.R. REP. NO. 103-8, pt. I, at 40 (1993), at 40; S. REP. NO. 103-3, at 28 (1993). Two House committee reports accompanied the FMLA—one by the Committee on Education and Labor dealing with Title I of the Act, and the other by the Committee on Post Office and Civil Service, dealing with Title II. Because this memo focuses solely on Title I of the Act, all references to the House Committee Report refer to the report by the Committee on Education and Labor, unless otherwise noted.

employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery.”⁵ The committee reports noted that the statutory definition of “serious health condition” requires either inpatient care or continuing treatment by a health care provider. As the reports explained, “in any case where there is doubt whether coverage is provided by this act, the general test set forth in this paragraph shall be determinative.”

With respect to medical leave to care for a family member, the House report states that the term “serious health condition” is intended to cover conditions or illnesses that similarly **affect the health of the spouse, son, daughter or parent such that he or she is unable to participate in school or in his or her regular daily activities.**⁶ The Senate report states that an employee may take leave to care for a parent or spouse whose “daily living activities are impaired” by a serious health condition.⁷ Thus, although the statute does not require a particular form of incapacity in the family member, the committee reports presume that the general test stated above will apply equally to personal medical leave and medical leave to care for a family member.

II. SOME LEGISLATIVE BACKGROUND

From the time of its first introduction in April 1985, the FMLA covered only **serious illnesses, injuries or conditions** that made the employee **unable to work because of the treatment for or effects of the condition.**

The first bill on job-protected family and medical leave was introduced by Representative Patricia Schroeder (D-CO) in 1985—H.R. 2020, the Parental and Temporary Disability Act. In that bill, medical leave was described as “temporary disability leave” for those serious conditions that were “**likely to require**” **continuing medical treatment** or “**confinement**” of one month or more.⁸

In 1986, companion FMLA bills were introduced in the House and the Senate: H.R. 4300, with Rep. William Clay as the chief sponsor, and S. 2278, with Sen. Chris Dodd as the chief sponsor. In both of those bills, and in all subsequent versions of the bill, employees were given a right to unpaid medical leave for “serious health conditions,” defined as conditions that **involve “inpatient care or continuing treatment or supervision”** by a health care provider.⁹ In the version of the FMLA that was enacted, the phrase “or supervision” was dropped from the definition. Thus, medical leave under the FMLA is available for a health condition that involves “continuing treatment” by a health care provider.

⁵ H.R. REP. NO. 103-8, pt. I, at 40 (1993).

⁶ *Id.*

⁷ S. REP. NO. 103-3, at 24 (1993).

⁸ H.R. 2020, 99th Cong. § 101(10), (14) (1985).

See Workplace Flexibility 2010, Eligibility for Medical & Family Leave Under the FMLA: Development of the Statutory Text 1985-1993 (2004) (chart detailing eligibility for medical leave language in every FMLA introduced in Congress.) (hereinafter “Statutory Text Development Chart”).

Committee reports accompanying the version of the FMLA enacted in 1993 indicate that the definition “serious health condition” was intentionally expansive. Both the House and Senate reports note that the definition is “broad and intended to cover various types of physical and mental conditions” that meet the “**general test** that either the underlying health condition or the treatment for it requires that the employee be **absent from work on a recurring basis or for more than a few days for treatment or recovery.**”¹⁰ In addition, the committee reports indicated that the definition permits intermittent leave for necessary doctor’s visits.¹¹

The committee reports provide a **nonexhaustive list** of various “serious health conditions.” These included, for example, heart attacks, cancers and respiratory ailments. But the reports emphasize that serious health conditions are not limited to those enumerated.¹² The reports also explained that all of the enumerated conditions meet the “**general test,**” i.e., that the condition or its treatment requires recurring or extended absence from work, and the **statutory test,** i.e., that the condition involves “either inpatient care or continuing treatment [] by a health care provider, and frequently involves both.”¹³

While the definition of “serious health condition” was intended to be read broadly, the reports explain that the term was not meant to include minor and short-term ailments. Both the House and Senate reports in 1993 state that the term was **not intended to cover “short-term conditions for which treatment and recovery are very brief,” “minor illnesses which last only a few days,” or “surgical procedures which typically do not involve hospitalization and require only a brief recovery period”** (unless complications arise).¹⁴ For all such conditions, the committee reports noted that **for most employees, such leave would be provided by “even the most modest sick leave policies.”**¹⁵

¹⁰ H.R. REP. NO. 103-8, pt. I, at 40 (1993); S. REP. NO. 103-3, at 29 (1993).

¹¹ *Id.* For more on the issue of intermittent leave, see Workplace Flexibility 2010, *Intermittent Leave and Reduced Schedule Leave Under the FMLA* (2004).

¹² H.R. REP. NO. 103-8, pt. I, at 40 (1993); S. REP. NO. 103-3, at 29 (1993) (emphasis added).

¹³ *Id.* The 1993 committee reports included the term “supervision” in their explanation of continuing treatment, but this is most likely an oversight, since by this time, the House and Senate bills no longer contained “supervision” in the statutory definition of “serious health condition.” See Workplace Flexibility 2010, *Statutory Text Development Chart*, *supra* note 12 at 8-9.

¹⁴ H.R. REP. NO. 103-8, pt. I, at 40 (1993); S. REP. NO. 103-3, at 28 (1993).

¹⁵ H.R. REP. NO. 103-8, pt. I, at 40 (1993); S. REP. NO. 103-3, at 28 (1993). Because of extensive negotiations on this particular language, this paragraph remained the same throughout several committee report versions. The full paragraph reads as follows:

The term “serious health condition” is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. Complications arising out of such procedures that develop into “serious health conditions” will be covered by this Act. It is intended that in any case where there is doubt whether coverage is provided by this Act, the general test set forth in this paragraph shall be determinative. Of course, nothing in this Act is intended or may construed to modify or affect any law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or handicapped status, as section 401 clarifies.

Of course the actual reality of sick leave coverage for employees was slightly more complicated. For instance, in the 1993 House Committee Report, members of the Committee cited a 1991 Bureau of Labor Statistics survey of employers with 100 or more employees finding that “67 percent [of these employers] provide paid sick leave.”¹⁶ By contrast, the committee noted that a survey commissioned by the U.S. Small Business Association found that only “1 percent of the sample [businesses] offered nondiscretionary unpaid sick leaves of specified length, where the firm also provides job and seniority guarantees and health benefit continuation,” and that in many circumstances vacation leave was the only leave available.¹⁷ Additionally, the same survey found that “30 to 40 percent of employers do not offer job-guaranteed sick leave and that 70 to 90 percent of firms offer leave only of variable or unspecified length.

In any event, while the committee acknowledged that not all workers had access to sick leave, and that many low-wage and small business employees in particular did not have job-protected sick leave, its prevailing assumption was that most workers could rely on sick leave for less severe injuries, illnesses or conditions that did not require extended absences from work.¹⁸

In committee reports and floor testimony on the meaning of “serious health condition,” proponents of the FMLA (most of them Democrats) sought to walk a thin line between asserting that the term “serious health condition” did not cover every small and minor medical condition (for which supporters asserted that “even modest sick leave policies” would provide leave) and, at the same time, maintaining that the definition was sufficiently broad to cover most situations in which employees would need extended or intermittent leave.

By contrast, those opposing the FMLA sought to cast the definition of “serious health condition” as “grossly broad.” For example, the minority views in the 1993 House Report noted that the term “serious health condition” was identical to that in a Wisconsin statute, under which a child’s ear infection was held to be a “serious health condition.”¹⁹ The minority views also argued that the “grossly broad” definition would likely cover even voluntary cosmetic surgery.²⁰ Finally, the minority views objected to the broad definition of “health care provider,” which they argued would further expand the scope of medical leave under the Act.²¹

H.R. REP. NO. 102-135, pt. I, at 60 (1991).

¹⁶ H.R. REP. NO. 103-8, pt. I, at 60 (1993).

¹⁷ H.Rep. No. 103-8(I) (1993), at 28.

¹⁸ *Id.* at 28.

¹⁹ *Id.* at 62-63 (minority views on the FMLA) (the Wisconsin statute is W.S.A. § 103.10). After extensive searching, we have not been able to find the Wisconsin case referred to by the minority views. One year after the passage of the FMLA, a district court ruled that an ear infection was not a serious health condition under the FMLA. See *Seidle v. Provident Mutual Life Ins. Co.*, 871 F.Supp. 238 (E.D. Pa. 1994). But in *Caldwell v. Holland*, 208 F.3d 671 (8th Cir. 2000), an appellate court held that a child’s ear infection in that factual situation did constitute a “serious health condition.”

²⁰ H.R. REP. NO. 103-8, pt. I, at 68 (1993).

²¹ *Id.* (minority views on the FMLA).

Concerns over the “grossly broad” definition of “serious health condition” caused some Members of Congress to offer amendments to restrict the scope of coverage. For example, during the markup of the FMLA in the House Education and Labor committee in January 1993, Congressman John Boehner (R-OH) offered an amendment to limit the definition of “serious health condition” to those conditions that are so severe as to make a person unable to participate in his or her daily activities.²² That amendment failed on a party-line vote.

In setting the terms for floor consideration of the FMLA in January 1993, the Democratically-controlled Rules Committee refused to permit a vote on restricting the scope of the term “serious health condition.”²³ Nevertheless, during debate, opponents voiced their longstanding opposition to the breadth of the term and what they asserted were the resulting possibilities for employee abuse. For example, Representative Scott McInnis (R-CO) noted that,

“[w]hile the American public may be thinking that this legislation will simply allow a parent to take care of a child who is suffering from a disease like leukemia or that it will allow an employee to undergo a procedure like that of chemotherapy, the bill appears to be much broader. A serious health condition is defined in this bill to include any physical or mental condition which requires continuing treatment by a health care provider.”²⁴

Representative McInnis went on to express concern that the term would include leave for taking a teenage child to a doctor for continuing treatment of acne or in-grown toenails.²⁵

These complaints about the breadth of the term “serious health condition” echoed similar arguments that had been made by opponents of the FMLA when the House of Representatives failed to override President George H.W. Bush’s veto of the FMLA in 1992.²⁶ Not surprisingly, however, once the FMLA was enacted into law and subject to implementation by regulation and enforcement by the courts, most business groups and individual employers have argued that the term “serious health condition” requires a very high threshold of impairment and does not cover conditions such as ear infections, shoulder injuries, neck injuries, assault injuries, mental illness, respiratory infections, stomach ulcers, flu, viral illness with vomiting, and atrial fibrillation (a heart condition). (See summary of cases in appendix to this memo.)

²² See H.R. REP. NO. 103-8, pt. I, at 75 (1993).

²³ H.R. Res. 58, 103rd Cong. (1993) (permitting debate for 3 hours and 20 minutes on **three** amendments, none of which amended the definition of “serious health condition.”).

²⁴ 139 CONG. REC. H398 (1993). Congressman Robert Dornan (R-CA) also objected to the term not being “adequately defined.” 139 CONG. REC. H385 (1993).

²⁵ 139 CONG. REC. H398 (1993).

