

THE FMLA: AN EMPLOYER'S ROADMAP TO ROOTING OUT FRAUD AND PROTECTING RIGHTS

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I. THE FMLA: A REMARKABLE EMPLOYMENT LAW, THAT PRESENTS UNPRECEDENTED COMPLIANCE CHALLENGES TO EMPLOYERS

A. Overview

The FMLA and its regulations set forth rules for employers to follow that are unusually detailed, comprehensive, unforgiving, and – most of all – completely contrary to the “at-will” employment rule. *See Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 977 (5th Cir. 1998) (“It goes without saying that the FMLA makes incredible inroads on an at-will employment relationship, such as Satterfield’s with Wal-Mart.”).

The FMLA was enacted to permit employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. 29 U.S.C. § 2601(b)(2). Congress enacted the FMLA in response to concerns over “inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods.” *Miller v. AT & T Corp.*, 250 F.3d 820, 833 (4th Cir. 2001) (internal quotations omitted). The FMLA redresses the “serious problems with the discretionary nature of family leave” by guaranteeing leave to qualified employees in certain circumstances. *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721, 732 (2003) (internal quotations omitted).

“The FMLA has two distinct sets of provisions, which together seek to meet the needs of families and employees and to accommodate the legitimate interests of employers.” *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 763 (5th Cir. 2001) (citing *Nero v. Industrial Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999); *Bocalbos v. National W. Life Ins. Co.*, 162 F.3d 379, 383 (5th Cir. 1998)). The first set of provisions are prescriptive: They create a series of substantive rights, namely, the right to take up to twelve weeks of unpaid leave under certain circumstances. *Id.* The provisions in the second set are proscriptive: They bar employers from penalizing employees and other individuals for exercising their rights. *Id.*; *see also* 29 U.S.C. §§ 2615(a)(1)-(2); *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 320-22 (5th Cir. 2003) (holding that there is a distinction between substantive FMLA rights and causes of action for retaliation designed to protect those rights); *Chaffin v. John H. Carter Co.*, 179 F.3d 316, 319 (5th Cir. 1999); *Bocalbos*, 162 F.3d at 383 (“[T]he Act protects employees from interference with their leave as well as against discrimination or retaliation for exercising their rights.”).

The FMLA poses unique challenges and dangers to employers, Human Resources departments, and individual managers, for many reasons, including the following:

- The regulations are lengthy (>40 pages), dense, complex, and often do not provide bright-line answers to common questions, such as “if the employee never provides “X” can I fire them?”
- It is challenging to track and difficult to administer over time, especially in non-block leave scenarios.
- It sometimes requires employers to partially forgive an employee’s noncompliance with sales quotas or other normal metrics for workplace

performance. *See, e.g., Pagel v. TIN Inc.*, ___ F.3d ___, NO. 11-2318, 2012 WL 3217623, at *6 (7th Cir. Aug. 9, 2012) (reversing summary judgment in FMLA interference case where employer arguably relied on plaintiff's poor sales results during time period that included his FMLA leave, and did not adjust its analysis to account for his FMLA leave, stating, "[t]he FMLA does not require an employer to adjust its performance standards for the time an employee is actually on the job, but it can require that performance standards be adjusted to avoid penalizing an employee for being absent during FMLA-protected leave.") (citations omitted).

- FMLA interference claims do not require proof of prohibited intent or bad motive. *See Ballato v. Comcast Corp.*, 676 F.3d 768 (8th Cir. 2012) (For an FMLA interference claim, "the employer's intent is immaterial."). Thus, unlike typical anti-discrimination laws, a simple paperwork oversight or administrative error can lead to significant employer liability. *See, e.g., Downey v. Strain*, 510 F.3d 534 (5th Cir. 2007) (employer's failure to provide individualized notice to employee that it was counting her time off as FMLA leave led to expensive FMLA suit that the employer lost)
- Individual liability is a real possibility. *See Haybarger v. Lawrence Cty. Adult Probation & Parole*, 667 F.3d 408, 413-14 (3d Cir. 2012), and cases cited therein.
- Loose language by a well-meaning Human Resources manager or supervisor can lead to FMLA liability even when the employee was not really entitled to FMLA leave in the first place. *See, e.g., Minard v. ITC Deltacom Comm.*, 447 F.3d 352 (5th Cir. 2006) (applying "equitable estoppel" theory in FMLA context).
- Quick and easy access to court, as there are no administrative prerequisites to an FMLA lawsuit.
- Full range of back-pay damages available, including overtime pay the plaintiff would have otherwise worked. *See Pagan-Colon v. Walgreens of San Patricio, Inc.*, ___ F.3d ___, ___, NO. 11-1089, 11-1091, 2012 WL 3793126, at *7 (1st Cir. Sept. 4, 2012) ("Although we have not previously addressed the issue, we see no reason why overtime pay should not be included in an award of backpay under the FMLA.").
- Easy double-damages if the plaintiff wins: an award of liquidated damages is "the norm under the FMLA." *Nero v. Industrial Molding Corp.*, 167 F.3d 921, 929 (5th Cir. 1999). *See also Thom v. American Standard, Inc.*, 666 F.3d 968, 977-78 (6th Cir. 2012) (reversing district court's refusal to award liquidated damages to plaintiff in an FMLA case, and noting that there is a "*strong presumption* under the statute in favor of doubling." (citation omitted, italics in the original).

- Easy access to private lawyers: for the past two years, President Obama’s administration’s “Middle Class Task Force” has implemented a program whereby the DOL works with the ABA to refer FLSA and FMLA claimants to private plaintiffs’ lawyers.

B. Brief Description Of Eligible Employees

An employee is eligible for FMLA leave when he or she has worked for his or her employer at least twelve months, and worked “at least 1,250 hours of service with his employer during the previous 12 month period,” excluding any employee who is employed at a worksite at which, or within 75 miles of which, the employer employs less than 50 employees. 29 U.S.C. §§ 2611(2)(A) & 2611(2)(B)(ii). Employees who do not satisfy this test are not eligible for FMLA leave. *See Gangnon v. Park Nicollet Methodist Hosp.*, 771 F. Supp. 2d 1049, 1053 (D. Minn. 2011) (“It is undisputed that Plaintiff worked 948.7 hours in the twelve months prior to her request for FMLA leave. . . . Because Plaintiff did not qualify for FMLA leave at the time she made her request, Plaintiff’s FMLA claim is dismissed.”).

The “50 employees within 75 miles of the employee’s worksite” limitation is measured in surface miles, not “as the crow flies.” *Bellum v. PCE Constructors*, 407 F.3d 734, 739-740 (5th Cir. 2005). Where a worker has no fixed worksite, the regulations define the worksite as the site assigned as the worker’s home base, the site from which his or her work is assigned, or the site to which he or she reports. *See* 29 C.F.R. § 825.111(a)(2); *Schexnaydre v. Aries Marine Corp.*, Civil Action No. 06-0987, 2009 WL 222958, at *4 (W.D. La. Jan. 29, 2009 (finding that the port was considered the seaman’s worksite, and thus he was ineligible for FMLA leave, because the port employed less than 50 people within 75 miles).

It is important to note that, just because an employee who requests FMLA leave may not be eligible for such leave when they request it, does not mean that an employer may terminate the employee in order to prevent them from taking the leave. A case that teaches this point is *Reynolds v. Inter-Industrial Conference on Auto Collision Repair*, 594 F. Supp. 2d 925 (N.D. Ill. 2009). In *Reynolds*, the plaintiff was fired immediately after he told his employer that he would need FMLA leave in the near future. *Id.* at 926-27. He was not eligible for FMLA leave when he made that statement, but he would have been eligible three months later, when his requested leave would begin. *Id.* at 926. The defendant moved to dismiss the plaintiff’s FMLA retaliation claim because the plaintiff was not eligible for FMLA leave when he requested FMLA leave, or when he was fired. *Id.* at 927. The *Reynolds* court noted that sections 2612 and 2617 of the statute, which entitle “eligible employee[s]” to leave and make those who violate section 2615 liable to “eligible employees affected,” *see* 29 U.S.C. §§ 2612, 2617(a)(1), “provide . . . textual support” for defendant’s argument. 594 F. Supp. 2d at 928. But, the court said that support was vitiated by other sections of the statute:

[T]he FMLA also clearly contemplates the scenario in which an employee requests leave beginning on a foreseeable future date:

In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or

placement, *the employee* shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave

29 U.S.C. § 2612(e)(1) (emphasis added) . . . It would be illogical to interpret the notice requirement in a way that requires employees to disclose requests for leave which would, in turn, expose them to retaliation, or interference, for which they have no remedy. . . . Furthermore, the FMLA protects the "attempt" to exercise a right, which can only mean (in contrast with the actual exercise of that right) that the FMLA protects an employee who asks for leave even though he may not be eligible. . . .

Id. at 928-29.

The *Reynolds* court also said its interpretation was supported by the FMLA regulations, which require eligibility to be determined "as of the date the . . . leave is to start" and prohibit discrimination against prospective employees, "who are by definition not yet eligible for FMLA leave." *Id.* at 929 (quotation and emphasis omitted); see 29 C.F.R. §§ 825.110(d), 825.220(c). In accordance with its interpretation, the *Reynolds* court held that "under the FMLA, an employer may not terminate an employee who has worked less than twelve months for requesting foreseeable future leave that the employee will be eligible for and entitled to at the time the leave is to begin." *Reynolds*, 594 F. Supp. 2d at 930. In *Gleaton v. Monumental Life Ins. Co.*, 719 F. Supp. 2d 623, 629 (D.S.C. 2010), the court followed *Reynolds*, and also denied an employer's motion to dismiss a plaintiff's FMLA claim in a case involving a similar alleged fact pattern.

More recently, in *Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269 (11th Cir. 2012), the plaintiff, Pereda, advised her employer that she was pregnant and would be requesting FMLA leave in the future, after the expected birth of her child. See 666 F.3d at 1271. During her pregnancy, Pereda experienced complications and missed some work, although she was eligible at the time for non-FMLA leave. See *id.* Before she gave birth and became eligible for leave under the FMLA itself, she was fired. See *id.* The district court below held that because she was not FMLA-eligible at the time she requested her leave, she was not engaged in statutorily protected activity, and her retaliation and interference claims failed. See *id.* at 1273.

The Eleventh Circuit on review stated that "[i]n order to receive FMLA protections, one must be both eligible, meaning having worked the requisite hours, and entitled to leave, meaning an employee has experienced a triggering event, such as the birth of a child." *Id.* at 1272 (footnote call number omitted). The court found it was undisputed both that the plaintiff was not eligible for protection at the time of her request (because she had not yet worked enough hours nor given birth), and that she would have been both eligible and entitled to FMLA protection by the time she gave birth and began her leave. See *id.* & n. 5. The Eleventh Circuit reversed the district court, holding that the district court's ruling "would violate the purposes for which the FMLA was enacted. Without protecting against pre-eligibility interference, a loophole is created whereby an employer has total freedom to terminate an employee before she can ever become eligible." *Id.* The court noted that an overly narrow interpretation of the statute "would permit an employer to evade the FMLA by blacklisting an employee that the employer suspects is likely to

take advantage of the Act.” *Id.* at 1275 (citing *Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1307 (11th Cir. 2001)). The Eleventh Circuit concluded that “the FMLA protects a pre-eligibility request for post-eligibility maternity leave.” *Id.*

C. Brief Description Of Covered Employers

To be a “covered employer” under the FMLA, a business must “employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.” 29 U.S.C. § 2611(4)(A)(I).

D. Is A Rotational Or Other Employee Taking Non-Intermittent FMLA Leave Entitled To Twelve Weeks Of Leave, Or Twelve Workweeks Of Leave?

In *Truitt v. Doyon Drilling, Inc.*, 764 F. Supp. 2d 1167 (D. Alaska 2010), *Truitt*, a mechanic who worked a rotational schedule of two weeks on, two weeks off, suffered from two serious medical conditions which caused him to be absent from work during separate periods of time. First, he sustained a foot infection that required him to be off work from January 23, 2006 until March 10, 2006. *Id.* at 1168. Subsequently, he suffered a heart attack and underwent emergency bypass surgery on June 23, 2006. As a result, he was absent from work beginning June 22, 2006, and was not medically cleared to resume work until October 2, 2006. *Id.* His employer terminated him on or about June 30, 2006, and denied his request to be reinstated as a mechanic on September 29, 2006. *Id.* The employer had calculated plaintiff’s FMLA leave period by counting each calendar week that plaintiff was absent, regardless of whether he was scheduled to work. *Id.* at 1169. As a result, the employer counted the approximately two weeks per month that plaintiff was not scheduled to report for duty in reducing his FMLA leave time. Applying this calculation, defendant concluded plaintiff’s available FMLA leave period expired before plaintiff was medically certified to return to work. *Id.* Plaintiff argued that in calculating FMLA leave time, defendant could only reduce his FMLA leave entitlement for those weeks that plaintiff was scheduled to report to work. *Id.*

The court in *Truitt* found that Congress had not “directly spoken to the precise question of how to calculate FMLA leave entitlement for a rotational employee,” and thus the FMLA was ambiguous or silent with respect to the issue at hand. *Id.* at 1169–70 (citation and quotation omitted). It concluded “any ambiguity in interpreting Section 2612(a)(1)(D) of the FMLA is dispelled by the preamble accompanying and explaining the regulation.” *Id.* at 1170. Specifically, the court cited the Department of Labor’s statements at 60 Fed.Reg. 2203 (1995) and 60 Fed.Reg. 2229 (1995). The court in *Truitt* — finding the preamble to contain the DOL’s official interpretation of the Act — held it must grant deference to the agency’s interpretation unless it was arbitrary, capricious or manifestly contrary to the statute. *Id.* at 1170. It concluded the DOL’s interpretation is a permissible construction of the statute, and must be accorded deference. *Id.* at 1170–71. Therefore, it held the employer could not include the employee’s normal off weeks in its calculation of FMLA leave time.

In contrast, in *Murphy v. John Christner Trucking, LLC*, ___ F. Supp. 2d ___, Case No. 11–CV–444–GKF–TLW, 2012 WL 3428072, at *5 (N.D. Okla. Aug. 15, 2012), the court rejected *Truitt*, and held that twelve weeks means twelve weeks, not twelve workweeks. Thus,

in that case, the court held that the rotational worker was entitled to twelve weeks of total FMLA leave, not twelve workweeks.

II. EMPLOYERS SHOULD BE SURE TO CORRECTLY DESIGNATE THE TWELVE MONTH PERIOD IN WHICH EMPLOYEES MAY TAKE UP TO TWELVE WEEKS OF FMLA LEAVE

In *Thom v. American Standard, Inc.*, 666 F.3d 968 (6th Cir. 2012), the Sixth Circuit U.S. Court of Appeals held that an employer violated the FMLA when it discharged an employee for unexcused absences while out on FMLA-approved leave by calculating those absences based on a leave year that was inadequately conveyed to the employee.

Carl Thom Jr. worked for American Standard Inc. in Tiffin, Ohio, as a molder from July 1969 until he was discharged on June 17, 2005. *Id.* at 972. Because of a nonwork-related shoulder injury that required surgery, Thom requested FMLA leave from April 27, 2005, until June 27, 2005. *Id.* American Standard granted Thom's request for this time period in writing, the only company document setting out a return-to-work date. *Id.* Subsequently, Thom's doctor set June 13 as the probable date on which Thom could return for unrestricted work. *Id.*

When Thom failed to come to work on June 13, he informed the human resources department that he was experiencing increased pain in his shoulder and would return to work on June 27, the end date of his approved leave. Although Thom promised to get a doctor's note extending his timetable for recovery, he was unable to secure a timely doctor's appointment. American Standard terminated Thom's employment on June 17 by counting every day from June 13 to 17 as an unexcused absence, resulting in Thom exceeding the absences allowed by the company.