²⁶ See, e.g., 138 CONG. REC. H9931 (1992). Rep. Harris Fawell (R-IL) argued that the term “serious health condition” was “so broadly defined as to cover anyone [who is ill and] under the care of a health provider.” He further noted that “this language ... gives employees very liberal discretion as to when to take unpaid leave and when to return to the job,” in contrast to the employer, who “is not even given discretion to delay reinstatement [of the employee who takes FMLA leave] until an equivalent position is available.” *Id.*

The committee reports accompanying the FMLA address the requirement that an employee be “unable to perform the functions” of his or her position because of the serious health condition in a relatively perfunctory fashion. The reports do not define this eligibility requirement in any depth. Rather, the reports emphasize that this requirement is satisfied where an employee is “unable” to work solely because of his or her need to be absent in order to obtain treatment.²⁷

For example, the House Committee Report explained:

The requirement that the employee be unable to perform his or her job functions does not mean in each instance that the employee must literally be so physically or mentally incapacitated that he or she is generally unable to work. An employee with early-stage cancer may, for example, be physically or mentally capable of performing her job, and indeed may continue to work while receiving treatment. However if the employee must be physically absent from work from time to time in order to receive the treatment, it follows as a matter of common sense that the employee is, during the time of treatments, temporarily “unable to perform the functions” of his or her position for the purposes of [29 USC § 2612(a)(1)(D)] and therefore eligible for leave for the time necessary to receive the treatments.²⁸

In a precursor of things to come, the committee reports also discuss an employee’s inability to work under their analysis of the term “serious health condition.” For example, the reports explained that the term “serious health condition” is intended to cover “illnesses or conditions that affect an employee’s health **to the extent that he or she must be absent from work** either for the condition or operation itself or for continuing medical treatment or supervision.”²⁹

Regarding medical leave to care for a family member, the committee reports do not discuss the statutory requirement that a family member be unable to participate in school or other regular daily activities, for the simple reason that there is no such requirement in the statute.³⁰ However, the committee reports presume such a requirement for family members through their definition of the term “serious health condition.” In the section of the report entitled “Meaning of serious health condition,” the House committee states that the term “is intended to cover conditions that affect the health of the child, spouse or parent [of an employee] **such that he or she is similarly unable to participate in school or in his or her regular daily activities.**”³¹ Similarly, the Senate report states that an

²⁷ H.R. REP. NO. 103-8, pt. I, at 36-37 (1993); S. REP. NO. 103-3, at 25 (1993).

²⁸ H.R. REP. NO. 103-8, pt. I, at 36-37 (1993); S. REP. NO. 103-3, at 24-25 (1993). The reports also state: Similarly, an employee who is recovering from a serious health condition may be physically or mentally capable of resuming his normal job functions, but may nevertheless require continuing medical supervision or treatment relating to that condition for which he must periodically be absent from work, rendering him temporarily “unable to perform the functions” of his position. Examples would include an employee who has returned to work following major heart surgery but is required to report periodically to a physical for examination or monitoring. It is intended that employees in such circumstances be entitled to leave under [29 U.S.C. § 2612(a)(1)(D)]. H.R. REP. NO. 103-8, pt. I, at 37 (1993); S. REP. NO. 103-3, at 25 (1993).

²⁹ H.R. REP. NO. 103-8, pt. I, at 40 (1993); S. REP. NO. 103-3, at 28 (1993).

³⁰ 29 U.S.C. § 2612(a)(1)(C).

³¹ H.R. REP. NO. 103-8, pt. I, at 40 (1993).

employee may take leave to care for a parent or spouse whose “daily living activities are impaired” by a serious health condition.³²

III. ELIGIBILITY FOR MEDICAL LEAVE FOR AN EMPLOYEE’S SERIOUS HEALTH CONDITION

The FMLA statute provides an entitlement of up to 12 workweeks of unpaid leave “because of a serious health condition” that makes an employee “unable to perform the functions of the position of such employee.”³³ The statute defines a “serious health condition” as an illness or injury “that involves inpatient care” (this term is not defined) **OR** “[that involves] continuing treatment by a health care provider.”³⁴ (“Continuing treatment” also is not defined.) The requirement that the “serious health condition” render the employee “unable to perform the functions of the position of such employee” also is not defined in the statute.

The Department of Labor (DOL) issued interim final regulations to the FMLA in June 1993. The final regulations were issued in January 1995, together with a lengthy preamble recounting and responding to over 900 comments received on the interim regulations³⁵

The DOL regulations add a host of definitions. “**Inpatient care**” is defined as:

- at least one **overnight stay** in a hospital, hospice, or residential medical care facility
 - including any period of **incapacity** or any subsequent **treatment** related to the inpatient care.³⁶

The DOL regulations define “**continuing treatment**” as:

- **More than three days of incapacity** (again defined as the inability to work, attend school or perform regular daily activities because of the condition, treatment or recovery) **that involves:**
 - **Two doctor visits OR**
 - **One doctor visit that results in:**
 - a **regimen of continuing treatment** under the provider’s supervision (e.g., physical therapy);³⁷

OR

³² S. REP. NO. 103-3, at 24 (1993).

³³ 29 U.S.C. § 2612(a)(1)(D).

³⁴ 29 U.S.C. § 2611(11).

³⁵ 60 Fed. Reg. 2180 (Jan. 6, 1995); 29 C.F.R. § 825.

³⁶ 29 C.F.R. § 825.114(a)(1). “Incapacity” under this definition is defined as the inability to work, attend school or perform regular daily activities because of the condition, treatment or recovery. *Id.*

³⁷ 29 C.F.R. § 825.114(a)(2)(i).

- **Any period of incapacity** due to:
 - **pregnancy** or prenatal care;³⁸
 - **chronic** serious health conditions (e.g. asthma), defined as conditions that
 - **require periodic visits** for treatment;
 - **continue over an extended period of time**; AND
 - **may cause episodic rather than a continuing period of incapacity**;³⁹ OR
 - **permanent or long-term** conditions that lack effective treatments (e.g., Alzheimer's);⁴⁰

OR

- **Absence to receive multiple treatments** for:
 - **restorative surgery** after an accident or injury; OR
 - a condition that **would likely result in incapacity** of more than three days **if not treated** (e.g., chemotherapy).⁴¹

This definition in the DOL regulations thus sets up five distinct scenarios that are included in the term “continuing treatment.” First, an employee receives “continuing treatment” when he or she is incapacitated by a condition for longer than three days *and* sees a doctor for the condition twice or more. If the employee is incapacitated for longer than three days but sees a doctor for the condition only once, then the visit must be followed by a “regimen of continuing treatment.” The term “regimen of continuing treatment” is defined by illustration to include “a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen).”⁴²

A second scenario falling under the definition of “continuing treatment” is incapacitation of any length because of pregnancy or prenatal care. As DOL noted, the legislative history of the FMLA makes clear that pregnancy was intended to be treated as a “serious health condition” under the statute.⁴³ DOL recognized that an employee may suffer from brief episodes of illness caused by pregnancy, such as severe morning sickness, that require an absence from work of less than three days. In addition, because a pregnant employee is presumed to be under the care of a health care provider throughout her pregnancy, she is not required to visit a health care provider in connection with any period of incapacity.

³⁸ 29 C.F.R. § 825.114(a)(2)(ii).

³⁹ 29 C.F.R. § 825.114(a)(2)(iii).

⁴⁰ 29 C.F.R. § 825.114(a)(2)(iv).

⁴¹ 29 C.F.R. § 825.114(a)(2)(v).

⁴² 29 C.F.R. § 825.114(b). Under the regulations, the term “treatment” includes (but is not limited to) “examinations to determine if a serious health condition exists and evaluations of the condition.” The term does not include routine physical examinations, eye examinations or dental examinations. *Id.*

⁴³ 60 Fed. Reg. 2195 (1995).

In a third scenario, the DOL regulations define “continuing treatment” to include incapacity of any length for chronic conditions, such as asthma and diabetes. A “chronic serious health condition” is defined as one that requires periodic treatment visits, continues over an extended time (including recurring episodes of a single condition), and “may cause episodic rather than a continuing period of incapacity.” DOL recognized that such conditions continue over a long period of time, “often without affecting [an employee’s] day-to-day ability to work or perform other activities,” except during episodic flare-ups. The regulations therefore do not require a minimum period of incapacity for chronic conditions.⁴⁴ In addition, because flare-ups of chronic conditions may be more effectively treated by staying at home than by visiting a health care provider, the regulations do not require doctor visits in connection with incapacity for such conditions.

In a fourth scenario, the regulations define “continuing treatment” to include permanent or long-term incapacity due to conditions that lack effective treatments, such as Alzheimer’s or a severe stroke. The patient need not be receiving active treatment; such conditions are considered to involve “continuing treatment” as long as the patient is under the supervision of a health care provider.

Finally, the fifth scenario in the regulations comes from defining “continuing treatment” as including absences to receive multiple treatments for restorative surgery or a condition that would likely result in more than three days of incapacity if not treated. The primary intent of this provision was to cover such treatments as chemotherapy or dialysis, which might make the employee “unable to perform the functions” of his or her job only by virtue of the need for absence to receive treatments.

The “more than three days” period used to define continuing treatment was never explicitly stated by Congress; rather, DOL based it on references in the committee report to “more than a few days” of incapacity.⁴⁵ In coming up with this standard, DOL looked to many state workers’ compensation programs and the Federal Employees’ Compensation Act, which require a three-day waiting period before benefits are paid for a “temporary disability.”⁴⁶

In other aspects of the regulations, DOL defined “**treatment**” to include both an examination to diagnose or evaluate a serious health condition and a “regimen of continuing treatment” (e.g., a course of prescription medication, oxygen therapy, etc.).⁴⁷ This definition excludes routine physician examinations (including eye and dental) and treatment regimens that can be initiated without a visit to a health care provider (e.g., recommendations for over-the-counter medication, bed rest, etc.).⁴⁸

⁴⁴ 60 Fed. Reg. 2195 (1995).

⁴⁵ 60 Fed. Reg. 2192 (1995).

⁴⁶ *Id.*

⁴⁷ 29 C.F.R. § 825.114(b).

⁴⁸ *Id.*

DOL noted, in the preamble to the regulations, that it had not included in the regulation the “laundry list” of serious health conditions that the committee reports had listed, such as cancer and heart attacks. The rationale for this absence, according to the agency, was that “their inclusion may lead employers to recognize only conditions on the list or to second-guess whether a condition is equally ‘serious’, rather than apply the regulatory standard.”⁴⁹ The regulations did, however, list a number of conditions that would ordinarily not be “serious health conditions” unless, for example, complications arose or inpatient care was required. These conditions included cosmetic treatments, the common cold, flu, earaches, upset stomach, minor ulcers, headaches (except migraines), routine dental or orthodontia problems, and periodontal disease.⁵⁰

In the ten-plus years since the FMLA’s passage, lawyers have spent considerable resources arguing, and courts have spent considerable time interpreting, the meaning of “serious health condition” under the FMLA. Not surprisingly, there has been much less litigation over the meaning of the phrase “unable to perform the functions of the [employee’s] position,” since the concept of incapacity was swallowed into the meaning of “serious health condition” by virtue of the regulations.