The FMLA stipulates that, "an eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period . . . because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(D). Employers, for their part, are "permitted to choose any one of . . . [four] methods for determining the '12-month period' in which the 12 weeks of leave entitlement . . . occurs." 29 C.F.R. § 825.200(b). The "rolling" method calculates an employee's leave year "backward from the date an employee uses any FMLA leave." *Id.* Using this method, Thom's leave would have expired on June 13. Under the "calendar" method, which renders an employee eligible for 12 weeks of FMLA leave each calendar year, Thom's allowed leave would have extended theoretically through July 14.

Thom claimed that American Standard failed to adequately notify him of its method for calculating FMLA leave because it did not inform him in writing or otherwise that company policy was to use a "rolling" method of leave calculation. American Standard claimed that it had always used the "rolling" method for calculating FMLA leave and that Thom should have known this fact. It further contended that because two officers in Thom's union provided affidavits stating that American Standard historically maintained a policy of applying the "rolling" method, their knowledge was imputed to Thom "through simple agency law."

The district court granted summary judgment in favor of Thom on his claim of FMLA interference, concluding that an employer is required to take affirmative steps to inform employees of its selected method for calculating leave. The Sixth Circuit affirmed.

The Sixth Circuit remarked that American Standard “fell decidedly short” of the standard that employers should inform their employees in writing of which method they will use to calculate the FMLA leave year. Although American Standard did internally amend its FMLA leave policy in March 2005 to the “rolling” method, the Sixth Circuit stressed that it did not give Thom actual notice of this changed policy or in any way tell him that his official leave date would expire earlier than June 27, the date the company had approved. Under the regulations, the company was obligated to give him sixty days notice. 29 C.F.R. § 825.200(d)(1). But, it provided no such notice. Consequently, Thom was entitled to rely on the calendar method and the date of June 27 that the company had given in writing. *See also Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 765-66 (5th Cir. 2001) (“The Medical Center cannot later select a method to calculate the twelve-month period in which leave accrues that produces an earlier expiration date for Hunt’s leave than the date the Medical Center itself designated in its written notice to Hunt.”).

Concerning American Standard’s proposition that notice of an employer’s method for calculating FMLA leave is sufficient when it is imputed from a union to its members, the Sixth Circuit noted that American Standard officially approved Thom’s leave through June 27 — 10 workdays in excess of his permitted leave under the “rolling” method. As such, the court commented, “actual notice of a particular return-to-work date trumps constructive notice of another.”

The regulations also provide that if the employer has not selected a particular method for counting the twelve month period in which an employee may take up to twelve weeks of FMLA leave, it must use the one most favorable to the employee. 29 C.F.R. § 825.200(e). *See, e.g., Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001) (emphasis added) (following regulation and ruling as a matter of law for the employee). An employer that has made this problem must provide sixty days notice of the method it has selected, and permit an employee taking FMLA leave during the sixty day notice period to use the most beneficial method to them. 29 C.F.R. § 825.200(e). After the sixty days expires, they can then implement their chosen method.

III. EMPLOYERS SHOULD NOT MAKE PROMISES OF FMLA ELIGIBILITY OR PROTECTION IF THEY ARE NOT 100% SURE; AND, IF THEY DO MAKE THIS MISTAKE, THEY SHOULD FIX IT IMMEDIATELY AND IN WRITING

It is not unusual for situations to arise where, under the technical application of the FMLA, an employee is ineligible for FMLA leave, but the employer mistakenly assures them that they are eligible. Sometimes, the employer will subsequently learn of its mistake, and then want to take disciplinary action against the employee, under the assumption that the FMLA is no obstacle to such action, since the employee is not actually eligible for FMLA leave. This fact pattern has played out in numerous FMLA court decisions. One of the theories that has arisen from those court decisions that can sometimes help employees in this situation -- and hurt

employers -- is the “equitable estoppel” doctrine. In some circumstances, courts will apply this doctrine to preclude employers from reneging on promises of FMLA leave, even if, in reality, the employee was not entitled to that leave under the technical rules of the FMLA.

An example of this sort of situation is *Minard v. ITS Deltacom Commc’ns, Inc.*, 447 F.3d 352, 359 (5th Cir. 2006). It involved an employee, Minard, who worked in ITC’s field sales office in Baton Rouge, Louisiana. She requested FMLA leave to undergo surgery. The company granted Minard’s request, stating in a standard form memorandum that she was an eligible employee under the FMLA and that she had the right to take up to 12 weeks of leave in a 12 month period.

However, on the day Minard was scheduled to return to work following surgery, ITC terminated her. The company said it had discovered that she was not eligible for FMLA leave because there were fewer than 50 employees at or within 75 miles of her worksite. So, Minard was not covered by the FMLA in the first place.

Nevertheless, Minard sued ITC for violation of the FMLA. She contended that, even if ITC was not actually covered by the FMLA, it was equitably estopped (barred for reasons of fairness) from denying that she was a covered and eligible employee. Minard argued that, because she relied to her detriment on the company’s statement that she was eligible for FMLA leave, she was entitled to reinstatement. The trial court rejected Minard’s argument and dismissed her case. She then appealed to the Fifth Circuit.

This was not the first time the Fifth Circuit had looked at this question. In a case decided in 2000, the Court had rejected essentially the same argument. In the earlier case, the Court reasoned that FMLA coverage and eligibility requirements are jurisdictional, and employees suing under the FMLA have to meet jurisdictional requirements no matter what the employer may have said or done. If the Court had followed that case, then Minard would have lost. However, the Fifth Circuit held that a February 2006 U.S. Supreme Court case decided under Title VII, *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235 (2006), required it to change its position and find that FMLA coverage and eligibility requirements are not jurisdictional. This U.S. Supreme Court decision led the Fifth Circuit to agree with Minard that, even if ITC was not actually covered by the FMLA, it could be barred for reasons of fairness from denying that she was a covered and eligible employee. So, the Fifth Circuit remanded the case back to the trial court where Minard was given the chance to prove that she relied to her detriment on the company’s statement that she was eligible for FMLA leave – even if the company did not intentionally mislead her.

Under the Fifth Circuit’s decision in *Minard*, an employer who mistakenly makes a definite but erroneous statement to an employee of FMLA eligibility and has reason to believe the employee will rely on its statement will be estopped when the employee presents evidence of detrimental reliance. Other courts have followed this same essential rule. *See, e.g., Cooper v. New York State Nurses Ass’n*, 847 F. Supp. 2d 437, 448 (E.D.N.Y. 2012) (because they granted her request for FMLA leave, defendants were estopped from asserting that employee did not have a “serious health condition,” under the FMLA); *Picarazzi v. John Crane, Inc.*, No. C-10-63, 2011 WL 486211, at *11 (S.D. Tex. Feb. 7, 2011) (denying summary judgment in FMLA case

based on estoppel argument where employer had made affirmative representations to the plaintiff that his time off work was covered by the FMLA); *Sisk v. Picture People, Inc.*, No. 4:08CV309-DJS, 2009 WL 879687 (E.D. Mo. Mar. 26, 2009) (potential application of estoppel doctrine precluded summary judgment for the employer in an FMLA case).