In general, courts often find that “treatment” has occurred where an employee has visited a doctor at least once regarding the condition. Nevertheless, some seemingly serious conditions fail to qualify because an employee fails to meet some aspect of the regulatory test, while other seemingly minor conditions qualify as serious health conditions because they do meet the technical aspects of the tests.⁵¹

The following discussion highlights some of most litigated and most contentious topics. **Brief summaries of the cases on which this discussion relies are contained in the attached appendix.**

➤ ***How do the courts analyze the “serious health condition” provision of the FMLA?***

Drawing heavily on the regulations, most courts apply a **three-part test** to address the threshold question of whether “continuing treatment” exists to support a finding of a “serious health condition” under the FMLA (i.e., in cases where there has been no inpatient hospitalization):

- does the employee have an ***incapacity*** requiring an absence from work;
- does the period of incapacity ***exceed three days***; and

⁴⁹ 60 Fed. Reg. 2195 (1995).

⁵⁰ 29 C.F.R. § 825.114(c).

⁵¹ It is interesting to note that suits over the definition of “serious health condition” often involve employees who have existing attendance or performance problems. See, e.g., *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995).

- does the employee receive ***continuing treatment*** by a health care provider during the period?⁵²

In addition to this three-part test, courts may also examine the nature and severity, expected duration and long-term impact of the impairment to determine whether a “serious health condition” exists.⁵³

➤ ***Given this three-part test, what conditions can be expected to be covered under the FMLA?***

It depends. As noted, the statute itself does not provide a laundry list of covered conditions, nor do the regulations. Instead, the courts must apply the ***regulatory test to each situation*** to determine whether or not the leave entitlement applies.

As the cases in the attached appendix demonstrate, courts have applied this regulatory test to find that there is ***not*** a “serious health condition” in the cases of learning disabilities, sexual abuse, assault injuries, a shoulder injury, the flu and ear infections ***when the criteria of the regulatory test*** requiring incapacity or medical treatment ***have not been met***.⁵⁴

By contrast, ***when the regulatory requirements have been met***, the courts have found that conditions such as substance abuse, a mental condition, and, in some instances, the flu and ear infections ***are*** “serious health conditions.”⁵⁵

Litigation over the meaning of “serious health condition” under the FMLA frequently centers on the question of whether or not the employee has received “continuing treatment” as a result of the condition (particularly whether or not the condition has led to “incapacity” and whether or not “treatment” has occurred). In addition, many cases have focused on whether or not the FMLA covers ***certain specific conditions*** that are “serious” (involving incapacity and treatment) in some instances but not “serious” in other instances.

➤ ***What constitutes “continuing treatment”?***

⁵² See, e.g., *Russell v. North Broward Hosp.*, 346 F.3d 1335 (11th Cir. 2003) (applying regulatory test requiring period of incapacity of more than three consecutive days and treatment at least two times by a health care provider, or one time followed by a regimen of continuing treatment); *Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir. 2000); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998).

⁵³ See, e.g., *Navarro v. Pfizer Corp.*, 261 F.3d 90 (1st Cir. 2001); *King v. Autoliv, APS, Inc.*, 2004 WL 724400 (D.Utah 2004).

⁵⁴ See, e.g., *Brennerman v. MedCentral Health Systems*, 366 F.3d 412 (6th Cir. 2004); *Marchisheck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa 1994). (See appendix for brief summaries of these cases.)

⁵⁵ See, e.g., *Rankin v. Seagate Technologies, Inc.*, 246 F.3d 1145 (8th Cir. 2001); *Caldwell v. Holland of Texas, Inc.*, 208 F.3d 671 (8th Cir. 2000); *Stekloff v. St. John’s Mercy Health Systems*, 218 F.3d 858 (8th Cir. 2000); *Sloop v. ABTCO, Inc.*, 178 F.3d 1285 (4th Cir. 1999). (See appendix for brief summaries of these cases).

As defined in the regulations, “continuing treatment” requires **both incapacity for more than three consecutive days and subsequent treatment OR incapacity that involves either two visits to the doctor or one visit to the doctor that results in a regimen of continuing treatment** under the doctor’s *supervision*.⁵⁶ The cases have applied this test, but have diverged in their interpretation of the terms used within the test.

➤ ***What does an employee need to show to demonstrate “incapacity”?***

In general, the courts have found that for an employee to be “incapacitated” under the definition of “serious health condition” the employee must be unable to perform his or her work for the required three consecutive days

➤ ***What does an employee or family member need to show to demonstrate that “treatment” or “subsequent treatment” has occurred?***

The courts generally have required evidence of visits to the doctor, courses of medication or physical therapy to meet the requirement for “subsequent treatment.”

As set forth in the attached appendix, courts have also followed the regulations in holding that the definition of “treatment” under the FMLA includes both examinations to determine if a “serious health condition” exists (i.e., diagnosis) and evaluation or supervision of a condition.

In *Hodgens v. General Dynamics Corp.*, the court held that “treatment” of a “serious health condition” under the FMLA includes “visits to a doctor when the employee has symptoms that are eventually diagnosed as constituting a serious health condition, even if, at the time of the initial medical appointments, the illness has not yet been diagnosed nor its degree of seriousness determined.”⁵⁷ Under this reasoning, an employer who discharges or otherwise penalizes an employee who later claims benefits under the FMLA bears the risk that the health condition at issue will develop into a serious health condition covered by the FMLA.⁵⁸

Similarly, in *Miller v. AT&T*, the Fourth Circuit held that a follow-up evaluation with a doctor, which included a physical examination and blood test, constituted “treatment” under the definition of “serious health condition.”⁵⁹ The court rejected the employer’s argument that the regulatory definition of treatment was overly broad because it included both the evaluation and the treatment of an employee’s condition. The employer argued that this regulatory definition was contrary to Congressional intent because it included evaluation in addition to treatment of an employee’s condition. The court disagreed, finding that the regulatory interpretation could not be inconsistent with Congress’ intent

⁵⁶ 29 C.F.R. § 825.114.

⁵⁷ *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998).

⁵⁸ *Caldwell v. Holland of Texas, Inc.*, 208 F.3d 671 (8th Cir. 2000) (employer does not avoid FMLA liability by discharging employee who takes leave in order to seek treatment for a condition later found to be covered by the FMLA).

⁵⁹ *Miller v. AT&T Corp.*, 250 F.3d 820, 834 (4th Cir. 2001).

because there was an absence of any legislative history of the term “continuing treatment” that would have indicated Congress’ intent.⁶⁰ A dissenting opinion found that the Department of Labor impermissibly expanded the scope of FMLA coverage beyond Congress’ intent in its regulations setting forth the regulatory test when “continuing treatment” was an unambiguous statutory term meaning “treatment on a continuing basis,” not diagnosis, monitoring or supervision of a condition as added by the regulation.⁶¹ The dissent also noted the circular definition of continuing treatment – “continuing treatment” can consist of only one visit to a health care provider as long as “continuing treatment” occurs thereafter.⁶²

Finally, courts have confirmed that FMLA leave is available only for treatment for substance abuse by a health care provider, not for absences related to the use of alcohol or drugs.⁶³

➤ ***Are specific conditions covered that may be serious in some instances and not serious in other instances?***

As referenced to some degree above, litigation has arisen over whether specific conditions that are not always “serious,” like the common cold, flu or ulcers, can trigger medical leave eligibility. As noted, the legislative history of the FMLA and Department of Labor regulations both indicate that conditions involving no absence or only a brief absence from work or involving no inpatient care or other medical treatment generally are not covered by the FMLA.⁶⁴ Applying this test, courts in some cases have refused to find a “serious health condition” with respect to such ailments as the flu and ear infections when no complications arise.⁶⁵ In other instances, courts have applied the test to find that similarly common (and ordinarily “minor”) conditions are “serious health conditions” where they involve inpatient care or extended incapacity and subsequent treatment.⁶⁶

For example, the Eighth Circuit has recognized a “serious health condition” under the regulatory test based on an employee’s vomiting, coughing, congestion and sleeplessness; a three-year-old child’s ear infection; and a case of gastrointestinal distress/ulcer. In *Thorson v. Gemini, Inc.*, the Eighth Circuit stated:

⁶⁰ *Id.* (also noting that the requirement that the employee be incapacitated for at least three days serves to help weed out claims based on nothing more than physician visits for minor health complaints).

⁶¹ *Id.*

⁶² *Id.*

⁶³ 29 C.F.R. § 825.114(d). See *Sloop v. ABTCO, Inc.*, 178 F.3d 1285 (4th Cir. 1999)(employee was “treated” at a detox center for a “serious health condition” per the FMLA when his condition was evaluated by two physicians who found him to be a danger to himself and others and recommended involuntary commitment, but absence from work due to use of alcohol over July 4th weekend, as opposed to court-ordered residential treatment a week later, was not covered by the FMLA).

⁶⁴ See S. REP. NO. 103-3, at 28 (1993); 29 C.F.R. § 825.114(c).

⁶⁵ *Brennerman v. MedCentral Health System*, 366 F.3d 412 (6th Cir. 2004); *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa 1994).

⁶⁶ *Rankin v. Seagate Technologies, Inc.*, 246 F.3d 1145 (8th Cir. 2001); *Caldwell v. Holland of Texas, Inc.*, 208 F.3d 671 (8th Cir. 2000); *Victorelli v. Shadyside Hospital*, 128 F.3d 184 (3rd Cir. 1997).

Under the DOL definition, it is possible that some absences for minor illnesses that Congress did not intend to be classified as ‘serious health conditions’ may qualify for FMLA protection. But the DOL reasonably decided that such would be a legitimate trade-off for having a definition of ‘serious health condition’ that sets out an objective test that employers can apply uniformly.⁶⁷

In *Thorson*, a worker who was ultimately diagnosed with the ordinarily minor conditions of an upset stomach and minor ulcer was deemed to satisfy the objective factors of the regulatory test for a “serious health condition” when she demonstrated that her condition involved “continuing treatment.”⁶⁸ *Thorson* also discussed the FMLA’s legislative and regulatory history with respect to the definition of “serious health condition,” finding the statute itself silent as to specific examples of illnesses that do or do not qualify as “serious health conditions” (despite some legislative history language setting forth just such a list of illnesses) and the regulatory guidance clearly rejecting a “laundry list” of serious health conditions.⁶⁹

Similarly, the Fourth Circuit in *Miller v. AT&T Corp.* found that an employee who suffered from the flu—often a “minor” condition resulting in only brief inability to work and no medical treatment—met the test for “serious health condition” when she was incapacitated for three or more days and received treatment two or more times.⁷⁰

The Fourth Circuit noted the potential inconsistency in DOL’s decision to list certain conditions that ordinarily do not constitute “serious health conditions”:

There is unquestionably some tension between subsection (a) [29 CFR 825.114(a)], setting forth objective criteria for determining whether a serious health condition exists, and subsection (c) [29 CFR 825.114(c)], which states that certain enumerated conditions “ordinarily” are not serious health conditions. Indeed, the tension is evidenced by Miller’s illness. Miller was incapacitated for more than three consecutive calendar days and received treatment two or more times; thus, she satisfied the regulatory definition of a serious health condition under subsection (a). But, the condition from which Miller suffered—the flu—is one of those listed as being “ordinarily” not subject to coverage under the FMLA.⁷¹

The court recognized that the regulation could be interpreted to mean either that the ailments listed in 29 CFR 825.114(c) were automatically excepted from coverage even when they met the regulatory test, or that 29 CFR 825.114(c) meant that ordinarily such ailments would not be covered, but in unusual circumstances where the minor ailment met the regulatory test, it would be covered as a “serious health condition.” The Fourth Circuit chose the latter interpretation, based on the legislative history, statutory language, and regulatory background of the FMLA. The court noted that although the legislative history did contain a list of serious ailments, the actual statute defines “serious health condition” broadly and contains no specific examples of qualifying conditions. The court also found that the DOL regulations focusing on the effect and treatment of the condition

⁶⁷ *Thorson v. Gemini, Inc.*, 205 F.3d 370, 379-80 (8th Cir. 2000).