Minard and the cases following it underscore that employers should be 100% sure that employees are indeed covered by and eligible for FMLA leave before granting them such leave. Otherwise, if it turns out that the employer is mistaken, it may not be able to renege on the leave, even if the mistake was an honest one. Along these lines, employers should: (a) review their FMLA policies to ensure that they do not promise FMLA coverage to employees at worksites that employ fewer than 50 employees at or within 75 miles; (b) review their FMLA notices to ensure that FMLA coverage is not extended to ineligible employees; (c) insist that employees strictly comply with FMLA requirements, such as providing certification of a serious health condition, before certifying that they are covered by the FMLA; and (d) centralize the company's FMLA functions to ensure consistency in communications.

Sometimes employers can fix the problem caused by an inaccurate communication to an employee about FMLA eligibility or leave, so long as they act quickly and clearly. For example, in *Garcia v. Kinder Morgan Inc.*, No. H-07-1081, 2009 WL 1606938 (S.D. Tex. June 8, 2009), the employer, Kinder Morgan, erroneously informed Garcia that he had 84 days of FMLA leave remaining when in fact he possessed only 37 days. Kinder Morgan had sent written notices to Garcia with the erroneous dates. When the company discovered the mistake, the Human Resources department made phone calls and sent letters to Garcia, explaining that he would need to re-establish short-term eligibility as his FMLA time had expired. When Garcia failed to do so, the company discharged him.

In his FMLA lawsuit, Garcia asserted that Kinder Morgan was estopped from terminating him before the original and erroneous FMLA expiration date based on his allegedly reasonable reliance on the company's communications in which it informed him that he had 84 days of FMLA leave remaining. In rejecting Garcia's argument, and awarding the company summary judgment, the district court noted that, while Garcia claimed not to have received some specific communications about his actual FMLA leave, he admitted to Kinder Morgan continually harassing him for medical paperwork. Consequently, the Court explained that his reliance on the original leave designation form was not reasonable, because Garcia could not unilaterally decide to open his ears to the good news of extended leave from Kinder Morgan, but then close his ears to the demand for medical paperwork, labeling it "harassment."

IV. EMPLOYERS SHOULD KNOW HOW TO RECOGNIZE A SITUATION WHERE AN EMPLOYEE HAS MISSED WORK BECAUSE OF A COVERED “SERIOUS HEALTH CONDITION,” AND KNOW HOW TO PROPERLY RESPOND ONCE IT IS ON NOTICE OF AN EMPLOYEE’S POSSIBLE NEED FOR FMLA LEAVE

A. Why It Is Important To Know How To Recognize A “Serious Health Condition”

Because employers have certain duties (to be discussed below) once they are on notice of an employee’s potential need for FMLA leave, it is important to understand what factual circumstances can constitute a “serious health condition” entitling an employee to FMLA leave. Employers need not become medical experts, but they should have a solid understanding of the Act’s definition of “serious health condition,” so that once they are on notice that an employee has missed work because of a potentially “serious health condition” they are able to respond appropriately. One of the worst things an employer can do is to be put on such notice, not comprehend that it is on notice, and instead plow forward with termination based on the employee’s potentially FMLA-covered absences. *See, e.g., Dollar v. Smithway Motor Xpress, Inc.*, 787 F. Supp. 2d 896 (N.D. Iowa Apr. 13, 2011) (finding for plaintiff and awarding ten years of front-pay where the employer was on crystal clear notice that the employee was off work due to an FMLA qualifying condition, but apparently did not comprehend that fact, and instead fired the employee for missing work).

B. How To Recognize A “Serious Health Condition”

Under the FMLA, an eligible employee is entitled to up to 12 weeks of unpaid leave each year for a “serious health condition” that makes the employee unable to perform the functions of her job. 29 U.S.C. § 2612(a)(1)(D); *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 908 (7th Cir. 2008). An employer is prohibited from interfering with an eligible employee’s exercise or attempt to exercise a right under the Act. 29 U.S.C. § 2615(a)(1).

An employee is entitled to leave under the FMLA if (1) he or she is afflicted with a “serious health condition,” and (2) that condition renders him or her unable to perform the functions of his or her job. 29 U.S.C. § 2612(a)(1)(D). A “serious health condition” is defined as “an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.” 29 U.S.C. § 2611(11). Each of these two definitions are explained in greater detail below.

1. Definition Number 1 Of A “Serious Health Condition”: An Illness, Injury, Or Physical Or Mental Condition That Involves Inpatient Care In A Hospital, Hospice, Or Residential Medical Care Facility

29 C.F.R. § 825.113(a) provides that a serious health condition includes an illness, injury, or physical or mental condition that involves “inpatient care.” “Inpatient care” means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of

incapacity as defined in 29 C.F.R. § 825.113(b), or any subsequent treatment in connection with such inpatient care. *See* 29 C.F.R. § 825.114.

According to 29 C.F.R. § 825.113(b), the term “incapacity” means “inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.” For example, in *Tornberg v. Bus. Interlink Servs., Inc.*, 237 F. Supp. 2d 778, 786 (E.D. Mich. 2002), the district court held as a matter of law that the plaintiff’s kidney stone was a “serious health condition,” partially because it required an overnight stay in a hospital. Likewise, in *Pagel v. TIN Inc.*, ___ F.3d ___, NO. 11-2318, 2012 WL 3217623 (7th Cir. Aug. 9, 2012), the Seventh Circuit U.S. Court of Appeals found that the plaintiff’s septal wall ischemia qualified as an FMLA-defined “serious health condition” under this definition, because it required overnight inpatient care at a hospital on three different occasions. *Id.* at *4.

2. Definition Number 2 Of A “Serious Health Condition”: An Illness, Injury, Or Physical Or Mental Condition That Involves Continuing Treatment By A Health Care Provider

29 C.F.R. § 825.113(a) also provides that a serious health condition includes an illness, injury, or physical or mental condition that involves continuing treatment by a health care provider. Under 29 C.F.R. § 825.115, a serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

a. Incapacity And Treatment

29 C.F.R. § 825.115(a) provides that a serious health condition includes a period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term “extenuating circumstances” in paragraph (a)(1) of this section means circumstances beyond the employee’s control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

This “test for a serious health condition is met if the employee is incapacitated by an illness, injury, impairment, or physical or mental condition for more than three consecutive days and for which he is treated by a health care provider on two or more occasions.” *Woods v. DaimlerChrysler*, 409 F.3d 984, 990 (8th Cir. 2005). Thus, for example, in *Dollar v. Smithway Motor Xpress, Inc.*, 787 F. Supp. 2d 896 (N.D. Iowa 2011), the Court recited the relevant facts and found that the plaintiff suffered from a “serious health condition” under this section, stating:

On June 10, 2007, Dollar went to the emergency room at Trinity Regional Medical Center and sought admission to the hospital’s psychiatric ward. At the hospital, Dollar was examined, given a prescription for Ambien to help her sleep, and told to contact the mental health center the following day. On June 11th, Dollar was seen at the mental health center by Burr, a licensed mental health counselor, who diagnosed her with depression, and excused her from work for the following week. On June 19th, Dollar was treated by Dr. Berryhill, a psychiatrist. After his examination, Dr. Berryhill further excused Dollar from work until July 9th. On July 3rd, Dollar was seen by Crane, an Advanced Registered Practical Nurse, at Trinity Regional Medical Center. Crane prescribed a new medication for Dollar and gave her a medical excuse to be absent from work until July 30th. Given this evidence, I have no difficulty finding that Dollar was suffering from a “serious health condition.”

Id. at 912.