⁶⁸ *Id.*

⁶⁹ *Id.* at 380. As noted, the Department of Labor, when issuing its regulations, believed that provision of such a list would “lead employers to recognize only conditions in the list or to second-guess whether a condition is equally ‘serious,’ rather than apply the regulatory standard.” 60 Fed. Reg. 2180, 2195 (1995).

⁷⁰ *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001).

⁷¹ 250 F.3d at 831.

rather than a particular diagnosis were a reasonable policy decision that were not so inconsistent with Congressional intent that the regulations should be deemed arbitrary and invalid.⁷²

Finally, the oft-referenced “ingrown toenail” case indirectly illustrates the tension that arises in application of the regulatory test for “serious health conditions.” In *Manuel v. Westlake Polymers Corporation*, the Fifth Circuit found that, for unforeseeable leave, an employee need not specifically mention the FMLA in order to invoke its protections even if the condition at issue might not ordinarily trigger the employer to seek more information about the underlying need for leave.⁷³

In *Manuel*, the employee was terminated under a no-fault attendance policy. Over a month of her leave had been taken for a procedure to remove an ingrown toenail and to recover from complications (an infection) from the procedure that required her to be on crutches. In her challenge of the termination, the employee pointed out that the infection “presumably could have led to gangrene and amputation if not treated properly.”⁷⁴ Upon her termination, she filed suit under the FMLA claiming that these absences were unlawfully counted as an additional step in her employer’s no-fault attendance policy.⁷⁵

The case ultimately turned on the issue of the notice required to invoke the FMLA’s entitlement for unforeseeable leave. (See Workplace Flexibility 2010, *Notice, Designation and Substitution of Leave Under the FMLA* (2004).) The Fifth Circuit expressly refused to rule on whether the complications arising from the employee’s ingrown toenail surgery constituted a “serious health condition.”⁷⁶ Nonetheless, the “ingrown toenail” case is often discussed in political circles as an example of the potential for abuse of the “serious health condition” definition, with some viewing an ingrown toenail as a minor ailment and others finding the possibility of gangrene sufficient to make the condition “serious” under the FMLA.

IV. ELIGIBILITY FOR MEDICAL LEAVE FOR A FAMILY MEMBER’S SERIOUS HEALTH CONDITION

⁷² The court states, “It is possible, of course, that the definition adopted by the Secretary will, in some cases—and perhaps even in this one—provide FMLA coverage to illnesses that Congress never envisioned would be protected. We cannot say, however, that the regulations adopted by the Secretary are so manifestly contrary to Congressional intent as to be considered arbitrary.” *Id.* at 835. The court also reviewed, but did not rely on, a 1996 Department of Labor opinion (superseding a 1995 opinion) that concluded that meeting the regulatory criteria could cause an ordinarily minor illness to qualify as a “serious health condition.” *Id.* at 831-32.

⁷³ *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995). This case was decided under the interim regulations, though the court discussed both the interim and final regulations.

⁷⁴ Reply Brief of Appellant, June Manuel, *Manuel v. Westlake Polymers Corp.* (filed April 21, 1995) at 7, available at 1995 WL 17116703.

⁷⁵ *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995). The court noted that employers have protection against employees who seek to abuse the FMLA’s “generous provisions,” namely, the certification and second opinion procedures that permit further inquiry into the seriousness of the health condition. *Id.* at 763-64.

⁷⁶ *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764n.3 (5th Cir. 1995).

A. The Statute

The FMLA statute permits workers to “care for” an immediate family member with a “serious health condition.”

B. The Legislative History

The legislative history provides that the FMLA leave entitlement “to care for” a family member with a “serious health condition” is “intended to be read broadly to include both physical and psychological care.”⁷⁷ This includes an employee’s ability to tend to the needs of an immediate family member with a serious health condition during periods of both inpatient care and home care.⁷⁸

C. The Regulations

The regulations define “caring for” an ill family member as providing either physical and/or psychological care to the family member, making arrangements for changes in care or providing respite care for others who normally provide such care.⁷⁹ In promulgating the regulations, DOL stated that this regulation “clearly reflects the intent of the Congress that providing psychological care and comfort to family members with serious health conditions would be a legitimate use of FMLA leave entitlement provisions” giving “no discretion” in this area to employers to deny leave on this basis without running afoul of the prohibited acts provisions of the FMLA.⁸⁰

D. The Cases

District courts and some circuit courts have wrestled with the issue of what it means to “care for” a family member with a serious health condition. As the cases in the appendix demonstrate, courts generally interpret the term “care for” broadly, only requiring some evidence that the employee is participating in the care of the family member, either by providing psychological comfort or by participating in medical decision-making.

In one case, the Ninth Circuit, recognizing the FMLA’s purpose to provide “leave for uncommon and often stressful events such as caring for a family member with a serious health condition,” found that an employee who had moved to a new city to live with his father and provide emotional support following his sister’s murder could meet the definition of “caring for” his depressed father.⁸¹ In another case, however, the Ninth

⁷⁷ H.R. REP. NO. 103-8, pt. I, at 36 (1993); S. REP. NO. 103-3, at 24 (1993). This broad reading extends to the requirement that the medical certification state that the employee is needed to care for the family member with a serious health condition. H.R. REP. NO. 103-8, pt. I, at 39 (1993); S. REP. NO. 103-3, at 24 (1993).

⁷⁸ H.R. REP. NO. 103-8, pt. I, at 36 (1993); S. REP. NO. 103-3, at 24 (1993).

⁷⁹ 29 U.S.C. § 2611; 29 C.F.R. § 825.116(a); 29 C.F.R. § 825.116(b).

⁸⁰ 60 Fed. Reg. at 2197.

⁸¹ *Scamihorn v. General Truck Drivers*, 282 F.3d 1078, 1082 (9th Cir. 2002). A dissenting opinion found this kind of care fell outside the parameters of the FMLA. *Id.*

Circuit found that a mother was not “caring for” her son’s alleged serious health condition when she sought FMLA leave to move him to the Philippines after he was assaulted, when she would not be participating in her son’s treatment and when no treatment was planned or available in the Philippines.⁸² Similarly, the Seventh Circuit, in reviewing a case where a husband sought leave to stay home with his pregnant wife, noted, “Wanting to stay home with one’s wife until she has the baby, while understandable, is not the same thing as wanting to stay home to care for a spouse who has a serious health condition.”⁸³

Finally, in a well-known New York district court case, the court found that an employee was not entitled to FMLA leave when he took leave to be at the hospital while his ailing mother had brain surgery, when he provided no evidence that he assisted in medical decision-making, saw or spoke to his mother before or after surgery or otherwise participated in her physical or psychological care.⁸⁴ The court there stated that the “FMLA does not provide qualified leave to cover every family emergency.”⁸⁵

V. CERTIFICATION AND SECOND & THIRD OPINIONS

A. The Statute

The FMLA allows an employer to request certification (and recertification on a reasonable basis) of the existence of a “serious health condition” from an employee’s (or family member’s) health care provider, and requires employees to provide such certification in a timely manner.⁸⁶ The statute also sets forth the information that the certification must include when leave is needed for the employee’s own “serious health condition” or to care for an immediate family member with a “serious health condition,” or when intermittent leave is needed.⁸⁷

⁸² *Marchisheck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999).

⁸³ *Aubuchon v. Knauf Fiberglass*, 359 F.3d 950 (7th Cir. 2004).

⁸⁴ *Fioto v. Manhattan Woods Golf Enterprises*, 270 F.Supp.2d 401 (2003).

⁸⁵ *Id.* at 404 (“Congress could have drawn the statute more broadly; nothing could more surely have been anticipated than the need of workers to visit their ailing relatives. It chose to limit FMLA’s reach to absences that were occasioned by the provision of care.”). The district court noted that the evidentiary standard to show provision of care is quite low, but was not satisfied here. *Id.* at 406.

⁸⁶ 29 U.S.C. § 2613(a), 7(e).

⁸⁷ 29 U.S.C. § 2613. The certification must state: (i) the date on which the condition commenced, (ii) the probable duration of the condition, (iii) appropriate medical facts within the health care provider’s purview regarding the condition, and (iv) a statement that either the eligible employee is needed to care for a family member with an estimated amount of time such care will be needed, or that the eligible employee is unable to perform the functions of the employee’s position. 29 U.S.C. § 2613(b)(1)-(4). For intermittent leave, the certification must state the expected dates and duration of planned medical treatments, the medical necessity and expected duration of leave for the employee’s own serious health condition, or a statement that the employee’s leave is necessary to care for, or will assist in the recovery of, an immediate family member with a serious health condition, and the expected duration and schedule of the leave. 29 U.S.C. § 2613(b)(5)-(7).

If the employer doubts the validity of the certification, it may, at its own expense, require a second opinion, as well as a third opinion should the first and second opinion conflict.⁸⁸ The third opinion is final and binding on both parties.⁸⁹

Finally, an employer may require a certification of “fitness for duty” as a condition of job restoration, but only when the employer has a uniformly applied policy requiring such certification.⁹⁰

B. The Legislative History

According to the committee reports for the FMLA, the medical certification provision was “designed as a check against employee abuse of leave”⁹¹ The reports suggested that the FMLA provisions regarding certification and second and third opinions were permissive, i.e., an employer “may” request such certifications and opinions, but was not required to do so, in contrast to requirements for the content of such certifications where the word “must” was used in the reports.⁹² While the reports indicated that the FMLA “provides for the resolution of conflicts between first and second medical opinions” by permitting a third opinion that is considered “final and binding,” the statute contained no explicit requirement that employers exhaust these second and/or third opinion options before litigating the existence or validity of a “serious health condition.”⁹³

C. The Regulations

In its commentary accompanying the regulations, DOL indicated that the regulations “closely” track the statute.⁹⁴ The regulations, like the statute, also provide for medical certification of “serious health conditions” upon an employer’s request.⁹⁵ Further interpreting the statute, DOL treated this as “a basic qualification for FMLA leave” and placed the responsibility to provide such certification on the employee.⁹⁶

⁸⁸ 29 U.S.C. § 2613(c) & (d). The second opinion must be provided by a health care provider designated by, but not regularly employed by, the employer. *Id.* The third opinion must be provided by a jointly designated provider chosen in good faith by the employer and employee. *Id.*

⁸⁹ *Id.*

⁹⁰ 29 U.S.C. § 2614(a)(4). This provision is also limited by any superseding state or local laws or provisions of collective bargaining agreements. *Id.*

⁹¹ H.R. REP. NO. 103-8, pt. I, at 39 (1993); S. REP. NO. 103-3, at 22 (1993). The legislative history also notes that in Sweden, where leave policies are particularly generous (90 days per year to care for a child’s illness), “the average usage rate of this leave is seven days a year.” H.R. REP. NO. 103-8, pt. I, at 32 (1993); S. REP. NO. 103-3, at 29 (1993).

⁹² H.R. REP. NO. 103-8, pt. I, at 39 (1993); S. REP. NO. 103-3, at 26 (1993).

⁹³ *Id.*

⁹⁴ 60 Fed. Reg. at 2221.

⁹⁵ 29 C.F.R. § 825.305(a). If paid leave is substituted for unpaid leave, and the employer’s leave plan imposes less stringent medical certification requirements, only these less stringent requirements may be imposed. 29 C.F.R. § 825.305(e).

⁹⁶ 60 Fed. Reg. at 2221.

In addition, under the regulations, an employer must give notice (written under certain circumstances) each time certification is required.⁹⁷ When requesting certification, the employer must explain to the employee the consequences of not providing adequate certification, and must permit employees to correct any errors related to their certifications.⁹⁸ The regulations also set forth the specific information that may be obtained in the medical certification, providing that the information on the form must relate only to the serious health condition for which the current need for leave exists, and that no additional information may be required.⁹⁹

If an employee fails to provide certification generally within 15 days of the employer's request (if practicable), an employer may delay the taking of, or continuation of, FMLA leave until the certification is received.¹⁰⁰ If the employee never provides the certification, the leave is not considered FMLA leave, although there is some ambiguity on this point.¹⁰¹ Section 825.311(b) states that an employer may delay an employee's FMLA leave if the employee does not provide medical certification "as soon as reasonably possible" if it is an instance of unforeseeable leave. Section 825.311(a) states that an employer may delay an employee's FMLA leave if the requested certification is not received in a "timely" fashion. Section 825.312(b) states that an employer may refuse to provide FMLA leave or job restoration when an employee fails to provide timely certification of a serious health condition, and makes no distinction between foreseeable and unforeseeable leave. In light of these confusing regulations, the courts appear ready to apply Section 825.311(b) and its more flexible reasonableness standard to certification of foreseeable leave as well as to unforeseeable leave, citing paragraph (b) instead of paragraph (a) of Section 825.311 in cases where the FMLA leave at issue was foreseeable.¹⁰²

⁹⁷ 29 C.F.R. §§ 825.301, 825.305. When the employee gives 30 days notice of the need for leave (e.g., foreseeable leave), the employer should request certification generally within two days of such notice and the employee should provide the medical certification before the leave begins; when 30 days notice is not given (e.g., unforeseeable leave) the employer should request certification generally within two days after leave commences and the employee must provide the certification in the time frame the employer requests, provided it is at least 15 calendar days after the employer's request, unless impracticable despite good faith efforts. 29 C.F.R. § 825.305(b)&(c). The employer may request certification at a later date if reason to question the validity or duration of the leave arises. *Id.*

⁹⁸ 29 C.F.R. § 825.305(d).

⁹⁹ 29 C.F.R. § 825.306(b). If an employee provides the required certification, the employer may not request additional information directly from the employee's health care provider (unless permitted under state workers' compensation laws), but may clarify or authenticate the certification by having its own designated health care provider contact the employee's health care provider, with the employee's permission. 29 C.F.R. § 825.307(a).

¹⁰⁰ 29 C.F.R. §§ 825.311(a)&(b), 825.312(b).

¹⁰¹ 29 C.F.R. §§ 825.311(b), 825.312(b).

¹⁰² See, e.g., *Perry v. Jaguar of Troy*, 353 F.3d 510, 515 (6th Cir. 2003) (citing § 825.311(b), in an instance where the employee requested foreseeable leave under the FMLA to care for his son with ADHD, to mean that if an employee never submits requested certification of a serious health condition, the leave is not FMLA leave); *Toro v. Mastex Inds.*, 32 F. Supp. 2d 25, 29 (D. Mass. 1999) (in the context of an employee taking foreseeable FMLA leave to care for his wife, who was undergoing a scheduled mastectomy in Colombia, stating that the "regulations cannot be read in a vacuum" and that given the flexibility given by § 825.305, § 825.311(b) should be applied "only when an employee completely fails to certify the medical need for his leave.")

The regulations also permit second and third opinions.¹⁰³ Under the regulations, the employee is provisionally qualified for FMLA leave and is afforded all of the benefits of FMLA leave throughout the second- and third-opinion processes, but if no entitlement to FMLA leave is ultimately established, the leave is not considered FMLA leave.¹⁰⁴ Employers must provide employees with copies of the additional medical opinions upon request, must reimburse out-of-pocket travel expenses and generally may not require employees or their family members to travel outside normal commuting distances to obtain medical opinions.¹⁰⁵

D. The Cases

The medical certification provisions are generally viewed as procedural protections that benefit employers by giving them the ability to confirm that a truly serious health condition necessitates an employee's leave and that an employee is not simply abusing the FMLA right to leave. In accord with this protective purpose, the courts generally have not required employers to obtain a second opinion before being allowed to challenge a certification in court. At the same time, courts have required employers to show that they requested the certification from the employee, and also generally have given employees leeway in correcting untimely or inadequate certifications. The following discusses the most significant cases in the area of certification.

➤ Are certifications required?

Certifications may be challenged by employers or employees in the courts.¹⁰⁶ As demonstrated by the cases contained in the appendix, courts generally have stated that an employee need not provide medical certification of his or her "serious health condition" unless specifically requested by an employer.

➤ When is a certification not timely or otherwise inadequate?

FMLA regulations permit employers to delay the taking or continuation of FMLA leave if an employee does not provide timely certification (generally within 15 calendar days or

¹⁰³ 29 C.F.R. § 825.307(a)(2) & (c). The regulations add that if the employer fails to act in good faith, the first certification is binding; if the employee fails to act in good faith, the second certification is binding. 29 C.F.R. 825.307(c). The regulations also provide that an employer located in an area with limited access to health care may regularly use the same health care providers in the opinion process. 29 C.F.R. § 825.307(b).

¹⁰⁴ 29 C.F.R. § 825.307(a)(2); 60 Fed. Reg. at 2223.

¹⁰⁵ 29 C.F.R. § 825.307(d)-(f).

¹⁰⁶ See, e.g., *Rhoads v. FDIC*, 257 F.3d 373 (4th Cir. 2001)(employer may challenge in court the diagnosis of a serious health condition related to reactions to cigarette smoke); *Krohn v. Forsting*, 11 F.Supp.2d 1082 (E.D.Mo. 1998)(partially denying summary judgment for employer when employee challenged the diagnosis obtained from doctor regularly employed by employer). For cases related to whether the second opinion process must be utilized before challenging certification in court see "Are second and third opinions required?" below.

as soon as practicable).¹⁰⁷ If the employee never provides the certification, the leave is not considered FMLA leave.¹⁰⁸ Litigation has arisen over the timing of when an employee must provide certification. As cases contained in the appendix demonstrate, pertinent case law has applied the principle of “equitable tolling” to the timing of employee certification—generally, courts have extended the time frame to obtain certification when the employee demonstrates a bona fide effort to complete the certification form and has communicated this effort to the employer, but have not allowed employees who do not make such effort to enjoy the FMLA’s protections.

➤ Are second and third opinions required?

FMLA regulations provide that an employer “may” request a second opinion if the employer has reason to doubt the first certification, and “may” request a third opinion when the first and second opinion conflict.¹⁰⁹ As with certifications, the courts have generally ruled that second and third opinions are permissive options available to employers at their discretion.¹¹⁰

As detailed in the appendix, a few district courts have ruled that an employer gives up its right to challenge the certification of an employee’s health condition in court if it fails to get a second opinion of the employee’s health condition at the time that FMLA leave is taken. Circuit courts, however, have generally found that both the statute and the regulations are permissive (not mandatory), providing that an employer *may* obtain a second opinion, and have not found this opinion necessary in order for the employer to later challenge an employee’s health condition in court.

Courts have also found that an employer may not fire an employee for abusing FMLA leave simply because the employer doubts the validity of an employee’s medical certification; rather, the employer’s proper course of action is to request a second opinion.¹¹¹ One court, however, has found that an employee may be fired after failing to appear for a second medical opinion requested by the employer when disparate certifications gave the employer reason to doubt the validity of the certification.¹¹² Finally, a district court in New York has ruled that when a second opinion is in conflict with the employee’s original certification, an employer may rely on the second opinion to

¹⁰⁷ 29 C.F.R. § 825.311, 825.312(b).

¹⁰⁸ 29 C.F.R. § 825.311(b), 825.312(b).

¹⁰⁹ 29 C.F.R. § 825.307(a)&(c).

¹¹⁰ See, e.g., *Stekloff v. St. John’s Mercy Health Sys.*, 218 F.3d 858 (8th Cir. 2000)(provision allowing second opinion is only permissive).

¹¹¹ *Peter v. Lincoln Tech. Inst.*, 255 F. Supp. 2d 417 (E.D. Pa. 2002) (stating that if an employer doubts the validity of a medical certification, it may obtain a second opinion but cannot fire an employee based solely on those doubts); *Whitaker v. Bosch Braking Sys. Div. Of Robert Bosch Corp.*, 180 F.Supp.2d 922 (W.D. Mich. 2001)(summary judgment to employee, finding that employer could not deny certification stating that pregnancy was a serious health condition based solely on employer’s opinion that pregnancy was not; employer was required to follow proper procedure of getting s second opinion).

¹¹² See *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711 (7th Cir. 1997)(summary judgment granted for employer when employee fired for failing to appear for second opinion exam after employer received medical certification for bronchitis and separate medical certification for conditions unrelated to bronchitis, giving it reason to doubt the validity of the certifications).

require the employee to return to work, and is not required to obtain a third opinion when the original certification and the second opinion conflict (i.e., the third opinion process is permissive).¹¹³

VI. CONCLUSION

The FMLA appears to have evolved from a bill with a strong focus on unpaid “temporary disability leave” to a law designed to provide unpaid job-protected leave for individuals with serious health conditions that incapacitate them from their jobs for an extended period of time, as well as for individuals with serious health conditions who are unable to do their jobs for intermittent periods because of the need for treatment or recovery. Both of these types of health conditions require job-related leave. Indeed, individuals with the latter type of health conditions require some of the same type of intermittent leaves or reduced schedule needs that pregnant women require. Given that leaves needed for pregnancy, childbirth, and child bonding were the initial catalyst for the bill, such leaves may have continued to serve as templates for other sections of the law.

¹¹³ *Porter v. New York University School of Law*, 2003 WL 22004841 (S.D.N.Y. 2003)[unpublished opinion].

APPENDIX

SELECT CASES WHERE THE CRITERIA OF THE REGULATORY TEST REQUIRING INCAPACITY OR MEDICAL TREATMENT WERE MET.