In *Branham v. Gannett Satellite Information Network, Inc.*, 619 F.3d 563 (6th Cir. 2010), the appeals court reversed a summary judgment that the district court had entered, finding that the evidence conflicted regarding whether: (i) the plaintiff was incapacitated more than three consecutive calendar days; (ii) had two treatment visits; or (iii) had one visit, but was put on a continuing course of care which result[ed] in a regimen of continuing treatment under the supervision of the health care provider. Because of these factual disputes, the court of appeals held that it could not be determined as a matter of law that the plaintiff had not satisfied the definition of “serious health condition.”

b. Pregnancy Or Prenatal Care

29 C.F.R. § 825.115(b) provides that a serious health condition includes any period of incapacity due to pregnancy, or for prenatal care. 29 C.F.R. § 825.115(f) also notes that time off work due to incapacity caused by pregnancy or prenatal care qualifies for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three

consecutive, full calendar days. For example, “an employee who is pregnant may be unable to report to work because of severe morning sickness.” *Id.*

Being pregnant, as distinct from being incapacitated because of pregnancy, or experiencing complications of pregnancy that could include premature contractions which unless treated by drugs or bed rest might result in the premature birth of the baby, is not a serious health condition within the meaning of the statute or the applicable regulations. *Cruz v. Publix Super Markets, Inc.*, 428 F.3d 1379, 1383 (11th Cir. 2005) (“Furthermore, we note that being pregnant, as opposed to being incapacitated because of pregnancy, is not a “serious health condition” within the meaning of the FMLA.”); *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 952 (7th Cir. 2004) (same).

Thus, because pregnancy is not a “serious health condition” “per se” the specific facts relating to a pregnant employee are important. *See Whitaker v. Bosch Braking Systems Division of Robert Bosch Corp.*, 180 F. Supp. 2d 922 (W.D. Mich. 2001). In *Whitaker*, the plaintiff was a factory worker who became pregnant. She requested FMLA leave from working overtime so she could work only forty hours a week, and presented a signed doctor’s note indicating this restriction was necessary for her health. *Id.* at 924-25. After the defendant denied the plaintiff’s request and forced her to take short term disability leave instead, she sued for the difference in wages between what she would have earned working forty hours a week, and what she earned on the short term disability leave she was forced to take. *Id.* at 925.

In considering the “serious health condition” issue, the *Whitaker* court determined that pregnancy, by itself, is not a serious health condition. Rather, the pregnancy must produce a period of incapacity, or the employee must seek prenatal care. *Id.* at 928 (citing the former 29 C.F.R. § 825.114(a)(2)(ii)). The court went on to conclude that the plaintiff had established incapacity because the restrictions imposed on her by her doctor prevented her from working overtime. *Id.* at 931. The court pointed out, “nothing in the FMLA provides that a pregnancy can constitute a serious health condition only if the pregnancy is abnormal or if the employee is physically unable to perform her job Plaintiff may have been physically able to perform her job, but she was prevented from doing so by [her doctor’s] restriction.” *Id.* The court found the plaintiff had established a serious medical condition, and after considering the other elements of the plaintiff’s FMLA claim, awarded summary judgment in the plaintiff’s favor. *See also Treadaway v. Big Red Powersports, LLC*, 611 F. Supp. 2d 768, 778 (E.D. Tenn. 2009) (following *Whitaker* and concluding that a pregnant plaintiff who was given work restrictions partially because of her pregnancy had created a fact issue as to whether she had a “serious health condition.”).

In *Meijas Miranda v. BBII Acquis’n Corp.*, 120 F. Supp. 2d 157 (D.P.R. 2000), the plaintiff suffered vaginal bleeding while she was working at BBII. *Id.* at 169. The plaintiff’s obstetrician, after she received medical attention, ordered her to rest until August 6, 1997. *Id.* On July 30, 1997, after a second episode of vaginal bleeding, she was hospitalized at the Bella Vista Hospital. *Id.* After a second evaluation the plaintiff’s doctor ordered her resting period extended because of complications with her pregnancy. *Id.* The court held that, “[b]ased on the totality of the evidence the Court finds that Plaintiff is a protected person under the FMLA because of her medical complications with her pregnancy being covered by the Act.” *Id.*

c. Chronic Conditions

29 C.F.R. § 825.115(c) provides that a serious health condition includes any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

- (1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;
- (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
- (3) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

29 C.F.R. § 825.115(f) also notes that time off work due to incapacity or treatment for such incapacity that is caused by a chronic serious health condition qualifies for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. “For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee’s health care provider has advised the employee to stay home when the pollen count exceeds a certain level.”

In summary, a chronic serious health condition under this section involves (1) “periodic visits to a health care provider for treatment;” (2) a continuing condition “over an extended period of time-including recurring episodes of the underlying condition;” and (3) which “may be episodic, as with asthma, rather than continuing.” *Fink v. Ohio Health Corp.*, 139 Fed. Appx. 667, 670 (6th Cir. 2005); *see also Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 421 (6th Cir. 2004). The regulations do not define “an extended period of time.” However, “the language of the FMLA itself, its legislative history, and the regulations promulgated pursuant to that statute all suggest that to constitute a ‘chronic’ illness, the condition must exist for well more than a few weeks.” *Taylor v. Autozoners, LLC*, 706 F. Supp. 2d 843, 852 (W.D. Tenn. 2010) (quoting *Flanagan v. Keller Prods., Inc.*, No. Civ. NO. 00-542-M, 2002 DNH 047, 2002 WL 313138, at *7 (D. N.H. Feb. 25, 2002)).

In addition, “incapacity” is still required to make out a “serious health condition” under this section. *See* 29 C.F.R. § 825.115(c). For example, in *Mauder v. Metropolitan Transit Auth.*, 446 F.3d 574 (5th Cir. 2006), the plaintiff learned he was diabetic while receiving medical treatment for an unrelated condition. *Id.* at 577. When he returned to work, he did not notify his employer that he had been diagnosed as having diabetes. *Id.* The insulin drug Mauder’s doctor prescribed for him had a side effect of uncontrollable bowel movements. *Id.* As a result, Mauder made frequent trips to the bathroom that were not always at the scheduled break time. *Id.* Mauder did not inform his supervisor of his medical condition until after she emailed him concerning his tardiness in returning from scheduled breaks. *Id.* When his supervisor asked Mauder to provide more information regarding his medical condition, Mauder refused. *Id.* at 578. Several weeks later, Mauder provided his employer with a doctor’s note. The note,

however, merely stated that the side effects of the medication, like diarrhea, were usually transient and the doctor would try to manage the side effects on Mauder's next office visit. *Id.*

Mauder argued that he should have been given temporary leave under the FMLA to go to the restroom because of his persistent diarrhea. The court acknowledged the "novelty" of Mauder's claim -- that he was asking for unfettered permission to take necessary restroom breaks -- but ultimately resolved the issue without deciding whether such breaks fell within the ambit of the FMLA. Specifically, the court found that Mauder failed to show that his medical condition left him incapacitated as required by the statute. Thus he was not entitled to FMLA leave. *Id.* at 581-81.

More recently, in *Neel v. Mid-Atlantic of Fairfield, LLC*, 778 F. Supp. 2d 593 (D. Md. 2011), the plaintiff suffered a neck injury, which was then aggravated in a car accident. She then took time off work to receive steroid injections and undergo physical therapy. *Id.* at 594-95. She also saw her doctor frequently for examination and treatment. The district court held as a matter of law that the plaintiff's neck injury qualified as a "serious health condition" under this section, stating:

Neel further argues that she had a chronic condition, as defined by section 825.115(c). This is a more successful argument. No particular length of incapacity or treatment is required for a chronic condition. Neel's many visits to Dr. Freas for examination and treatment in 2009 appear to satisfy the necessity for "periodic visits" (defined as at least twice a year) for treatment by a health care provider. Additionally, the condition must continue over an extended period of time, including recurring episodes of a single, underlying condition. Neel's neck injury, which seemed to get better and worse over a period of months, satisfies this requirement. Finally, a chronic condition may cause episodic rather than a continuing period of incapacity. Again, the ebb and flow of Neel's condition appears to meet this parameter.

Id. at 599.

In *Doris v. City of Aurora*, No. 09-cv-3303, 2010 WL 3526664 (N.D. Ill. Aug. 31, 2010), the court found there was an issue of material fact over whether the plaintiff's recurring sinus infections qualified as a serious health condition under this provision. *Id.* at *7. The plaintiff's recurring sinus infections required him to visit a doctor twice in a year, continued over a period of more than eight months, and manifested themselves in episodic periods of pronounced symptoms. *Id.* These sinus infections caused the plaintiff to experience nausea, sensitivity to light, difficulty breathing, and debilitating headaches that rendered him incapable of performing the functions of his job. *Id.* Given this evidence, the court held a reasonable jury could find that the plaintiff suffered from a serious health condition as a "chronic condition," and denied the employer's motion for summary judgment. *Id.* at *9.

d. Permanent Or Long-Term Conditions

29 C.F.R. § 825.115(d) provides that a serious health condition includes a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

For example, based on this section, "courts generally assume that autism is covered under the FMLA without much discussion." *Stroder v. United Parcel Service, Inc.*, 750 F. Supp. 2d 582, 591 n. 5 (M.D.N.C. 2010) (citing *Williams v. Potter*, No. Civ PJM 09-1009, 2010 WL 1245835 (D. Md. Mar. 25, 2010) ("Williams is the sole provider for her eight-year-old daughter, who suffers from epilepsy and autism, and who thus is covered under the FMLA"); *Mayhew v. T-Mobile USA, Inc.*, No. Civ 07-6313-TC, 2009 WL 5125642 (D. Or. Dec. 22, 2009) (noting that the plaintiff had been granted FMLA leave for absences related to her son's autism); *Kramer v. Exxon Mobil Corp.*, No. Civ. A 07-0436 (FSH), 2009 WL 1544690 (D. N.J. June 3, 2009) (noting that the plaintiff took FMLA leave to care for his son who had autism); *Derrick v. Metropolitan Gov't of Nashville and Davidson Cty.*, 2007 WL 4468673 (M.D. Tenn. Dec. 17, 2007) (noting that there was no dispute that plaintiff was entitled to take FMLA leave to care for her autistic son); *Shtab v. Greate Bay Hotel & Casino, Inc.*, 173 F. Supp. 2d 255 (D. N.J. 2001) (noting that there was no dispute that the plaintiff's son, who had been diagnosed with autism, suffered from a serious health condition as defined by the FMLA).

e. Conditions Requiring Multiple Treatments

29 C.F.R. § 825.115(e) provides that a serious health condition includes any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

- (1) Restorative surgery after an accident or other injury; or
- (2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), or kidney disease (dialysis).

For example, in *Neel*, a case mentioned above, the plaintiff suffered a neck injury, which was then aggravated in a car accident. After the car accident, she took time off work to receive steroid injections and undergo physical therapy. 2011 WL 1496783 at *4-5. The district court held as a matter of law that the plaintiff's neck injury qualified as a "serious health condition" as both a "chronic condition" (discussed earlier) and as a "condition requiring multiple treatments." The court found that the steroid injections and physical therapy qualified as "[r]estorative surgery after an accident or other injury," even though steroid injections and physical therapy are not typically considered "surgery" by a layperson. *Id.* at *6. In a more obvious example, in *Deloatch v. Harris Teeter, Inc.*, 797 F. Supp. 2d 48, 65-66 (D.D.C. 2011), the district court found that pancreatic cancer is likely a "serious health condition" under 29 C.F.R. § 825.115(e)(2).

Courts have held that FMLA leave “include[s] 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.” *Caldwell v. Holland of Tex., Inc.*, 208 F.3d 671, 676 (8th Cir. 2000) (quoting *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 163 (1st Cir. 1998)). As the court in *Hodgens* stated, “[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 profession is able to diagnose the cause of the problem.” *Hodgens*, 144 F.3d at 163. The regulations also provide that doctor’s visits may be covered if their purpose is “to determine if a serious health condition exists.” 29 C.F.R. § 825.113(c). A court recently held that this is so -- and the symptoms giving rise to the need for time off for the doctor’s visits themselves may qualify as a “serious health condition” -- even if it is ultimately determined that the employee does not have the disease or condition for which they needed the doctor’s visits. See *Rodriguez, ex rel. Fogel v. City of Chicago*, NO. 08 CV 4710, 2011 WL 1103864, at *9 (N.D. Ill. Mar. 25, 2011).

3. Under Either Definition Of A “Serious Health Condition,” An Employee Is Only Entitled To Leave If That Condition Renders Them Unable To Perform The Essential Functions Of Their Job

To be entitled to leave under the FMLA, an employee must not only have a “serious health condition,” but that that condition must render him or her unable to perform the functions of his or her job. 29 U.S.C. § 2612(a)(1)(D). Under 29 C.F.R. § 825.123, an employee is “unable to perform the functions of the position” where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee’s position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. § 12101 *et seq.*, and the regulations at 29 C.F.R. § 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. *Jones v. C & D Technologies, Inc.*, 684 F.3d 673, 677 (7th Cir. 2012). “In other words, an employee who receives treatment for a serious health condition is automatically considered to be unable to perform the functions of her position. Importantly, § 825.123 uses the word “must” to imply that the employee’s absence is necessary for that employee’s treatment. Alternatively, an absence for unnecessary treatment or no treatment at all means that the employee is not sufficiently incapacitated so as to render her unable to perform her duties.” *Id.*

In *Jones*, the issue was the definition of “treatment.” The plaintiff had a serious health condition as defined by the FMLA. He left work on the morning of October 1 to have a prescription filled by his doctor, and was fired for doing so. The Seventh Circuit affirmed a summary judgment ruling against the plaintiff on the basis that, even assuming he had a serious health condition,” he failed to demonstrate that he was incapacitated on the morning that he left work, because he received no “treatment.” *Id.* at 679. The court observed that:

The FMLA does not explicitly define treatment, but the DOL regulations seemingly attempt to do so in two different provisions. Section 825.115 defines “treatment” and § 825.113(c) defines both “treatment” and “a regimen of

continuing treatment.” The question for us is whether these treatment definitions can be applied to § 825.123 to determine whether “treatment” prevented Jones from performing the functions of his position.

We begin by noting that the DOL, in 29 C.F.R. § 825.113(a), parrots the Act’s definition of a “serious health condition,” except to note that § 825.114 further defines “inpatient care” while § 825.115 further defines “continuing treatment.” Section 825.115 then lists the ways in which an employee can prove that she suffers from a serious health condition requiring continuing treatment. But importantly for this case, § 825.115 does not define what constitutes such treatment. In other words, Jones’s pain and anxiety may constitute a chronic condition requiring continuing treatment, see 29 C.F.R. § 825.115(c), but that subsection is not helpful in determining whether Jones actually received medical treatment that prevented him from performing his job duties. And, the cases Jones attempts to rely upon generally only discuss whether the employee has a serious health condition requiring continuing treatment—an element not at issue here. See, e.g., *Stevenson v. Hyre Elec. Co.*, 505 F.3d 720, 727–28 (7th Cir. 2007); *Harrell v. Jacobs Field Servs. N. Am., Inc.*, No. 09–CV–02320, 2011 WL 3044863, at *5 (C.D. Ill. July 25, 2011); *Bardwell v. GlobalSantaFe Drilling Co.*, No. H–06–0171, 2007 WL 2446801, at *13 (S.D. Tex. Aug. 23, 2007); *Wheeler v. Pioneer Developmental Servs., Inc.*, 349 F. Supp. 2d 158, 165 (D. Mass. 2004). Section 825.115 brings us no closer to understanding the term “treatment” as used in § 825.123.