Cite & Issue	Ruling
<p><i>Rankin v. Seagate Technologies, Inc.</i>, 246 F.3d 1145 (8th Cir. 2001)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114(a)(2))</p> <p>Illness with vomiting, coughing, congestion and sleeplessness</p>	<p>FMLA is not implicated if absence is not attributable to a “serious health condition,” but finding, after applying test, summary judgment precluded when genuine issue of material fact existed as to whether employee’s vomiting, coughing, congestion and sleeplessness had period of incapacity greater than three days and whether employee received continuing treatment.</p> <p>Vacated summary judgment for employer and remanded.</p>
<p><i>Caldwell v. Holland of Texas, Inc.</i>, 208 F.3d 671 (8th Cir. 2000)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114 (a)(2)(i))</p> <p>Ear infection</p>	<p>Genuine issue of material fact existed as to whether 3-year old child’s ear infection was a “serious health condition” when evidence existed that child received subsequent treatment in form of visits to two physicians, ear surgery and ongoing antibiotic treatment; dissent considered ear infection a minor illness not covered by the FMLA.</p> <p>Vacated summary judgment for employer and remanded.</p>
<p><i>Stekloff v. St. John’s Mercy Health Systems</i>, 218 F.3d 858 (8th Cir. 2000)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114 (a)(2)(i)(A))</p> <p>Mental illness</p>	<p>Employee met requirements for incapacity of at least three days and at least two visits to a health care provider for treatment when left job after an argument with a supervisor over making personal calls and did not return for two weeks due to a mental health condition.</p> <p>Vacated summary judgment for employer and remanded.</p>
<p><i>Sloop v. ABTCO, Inc.</i>, 178 F.3d 1285 (4th Cir. 1999)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114(d))</p> <p>Treatment at detoxification center</p>	<p>Employee was “treated” at a detox center for a “serious health condition” per the FMLA when his condition was evaluated by two physicians who found him to be a danger to himself and others and recommended involuntary commitment, but absence from work due to use of alcohol over July 4th weekend, as opposed to court-ordered residential treatment a week later, was not covered by the FMLA; FMLA regulation is permissible construction of FMLA and is due controlling weight.</p> <p>Granted summary judgment for employer on grounds that absence was due to use of, not treatment for, alcohol.</p>

**SELECT CASES WHERE THE CRITERIA OF THE REGULATORY TEST REQUIRING
INCAPACITY OR MEDICAL TREATMENT WERE NOT MET.**

Cite & Issue	Ruling
<p><i>Brennerman v. MedCentral Health System</i>, 366 F.3d 412 (6th Cir. 2004)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Flu (not complicated by employee's diabetes)</p>	<p>Diabetes was not a complicating condition for the flu, and flu was not a "serious health condition" when employee's FMLA certification document indicated only need for leave from work, bedrest, and fluids, which do not qualify as a regimen of continuing treatment under FMLA.</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Perry v. Jaguar of Troy</i>, 353 F.3d 510 (6th Cir. 2003)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114(a)(2))</p> <p>Learning disability</p>	<p>Insufficient evidence existed to show that employee's son with learning disabilities/ ADD/ADHD could not perform regular daily activities, as required by "serious health condition" definition, even if biannual doctor visits constituted treatment.</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Frazier v. Iowa Beef Processors, Inc.</i>, 200 F.3d 1190 (8th Cir. 2000)</p> <p>DOL Regulations (29 C.F.R. § 825.114(a)(2))</p> <p>Shoulder injury</p>	<p>No evidence that shoulder injury met FMLA requirements for a "serious health condition" when physician did not advise employee that he could not return to work and did not impose any work restrictions and when neither of his visits to physician resulted in a program of treatment, prescribed medication or physical therapy and employee failed to return for scheduled follow-up visits.</p> <p>Affirmed dismissal of employee's FMLA claim.</p>
<p><i>Marchisheck v. San Mateo County</i>, 199 F.3d 1068 (9th Cir. 1999)</p> <p>DOL Final Regulations (29 C.F.R. §§ 825.114(a)(2) & 825.116 (a))</p> <p>Injuries from assault</p>	<p>No "serious health condition" arising from the combination of separate physical and psychological treatment for the employee's child's injuries resulting from a beating when there was no showing that the child was incapacitated due to a combination of physical and psychological impairments ; employee's child's injuries resulting from a beating were not a "serious health condition" because even though the child was incapacitated for three days, medical treatment was obtained only once; psychological treatment was not counted toward the medical treatment requirement because psychological treatment was received for behavioral problems, not for the injuries related to the child's beating.</p> <p>Affirmed summary judgment for employer.</p>

<p><i>Martyszenko v. Safeway, Inc.</i>, 120 F.3d 120 (8th Cir. 1997)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114(a) & (b))</p> <p>Alleged sexual abuse</p>	<p>No “serious health condition” when examining psychiatrist found no psychological disorder despite alleged sexual abuse and did not restrict son’s daily activities; individual must be incapacitated to have a “serious health condition,” and even if son did have “serious health condition,” employer met FMLA obligations by permitting employee to leave initially and by scheduling her around subsequent examinations.</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Seidle v. Provident Mut. Life Ins. Co.</i>, 871 F. Supp. 238 (E.D. Pa 1994)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Ear infection</p>	<p>Employee’s child’s ear infection was not a “serious health condition” when ear infection was not included in Congress’ non-exhaustive list of “serious health conditions” and no evidence of incapacity or regimen of medication under continuing supervision of physician existed.</p> <p>Granted summary judgment for employer.</p>



SELECT CASES WHERE INCAPACITY WAS FOUND (OR SUMMARY JUDGMENT ON BASIS OF LACK OF INCAPACITY WAS REJECTED):

Cite & Issue	Ruling
<p><i>Rankin v. Seagate Technologies, Inc.</i>, 246 F.3d 1145 (8th Cir. 2001)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Viral illness with vomiting</p>	<p>Genuine issue of material fact as to employee’s incapacity based on employee’s affidavit that she was too sick to work, her conversations with nurses about her condition and her medical records showing she suffered from symptoms for a week.</p> <p>Denied summary judgment for employer.</p>
<p><i>Stekloff v. St. John’s Mercy Health Systems</i>, 218 F.3d 858 (8th Cir. 2000)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114(a)(2)(i)(A))</p>	<p>Employee presented sufficient evidence to allow a reasonable jury to find that she was unable to work in her job for a period of more than three consecutive calendar days when her doctor testified that she needed a break from her work and was “re-injuring a traumatized area of her life.”</p> <p>Reversed grant of summary judgment for employer.</p>

Mental Illness	
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SELECT CASES WHERE INCAPACITY WAS NOT FOUND (OR SUMMARY JUDGMENT
GRANTED ON BASIS OF LACK OF INCAPACITY):

Cite & Issue	Ruling
<p><i>Aubuchon v. Knauf Fiberglass GmbH</i>, 359 F.3d 950 (7th Cir. 2004)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114(a)(2)(ii))</p> <p>Pregnancy</p>	<p>Being pregnant is not itself a “serious health condition” absent incapacity from false labor or complications.</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Russell v. North Broward Hospital</i>, 346 F.3d 1335 (11th Cir. 2003)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Fractured elbow</p>	<p>“More than three consecutive calendar days” of incapacity under the FMLA means a continuous period of incapacity extending more than 72 hours and, therefore, employee who was absent from work for seven consecutive partial days of incapacity after falling at work did not have a “serious health condition” under the FMLA.</p> <p>Went to trial and court affirmed jury verdict in favor of employer.</p>
<p><i>Frazier v. Iowa Beef Processors, Inc.</i>, 200 F.3d 1190 (8th Cir. 2000)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Shoulder injury</p>	<p>No evidence that employee’s shoulder injury met FMLA requirements for a “serious health condition” when physician did not advise employee that he could not return to work and did not impose any work restrictions and neither of his visits to the physician resulted in a program of continuing treatment, prescribed medication or physical therapy and employee failed to return for scheduled follow-up visits.</p> <p>Affirmed dismissal of employee’s FMLA claim.</p>
<p><i>Haefling v. United Parcel Service</i>, 169 F.3d 494 (7th Cir. 1999)</p> <p>DOL Interim Regulations (29 C.F.R. § 825.114)</p> <p>Aggravation of existing neck injury</p>	<p>Reading the regulation to require three <i>consecutive</i> days of incapacity, employee’s neck injury was not a “serious health condition” when no evidence showed that he suffered a period of incapacity lasting more than three days or had a chronic or long-term health condition that would likely result in incapacity.</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Bauer v. Varity Dayton-Walther Corporation</i>, 118 F.3d 1109 (6th Cir. 1997)</p> <p>DOL Interim Regulations (29 C.F.R. § 825.114)</p> <p>Hematochezia (passage of stools containing blood)</p>	<p>Employee with hematochezia (bloody stool) did not have “serious health condition” when he was not absent from work for more than three days and condition did not require him to miss work.</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Murray v. Red Kap Industries, Inc.</i> 124 F.3d 695 (5th Cir. 1997)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Upper and lower respiratory tract infection</p>	<p>Employee did not have a “serious health condition” during second week of absence from work when physician had released her to return to work and no evidence supported an inability to work during the period.</p> <p>Affirmed judgment as a matter of law for employer.</p>



SELECT CASES WHERE TREATMENT WAS FOUND (OR SUMMARY JUDGMENT ON BASIS OF LACK OF TREATMENT WAS DENIED):

Cite & Issue	Ruling
<p><i>Rankin v. Seagate Technologies, Inc.</i>, 246 F.3d 1145 (8th Cir. 2001)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Viral illness with vomiting</p>	<p>Finding the fact that an employee is sufficiently ill to see a physician two times in a period of a few days is all the FMLA requires for “continuing treatment” and finding that employee’s visits to physician after termination constituted subsequent treatment related to “serious health condition” and thus met continuing treatment requirement.</p> <p>Denied summary judgment for employer.</p>
<p><i>Stekloff v. St. John’s Mercy Health Systems</i>, 218 F.3d 858, 863 (8th Cir. 2000)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114(a)(2)(i)(A))</p> <p>Mental illness</p>	<p>Finding that an employee was eligible for FMLA leave even though they were diagnosed with a “serious health condition” only after they had taken leave; “...it seems to us that an employee who falls and breaks a leg while on the job should not be required to attempt to keep working (and be subject to termination for failure to do so or even for failure to perform some tasks up to standard) until a doctor arrives and excuses him or her.”</p> <p>Reversed grant of summary judgment for employer.</p>
<p><i>Thorson v. Gemini, Inc.</i>, 205 F.3d 370 (8th Cir. 2000)</p> <p>FMLA (29 USC 2611(11), 2617); DOL Final Regulations (29 C.F.R. §§ 825.114, 825.302, 825.305, 825.800)</p> <p>Upset stomach and minor ulcer</p>	<p>Finding employee received “continuing treatment” under objective regulatory test for her upset stomach and minor ulcer when doctor diagnosed her after suspecting potentially serious peptic ulcer or gallbladder disease; not until after employee was terminated and definitive diagnosis made was employee sick enough to see doctor two times in a short period.</p> <p>Affirmed summary judgment for employee as to liability.</p>
<p><i>Miller v. AT&T Corp.</i>, 250 F.3d 820 (4th Cir. 2001)</p> <p>FMLA (29 U.S.C. §§ 2611(11), 2612, & 2615); DOL Final Regulations (29 C.F.R. §§ 825.114, 825.305, 825.307)</p>	<p>Finding that follow-up evaluation by doctor for flu, which included physical examination and drawing of blood, constituted “treatment” under the definition of “serious health condition.”</p> <p>Affirmed partial summary judgment for employee as to liability.</p>

<p><i>Hodgens v. General Dynamics Corp.</i>, 144 F.3d 151, 163 (1st Cir. 1998)</p> <p>FMLA (29 U.S.C. §§ 2611(11), 2612, & 2615); DOL Interim Regulations (29 C.F.R. § 825.114)</p> <p>Atrial fibrillation</p>	<p>Finding that “[I]t seems unlikely that Congress intended to punish people who are unlucky enough to develop new diseases, or to suffer serious symptoms for some period of time before the medical professions is able to diagnose the cause of the problem. Indeed, one reason for taking “intermittent leave” under the FMLA should be to visit the doctor for purposes of diagnosis and treatment, even if the employee does not take leave for the periods in between such visits.”</p> <p>Affirmed summary judgment for employer (when employee fired as part of legitimate reduction in force).</p>
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Select cases where treatment was not found (or summary judgment on basis of lack of treatment was granted):

Cite & Issue	Ruling
<p><i>Frazier v. Iowa Beef Processors, Inc.</i>, 200 F.3d 1190 (8th Cir. 2000)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Shoulder injury</p>	<p>No evidence that shoulder injury met FMLA requirements for a “serious health condition” when neither visit to physician resulted in a program of continuing treatment, prescribed medication or physical therapy and employee failed to return for scheduled follow-up visits.</p> <p>Affirmed dismissal of employee’s FMLA claim.</p>
<p><i>Murray v. Red Kap Industries, Inc.</i> 124 F.3d 695 (5th Cir. 1997)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Upper and lower respiratory tract infection</p>	<p>Employee did not have “serious health condition” during second week of absence from work when no evidence that employee had any treatment from a health care provider during the period.</p> <p>Affirmed judgment as a matter of law for employer.</p>



SELECT CASES IN WHICH AN ORDINARILY MINOR CONDITION WAS FOUND TO JUSTIFY FMLA LEAVE (OR SUMMARY JUDGMENT ON ALLEGATION OF SUCH CONDITION NOT MEETING FMLA STANDARDS WAS DENIED):

Cite & Issue	Ruling
<p><i>Rankin v. Seagate Technologies, Inc.</i>, 246 F.3d 1145 (8th Cir. 2001)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Viral illness with vomiting</p>	<p>FMLA is not implicated if absence is not attributable to a “serious health condition,” but finding, after applying test, summary judgment precluded when genuine issue of material fact existed as to whether employee’s vomiting, coughing, congestion and sleeplessness had period of incapacity greater than three days and whether employee received continuing treatment.</p> <p>Denied summary judgment for employer.</p>
<p><i>Caldwell v. Holland of Texas, Inc.</i>, 208 F.3d 671 (8th Cir. 2000)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114(a))</p> <p>Ear infection</p>	<p>Genuine issue of material fact existed as to whether 3-year-old child’s ear infection was a “serious health condition” when evidence existed that child received subsequent treatment in form of visits to two physicians, ear surgery and ongoing antibiotic treatment; dissent considered ear infection a minor illness not covered by the FMLA.</p> <p>Reversed summary judgment for employer and remanded.</p>
<p><i>Victorelli v. Shadyside Hospital</i>, 128 F.3d 184 (3rd Cir. 1997)</p> <p>DOL Interim and Final Regulations (29 C.F.R. § 825.114)</p> <p>Ulcer</p>	<p>Material question of fact as to whether employee’s ulcer met definition of episodic, chronic “serious health condition” precluded summary judgment on claim that termination following request for leave violated FMLA.</p> <p>Reversed summary judgment for employer and remanded.</p>

SELECT CASES IN WHICH A MINOR CONDITION WAS FOUND NOT TO JUSTIFY FMLA LEAVE (OR SUMMARY JUDGMENT ON ALLEGATION OF A MINOR CONDITION NOT MEETING FMLA STANDARDS WAS GRANTED):

Cite & Issue	Ruling
<p><i>Brennerman v. MedCentral Health System</i>, 366 F.3d 412 (6th Cir. 2004)</p> <p>DOL Final Regulations (29 C.F.R. § 825.114)</p> <p>Flu (not complicated by employee’s diabetes)</p>	<p>Diabetes was not a complicating condition for the flu, and flu was not a “serious health condition” when employee’s FMLA certification document indicated only need for leave from work, bedrest, and fluids, which do not qualify as a regimen of continuing treatment under FMLA.</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Raymond v. Albertson’s Inc.</i>, 38 F. Supp.2d 866 (D. Nev. 1999)</p> <p>DOL Final Regulations</p>	<p>Employee’s infant’s stomach flu was not a “serious health condition” absent evidence of complications.</p> <p>Granted summary judgment for employer.</p>

(29 C.F.R. § 825.114(c)) Stomach Flu	
<i>Seidle v. Provident Mut. Life Ins. Co.</i> , 871 F.Supp. 238 (E.D.Pa. 1994) DOL Final Regulations (29 C.F.R. § 825.114) Ear Infection	Employee's child's ear infection was not a "serious health condition" when ear infection was not included in Congress' non-exhaustive list of "serious health conditions" and no evidence of incapacity or regimen of medication under continuing supervision of physician existed. Granted summary judgment for employer.



SELECT CASES WHERE "CARE FOR" STANDARD MET (OR SUMMARY JUDGMENT ON BASIS OF LACK OF "CARE" WAS DENIED):

Cite & Issue	Ruling
<i>Scamihorn v. General Truck Drivers</i> , 282 F.3d 1078, 1082 (9th Cir. 2002) DOL Final Regulations (29 C.F.R. § 825.114, §825.116(a)) Depression	Applying regulatory test to preclude summary judgment for employer regarding whether employee's father's depression constituted a "serious health condition" and employee was caring for him as required by the FMLA; dissent found this kind of care fell outside the parameters of the FMLA. Reversed summary judgment for employer and remanded.
<i>Brunelle v. Cytec Plastics, Inc.</i> , 225 F.Supp.2d 67 (D. Me. 2002) DOL Final Regulations (29 C.F.R. § 825.203(c)) Injuries from a house fire	Finding son was entitled to intermittent FMLA leave to care for father hospitalized for months after rescue from a house fire when he assisted in medical decision-making and provided psychological comfort, even if he was seen out drinking with friends at a bar on night he could have been working. Denied summary judgment for employer.
<i>Mora v. Chem-Tronics, Inc.</i> , 16 F.Supp.2d 1192 (S.D. Cal. 1998) DOL Final Regulations (29 C.F.R. § 825.116(a), §825.116(c))	Caring for a sick family member includes both physical and psychological care; the term "needed to care for" in the statute does not require an employee to demonstrate that no other caretakers be available before obtaining leave; father was entitled to FMLA leave to care for son with AIDS when he provided psychological comfort, enforced medication regimen and monitored son's condition. Denied summary judgment for employer and employee (finding that father provided care for his son, but that issue of fact existed as to timing of employee notice).

AIDS	
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SELECT CASES WHERE “CARE FOR” STANDARD NOT MET (OR SUMMARY JUDGMENT ON BASIS OF LACK OF “CARE” WAS GRANTED):

Name & Cite	Ruling
<i>Marchisheck v. San Mateo County</i> , 199 F.3d 1068 (9th Cir. 1999) DOL Final Regulations (29 C.F.R. § 825.116) Injuries suffered from attack	Finding 29 C.F.R. §825.116 suggests that caring for a child with a “serious health condition” involves some level of participation in ongoing treatment of the condition and here employee was moving child to a place where child would receive no treatment. Affirmed summary judgment for employer.
<i>Fioto v. Manhattan Woods Golf Enterprises, LLC</i> , 270 F.Supp.2d 401 (S.D.N.Y. 2003) Motion for new trial granted Feb. 2004 DOL Final Regulations (29 C.F.R. § 825.116) Brain surgery	Employee was not entitled to FMLA leave when he took leave to be at the hospital during his mother’s brain surgery, when he provided no evidence that he assisted in medical decision-making, saw or spoke to his mother before or after surgery or otherwise participated in her physical or psychological care. Granted summary judgment for employer.



SELECT CASES WHERE CERTIFICATION REQUIREMENT DEEMED PERMISSIVE

Cite & Issue	Ruling
<i>Perry v. Jaguar of Troy</i> , 353 F.3d 510 (6th Cir. 2003) DOL Final Regulations (29 C.F.R. § 825.305) Son with ADD, ADHD, and learning disabilities	Finding genuine issue of fact as to whether employer had specifically requested certification of employee’s serious health condition; employer could not simply rely on provision in employee handbook that certification was required every time that FMLA leave was taken. Granted summary judgment to employer on grounds that condition failed to meet definition of serious health condition.
<i>Conrad v. Eaton Corp.</i> , 303 F. Supp. 2d 987 (N.D. Iowa 2004)	Finding issue of fact as to whether employer had specifically requested certification from employee for his serious health condition, when unclear whether certification request had been in notice sent to employee.

DOL Final Regulations (29 C.F.R. §§ 825.305, 825.308) Work-related depression	Denied summary judgment for employer.
<i>Carmen v. Unison Behavioral Health Group Inc.</i> , 295 F.Supp.2d 809 (N.D. Ohio 2003) FMLA (29 U.S.C. § 2613) Broken ankle	Finding the record was devoid of any indication that the employer had requested certification and therefore the employee was not required to provide certification to qualify for FMLA protection, demonstrating the mandatory/permissive nature of certification. Denied summary judgment for employer.
<i>Henderson v. Whirlpool Corp.</i> , 17 F. Supp. 2d 1238 (N.D. Okla. 1998) FMLA (29 USC 2613); DOL Final Regulations (29 C.F.R. §§ 825.305 and 825.308) Migraine headaches	Ruling that an employer does not fulfill its duty to specifically request certification each time FMLA leave is granted when it merely prints in an employee handbook a passage saying that certification is required and fires employee for failing to provide certification; “The effect [of allowing an employer to claim that a blanket statement in an employee handbook satisfies its request for certification responsibility would be to write into the law a trip to the doctor every time an employee requests medical leave. This result is contrary to the terms of the statute, illogical, and inconsistent with the legislative intent. Therefore, the Court concludes, as a matter of law, that a blanket requirement for medical certification in the policy manual cannot satisfy an employer’s obligation to notify an employee that medical certification is requested ‘each time a certification is required.’” Denied summary judgment for employer.



SELECT CASES ON TIMING OF CERTIFICATION

Cite & Issue	Ruling
<i>Junker v. Amana Company</i> , 240 F. Supp. 2d 894 (N.D. Iowa 2003) FMLA (29 U.S.C. 2613); DOL Final Regulations (29 C.F.R. §§ 825.308, 825.302, 825.309) Injuries from an automobile accident	Finding no FMLA violation when employer fired employee who did not personally notify employer of his extension of leave or the certification justifying leave, although employee apparently repeatedly sought to have health care provider send certification to employer. Granted summary judgment for employer.