At first blush, the definition of “treatment” in § 825.113(c) appears more promising (the provision begins by stating, “The term ‘treatment’ includes....”). Jones asks us to apply a portion of § 825.113(c) to our determination of whether he received treatment that prevented him from performing his job. Specifically, Jones points to the language in this provision that suggests that “a course of prescription medication” constitutes treatment. But, Jones overlooks a more nuanced—and accurate—reading of this provision.

The DOL defines both “treatment” and “a regimen of continuing treatment” in 29 C.F.R. § 825.113(c). The first two sentences of that subsection suggest that “treatment” includes examinations and evaluations of a “serious health condition,” but excludes routine physical examinations. The last two sentences of § 825.113(c) define “a regimen of continuing treatment,” as including “a course of prescription medication,” but not necessarily those activities that can be “initiated without a visit to a health care provider.” Jones points to the prescription-medication reference as evidence that he received FMLA treatment, but as already indicated, the “regimen-of-continuing-treatment,” like the “continuing-treatment” definition, is only useful for determining whether a “serious health condition” exists. And there is some logic to this distinction. Intuitively, a course of prescription medicine is evidence that an employee suffers from a serious medical condition requiring continuous treatment—that is, the medicine is designed to treat the condition. But, taking prescription medicine is

not indicative of whether an employee receives treatment that prevents her from performing her job. Many chronic conditions require a course of prescription medication, but the FMLA requires something more for an employee to become entitled to leave—inability to perform her job functions. A course of prescription medication and an inability to perform a job are not mutually exclusive.

This distinction squares with our earlier interpretations of “treatment.” In *Darst v. Interstate Brands Corp.*, we found that “treatment” does not include actions such as calling to make an appointment or scheduling substance-abuse rehabilitation. 512 F.3d at 911. Instead, treatment “include[s] examinations to determine if a serious health condition exists and evaluation of the condition.” *Id.* Darst’s interpretation is in line with the definition of “treatment” as used in the first two sentences of § 825.113(c). *See also Ridings*, 537 F.3d at 770.

That brings us back to Jones’s October 1 absence. That morning, Jones retrieved his paycheck from C & D and visited Dr. Lubak’s clinic to ensure his referral to another lab was in order. He also obtained a prescription-refill note. Jones’s first two activities plainly do not constitute treatment that otherwise prevented him from working that morning. *See Darst*, 512 F.3d at 911. Nor does merely picking up a prescription-refill note. Although we can envision a scenario where obtaining a prescription note in connection with a physician’s examination might constitute treatment, this case does not approach that hypothetical. Here, Dr. Lubak never evaluated or examined Jones, and Jones even conceded in a deposition that he was never “physically examined” that morning. Jones arrived at Dr. Lubak’s clinic unannounced and appeared only to briefly speak with his physician in the office lobby. The entirety of Jones’s interaction with Dr. Lubak consisted of the physician’s acquiescence to refill a prescription. There is simply no evidence that Jones was examined, and therefore treated, that morning. *See* 29 C.F.R. § 825.113(c). Ultimately, Jones’s prescription-refill note might be evidence of his need for continuing treatment—which only suggests that Jones has a serious health condition—but, it is not evidence that he received treatment that required him to be absent from work that morning. *See id.* § 825.123(a). Accordingly, we find that Jones did not receive treatment on the morning of October 1, and therefore, he was not entitled to take FMLA leave as a matter of law.

Id. at 678-79.

Courts have also thrown out cases where there is no proof that the plaintiff was unable to perform the functions of their job. *See Ames v. Home Depot U.S.A., Inc.*, NO. 08 CV 6060, 2009 WL 4673859 (N.D. Ill. Dec 12, 2009) (granting summary judgment against FMLA plaintiff partially on this basis, and stating, “[f]inally, the existence of a serious health condition aside, Ames still offers nothing to contradict the fact that her alcoholism never rendered her unable to perform her job functions, a requirement for entitlement to FMLA benefits.”), *aff’d*, 629 F.3d 665 (7th Cir. 2011); *Lottinger v. Shell Oil Co.*, 143 F. Supp. 2d 743, 771 (S.D. Tex. 2001) (plaintiff’s testimony that his work performance was never adversely affected by his alleged

depression or alcoholism indicated that he was not unable to perform the functions of his position, as necessary to qualify for FMLA leave).

An extreme example of such a case is *Hoang v. Wells Fargo Bank, N.A.*, 724 F. Supp. 2d 1094 (D. Or. 2010). There, the plaintiff went on a vacation to Cabo San Lucas, but tried to claim that time off was due to a “serious health condition” under the FMLA. The court assumed, without deciding, that there was a fact issue over whether the plaintiff’s bipolar disorder constituted a “serious health condition.” *Id.* at 1107. Nonetheless, the court dismissed the plaintiff’s FMLA case because there was no evidence that “Hoang was unable to work or unable to perform any of the essential functions of her job in November 2008. And again, Hoang testified she would have gone to work if she had not gone to Cabo San Lucas.” *Id.* This conclusion was probably especially easy to reach given that the record in the case included “pictures from Hoang’s vacation to Cabo San Lucas depict her buying jewelry, drinking alcohol, tanning on the beach, swimming, and eating in restaurants.” *Id.* at 1100.

Note that there appears to be some tension between the requirement in 29 C.F.R. § 815.123 (which provides only that the employee must be unable to perform any one of the essential functions of the employee’s position within the meaning of the ADA), and the requirement in various sections of 29 C.F.R. §§ 825.114 & 825.115, requiring that the employee suffer from an “incapacity,” which is defined in 29 C.F.R. § 825.113(b), as the “inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.” In *Branham v. Gannett Satellite Information Network, Inc.*, 619 F.3d 563, 569-70 (6th Cir. 2010), the court appeared to harmonize this tension by holding that a person can be “incapacitated” under the FMLA despite being able to do some of their regular work. Similarly, in *Pagel v. TIN Inc.*, ___ F.3d ___, NO. 11-2318, 2012 WL 3217623 (7th Cir. Aug. 9, 2012), the Seventh Circuit found that the plaintiff salesman was incapacitated (*i.e.*, unable to perform his job), even though he did make some sales calls over the phone during his alleged period of incapacity. *Id.* at *4. The court reasoned, “Although Pagel apparently made a few phone calls to customers during his recovery, the district court correctly reasoned that Pagel could not fully perform the essential function of visiting existing and prospective customers. After all, TIN would not have provided Pagel a company car if calling on customers required nothing more than a phone call.” *Id.*

C. How Employers Should Respond Once They Are On Notice Of An Employee’s Possible Need For FMLA Leave

1. The Employee’s Generally Light Burden To Put The Employer On Notice Of A Potentially Qualifying FMLA Leave

An employee has an obligation to notify their employer of the need for FMLA leave. However, the FMLA’s notice requirements “are not onerous” and are satisfied when an employee provides her employer with information sufficient to show that he or she “likely has an FMLA-qualifying condition.” See *Burnett v. LFW, Inc.*, 472 F.3d 471, 477 (7th Cir. 2006) (stating that notice is sufficient when employee provides employer with probable basis that FMLA leave applies). Although no categorical rules exist that define adequate notice, the regulations provide that “[a]n employee giving notice of the need for FMLA leave must explain

the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act.” *Id.* at 825.301(b). However, it is not necessary for the employee to “expressly assert rights under the Act or even mention the FMLA” in order to put the employer on notice of her need for leave. *Id.* “The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee’s request to take time off for a serious health condition.” *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995); *Ladner v. Hancock Med. Ctr.*, 299 Fed. Appx. 380 (5th Cir. 2008) (affirming verdict for plaintiff in FMLA case, rejecting employer’s claim that it lacked sufficient notice to trigger FMLA rights, and finding instead that there was sufficient evidence to show that the plaintiff’s son was incapacitated due to a serious health condition, chronic asthma, and that the defendant had notice of the serious health condition).