<p><i>Peter v. Lincoln Tech. Inst.</i>, 255 F. Supp. 2d 417 (E.D. Pa. 2002)</p> <p>DOL Final Regulations (29 C.F.R. § 825.305)</p> <p>Severe sleep apnea and sleepiness</p>	<p>Ruling that the amount of time given to an employee to fill out medical certification forms is subject to equitable tolling and that a reasonable jury could find employee's delay here excusable; employer's proper course of action was not terminating, but allowing employee an amount of time to fix the inadequate certification.</p> <p>Partially denied summary judgment to employer.</p>
<p><i>Toro v. Mastex Industries</i>, 32 F. Supp. 2d 25 (D. Mass. 1999)</p> <p>DOL Final Regulations (29 C.F.R. §§ 825.305, 825.312)</p> <p>Employee's wife (who was in Colombia) needed a mastectomy</p>	<p>Finding issue of material fact as to whether it was practicable for employee to provide notice to the company before taking FMLA leave, noting tension that exists between the regulation allowing an employer to fire an employee who does not submit timely and proper certification (29 CFR 825.312) and the regulation allowing an employee to submit certification when practicable (29 CFR 825.305).</p> <p>Denied summary judgment for both parties.</p>
<p><i>Harrington v. Boysville of Michigan, Inc.</i>, 1998 WL 252755 (6th Cir. 1998) [UNPUBLISHED]</p> <p>FMLA (29 U.S.C. § 2613); DOL Final Regulations (29 C.F.R. § 825.305)</p> <p>Bladder condition that made employee drowsy</p>	<p>Finding no FMLA violation when employee was terminated when she did not provide in a timely or adequate manner the requested certification for her extended absence (her certification stated that she could return from leave).</p> <p>Upheld summary judgment for employer in unpublished per curium opinion.</p>



SELECT CASES ON INADEQUATE CERTIFICATIONS

Cite & Issue	Ruling
<p><i>Bailey v. Southwest Gas Co.</i>, 275 F.3d 1181 (9th Cir. 2002)</p> <p>FMLA (29 U.S.C. § 2613, 2615); DOL Final Regulations (29 C.F.R. § 825.208, 825.307)</p> <p>Employee conceded she</p>	<p>Finding no FMLA violation when employer fired employee after giving her repeated opportunities to fix a faulty medical certification form (lacked sufficient information for employer to determine if she qualified for FMLA leave); court also noted employee's refusal to allow her doctor to share her medical information regarding her fatigue (e.g., her diagnosis, medication, and expected recovery time) with employer.</p> <p>Upheld summary judgment for employer.</p>

had no FMLA-qualifying condition	
<i>Miller v. AT&T</i> , 250 F.3d 820 (4th Cir. 2001) DOL Final Regulations (29 C.F.R. § 825.305) Flu	Finding employee did not have to proffer information that employer did not request on its certification form in order to qualify for FMLA leave, noting that if employer thought the certification form inadequate, it was required to provide employee with a suitable amount of time to fix it, and objecting to employer's efforts to claim that employee provided inadequate certification when employee filled out employer's own company-provided form. Affirmed grant of partial summary judgment for employee as to liability.
<i>Hoffman v. Professional Med Team</i> , 270 F. Supp. 2d 954 (W.D. Mich. 2003) DOL Final Regulations (29 C.F.R. § 825.310, 825.307) Migraine headaches	Finding employer justified in not accepting incomplete certification (forms were inconsistent, answers contradicted themselves) and acted properly in giving employee time to correct errors. Went to trial and court found in favor of employer (employee claim barred by statute of limitations).
<i>Peter v. Lincoln Technical Institute</i> , 255 F. Supp. 2d 417 (E.D. Pa. 2002) DOL Final Regulations (29 C.F.R. § 825.305) Severe sleep apnea and sleepiness	Finding employer not justified in firing employee even if certification was inadequate (it said that she would be unable to work "indefinitely" and did not specify an exact return date) because the proper course of action was to allow the employee an amount of time to fix the problems in the certification. Partially denied summary judgment to employer.
<i>Shtab v. The Grete Bay Hotel and Casino, Inc.</i> , 173 F. Supp. 2d 255 (D. N.J. 2001) FMLA (29 U.S.C. § 2613); DOL Final Regulations (29 C.F.R. §§ 825.307, 825.305, 825.301) Autistic son	Issue of fact as to whether employee's certification form, which did not include the first 5 days of his absence but would have if his doctor had realized that it should have, was complete (so that the company could depend on it in making its decision to fire him) or was incomplete and required the company to give employee a period of time in which to correct it. Denied summary judgment for both parties.



SELECT CASES WHERE OPINION PROCESS DEEMED PERMISSIVE

Cite & Issue	Ruling
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<p><i>Rhoads v. FDIC</i>, 257 F.3d 373 (4th Cir. 2001)</p> <p>FMLA (29 U.S.C. § 2613); DOL Final Regulations (29 C.F.R. § 825.305)</p> <p>Asthma attacks and migraines due to the secondhand smoke breathed while at work</p>	<p>Finding that an employer does not give up the right to challenge the validity of a serious health condition if it fails to obtain a second opinion, citing <i>Stekloff</i>; “Rhoad’s assertion – that adequate notice and certification alone entitled her to FMLA leave – must fail.”</p> <p>Upheld jury finding in favor of employer. Overturns that part of the <i>district court’s</i> ruling in <i>Miller</i> saying that an employer does give up the right to challenge the validity of a serious health condition if it does not obtain a second opinion. This court expressly noted that the circuit court’s affirmation of the district court’s ruling in <i>Miller</i> did not rely on this issue.</p>
<p><i>Stekloff v. St. John’s Mercy Health Systems</i>, 218 F.3d 858 (8th Cir. 2000)</p> <p>FMLA (29 U.S.C. § 2613)</p> <p>Upset following argument with supervisor about personal calls and doctor recommended two weeks of leave</p>	<p>Finding an employer does not lose the right to challenge an employee’s serious medical condition if it fails to seek a second opinion but that issue of material fact existed as to whether employer had a serious medical condition.</p> <p>Reversed summary judgment for employer and remanded.</p>
<p><i>Stoops v. One Call Communications, Inc.</i>, 141 F.3d 309 (7th Cir. 1998)</p> <p>FMLA (29 U.S.C. § 2612, 2613); DOL Final Regulations (29 C.F.R. § 825.303, 825.208)</p> <p>Chronic fatigue syndrome</p>	<p>Employer could rely upon original doctor’s certification saying that employee was ineligible for FMLA leave to deny leave; not required to get a second opinion for absences that occurred after his original certification.</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Hoffman v. Professional Med Team</i>, 270 F. Supp. 2d 954 (W.D. Mich. 2003)</p> <p>DOL Final Regulations (29 C.F.R. § 825.310, 825.307)</p> <p>Migraine headaches</p>	<p>Finding employer not required to obtain second opinion when it did not reject certification, but instead required employee to correct errors.</p> <p>Went to trial and court found in favor of employer (employee claim barred by statute of limitations).</p>

SELECT CASES WHERE OPINION PROCESS DEEMED MANDATORY

Cite & Issue	Ruling
<p><i>Sims v. Alameda-Contra Costa Transit District</i>, 2 F. Supp. 2d 1253 (N.D. Ca. 1998)</p> <p>FMLA (29 U.S.C. § 2613); DOL Final Regulations (29 C.F.R. §§ 825.307, 825.305)</p> <p>Back injury</p>	<p>Finding the statute ambiguous as to whether an employer could use the courts to challenge an employee's certification of his/her serious health condition or if the only way to challenge it was through a second opinion, but finding here that an employer may not challenge an employee's certification of a serious health condition in court if it does not seek a second opinion.</p> <p>Granted partial summary judgment for employee, denied summary judgment for employer.</p>
<p><i>Miller v. AT&T</i>, 60 F. Supp. 2d 574 (S.D. W.Va. 1999)</p> <p>FMLA (29 U.S.C. § 2613)</p> <p>Flu</p>	<p>Finding employer lost the opportunity to challenge employee's certification of a serious health condition because it did not seek a second opinion; "An employer who wishes to contest the validity of a medical certification must use the second-opinion procedures of § 2613(c)-(d)."</p> <p>Affirmed partial grant of employee's motion for summary judgment as to liability. This aspect of the court's ruling was overturned by <i>Rhoads</i>.</p>



SELECT CASES ON FITNESS-FOR-DUTY EXAM REQUIREMENTS

Cite & Issue	Ruling
<p><i>Porter v. United States Alumoweld Co.</i>, 125 F.3d 243 (4th Cir. 1997)</p> <p>DOL [Interim] Regulations (29 C.F.R. § 825.310)</p> <p>Back injury</p>	<p>Finding that employer did not violate the FMLA when it demanded a fitness-for-duty examination and functional capacity evaluation (paid for by employee) prior to employee's job restoration because "the FMLA implies that an employee has to meet the fitness requirements of the Act <i>and</i> the ADA," and that otherwise the Act "would be violated every time an employer requested a fitness for duty exam under the ADA, a request which requires the disclosure of more medical information than would be available from the FMLA's 'simple statement of an employee's ability to return to work.'" (125 F.3d at 247, emphasis in original).</p> <p>Affirmed summary judgment for employer.</p>
<p><i>Pollard v. City of Northwood</i>, 161 F. Supp. 2d 782 (N.D. Ohio 2001)</p> <p>29 C.F.R. § 825.307</p> <p>Work-related stress</p>	<p>Finding that the regulation providing that a physician used to obtain a second opinion may not be regularly employed by the employer seeking the second opinion did not apply to fitness-for-duty reports.</p> <p>Granted summary judgment for employer.</p>
<p><i>Routes v. Henderson, Postmaster of the USPS</i>, 58 F. Supp. 2d 959 (S.D. Ind. 1999)</p> <p>29 C.F.R. § 825.310</p>	<p>Finding FMLA violation, when doctor's certification amounted to unrestricted fitness-for-duty when the doctor thought employee only worked 5 days a week and thus reasonably could have meant employee was able to return to work without restriction (employee in fact worked 7 days a week at times); employer not entitled to request a fitness-for-duty examination when no uniform policy existed and when it had no reason to believe that employee was unable to return to duty.</p>

Alcoholism and depression including suicidal tendencies	Went to trial and court found in favor of employee.
<i>Albert v. Runyon</i> , 6 F. Supp. 2d 57 (D. Mass. 1998) FMLA (29 U.S.C. § 2613, 2614); DOL Final Regulations (29 C.F.R. § 825.310) Depression from on-site gender-based discrimination	Finding that an employer is not allowed to require a separate fitness-for-duty examination when the employee's doctor has already cleared employee for work; employer is not entitled to a second opinion of this fitness-for-duty certification and is only allowed to seek clarification from the employee's physician; based on the FMLA's regulatory guidelines stating that an employer's ability to get second opinions on the fitness-for-duty certification was explicitly rejected by the Secretary of Labor when the legislative history of the FMLA provided no basis for it. Granted summary judgment and job reinstatement for employee.