This is a light burden. As the Seventh Circuit stated in February 2011, “[g]enerally speaking, it does not take much for an employee to invoke his FMLA rights; he must simply provide enough information “to place the employer on notice of a probable basis for FMLA leave.”” *Righi v. SMC Corp.*, 632 F.3d 404, 409 (7th Cir. 2011) (quoting *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 953 (7th Cir. 2004)). For example, “[o]rdinarily, an employee’s statement to his employer indicating that he needs leave to care for a seriously ill parent would be sufficient to invoke the protections of the FMLA.” *Righi*, 632 F.3d at 409.

On the other hand, while the employee’s burden to put the employer on notice is light, it is not nonexistent. Thus, in *Satterfield*, the Fifth Circuit determined that a note from the employee stating that she “was having a lot of pain in her side, and would not be able to work that day” was not sufficient to allow her employer to determine if she was suffering from a serious medical condition. 135 F.3d at 980-81. *Satterfield* establishes the rule that, “[w]hile an employer’s duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant.” *Id.* at 980 (quoting *Johnson v. Primerica*, 1996 WL 34148, at *5 (S.D.N.Y. Jan. 30, 1996)). Consistent with this rule, it is well-established that an employee who calls in “sick” does not, by that alone, carry his or her burden to provide notice under the FMLA. See *Willis v. Coca Cola Enterp., Inc.*, 445 F.3d 413, 419 (5th Cir. 2006) (“A complaint of sickness will not suffice as notice of a need for FMLA leave.”); *Beaver v. RGIS Inventory Specialists, Inc.*, 144 Fed. Appx. 452, 456–57 (6th Cir. 2005) (holding that employee who informed her employer that she “didn’t feel good,” was “sick,” and “needed a couple days to get better, a few days” was insufficient for employer to conclude that the employee needed FMLA leave); *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001) (holding that, even assuming employee had serious health condition, advising employer only that she was “sick” was inadequate because “[s]ick” does not imply “a serious health condition”); 29 C.F.R. § 825.303(b) (stating that “[c]alling in ‘sick’ without providing more information will not be considered sufficient notice to trigger an employer’s obligations under the Act”); *Andrews v. CSX Transp., Inc.*, 737 F. Supp. 2d 1342, 1351 (M.D. Fla. 2010) (same).

Likewise, “the requirement of notice is not satisfied by the employee’s merely demanding leave. He must give the employer a reason to believe that he’s entitled to it.” *Aubuchon*, 359 F.3d at 952 (citing *Collins v. NTN-Bower Corp.*, *supra*, 272 F.3d at 1008; *Stoops v. One Call Communications, Inc.*, 141 F.3d 309, 312-13 (7th Cir. 1998); *Satterfield*, 135 F.3d at 977 (5th Cir. 1998)). As the court stated in *Aubuchon*, “[i]f you have brain cancer but just tell

your employer that you have a headache, you have not given the notice that the Act requires.” *Id.* at 952. See also *Naber v. Dover Healthcare Assoc., Inc.*, 765 F. Supp. 2d 622, 636 (D. Del. 2011) (“The court agrees with Silver Lake that Naber’s request for a reduced schedule on February 26, 2009, due to being exhausted from her extra workload during Mueller’s absence, was insufficient to put Silver Lake on notice that she was invoking her FMLA rights or that she had a serious health condition.”); *Fischer v. NYC Dep’t of Educ.*, 666 F. Supp. 2d 309, 318 (E.D.N.Y. 2009) (finding employee’s request for leave form did not place employer on notice of request for time off for serious medical condition and consequently did not constitute protected activity underlying retaliation claim); *Brown v. The Pension Boards*, 488 F. Supp. 2d 395, 410 (S.D.N.Y. 2007) (finding that employee did not provide notice by simply calling in sick and providing vague doctor’s note, defeating employee’s FMLA retaliation claim); *Ney v. City of Hoisington, Kansas*, 508 F. Supp. 2d 877, 887 (D. Kan. 2007) (finding no protected activity where employee did not fill out paperwork requesting FMLA leave). And, casual conversations about family medical issues alone, without a request for leave, are not sufficient. *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819, 826 (7th Cir. 2012) (“Here, the evidence falls short of establishing inquiry notice. Nicholson had one “casual conversation” with Naatz and others about the challenges of dealing with aging parents and may have mentioned her father’s condition. This is clearly insufficient as a matter of law to notify Naatz that FMLA-qualifying leave was needed.”); *Chappell v. Bilco Co.*, 675 F.3d 1110, 1116 (8th Cir. 2012) (employee who failed to specifically state that he needed time off to care for his mother because of his mother’s diabetic condition was unable to satisfy FMLA’s notice requirement as a matter of law, and therefore the district court properly dismissed his claim on summary judgment).

When the parties dispute the quantity and nature of communications regarding the employee’s illness, courts tend to deny summary judgment. See, e.g. *Pagel v. TIN Inc.*, ___ F.3d ___, NO. 11-2318, 2012 WL 3217623 (7th Cir. Aug. 9, 2012) (although far from conclusive, the evidence regarding the employee’s notice of the need for potentially FMLA qualifying leave was sufficient to go to a jury); *Matthews v. New Jersey Institute of Technology*, 772 F. Supp. 2d 647, 659 (D.N.J. 2011) (genuine issue of material fact, as to whether New Jersey city and its employees interfered with asthmatic employee’s FMLA rights when they failed to take any action on his request for FMLA leave, precluded summary judgment on that claim; employee completed FMLA certification and submitted forms to city and, viewed most favorably to employee, evidence showed that he provided notice that he was seeking FMLA leave). An example of this is found in the case of *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294 (3d Cir. 2012). In *Lichtenstein*, the Third Circuit found that the plaintiff had established a genuine issue of material fact as to whether she provided adequate notice to her employer about her need to take FMLA leave. Lichtenstein’s mother suffered a sudden serious health condition. The plaintiff called her supervisor and informed her that she was currently in the emergency room, that her mother had been brought into the hospital via ambulance, and that she would be unable to work that day. The Third Circuit distinguished the situation in *Lichtenstein* from a case where an employee merely gives a generic reference about going to the hospital because people rushed to the ER in an ambulance are generally in a more serious health condition than those who go in of their own accord. *Id.* at 304-05 & n.16.

2. Employees Who Fail To Follow Company Policies Regarding The Requesting Of FMLA Leave Often – But Not Always – Suffer A Bar Of Their FMLA Claim

Sometimes an employee will put his or her employer on notice that they may need time off work that would qualify as FMLA leave, but then later affirmatively represent that they do not want to take FMLA leave. Sometimes, such an employee may also intentionally refuse to comply with the employer's formal policy to request FMLA leave. In these types of situations, assuming the facts clearly demonstrate the employee's informed and unequivocal decision not to seek FMLA leave, or to follow their employer's FMLA policy, courts generally will reject an employee's subsequent FMLA claim. For example, in *Greenwell v. State Farm Mut. Auto. Ins. Co.*, 486 F.3d 840 (5th Cir. 2007), an employee with a history of both FMLA and unexcused absenteeism contacted her employer when she was required to miss work due to an injury to her child. *Id.* at 841. As the injury was not foreseeable, the employee had not been able to give advance notice of her absence. *Id.* The employee received verbal approval for her absence when she called into work. *Id.* When she returned to work, the employee refused to complete the necessary FMLA paperwork pursuant to the employer's FMLA policy, and the employer subsequently terminated her. *Id.* The court, faced with *Greenwell's* intentional and affirmative refusal to comply, enforced the employer's policy because *Greenwell* had actual knowledge of the policy and offered no persuasive reason to justify setting it aside.

On the other hand, this rule is not absolute. In *Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576, 583 (5th Cir. 2010), the Fifth Circuit distinguished *Greenwell* and held that noncompliance with the employer's FMLA policy was not a sufficient basis to dismiss her case. *Saenz* was an employee of Harlingen Medical Center (HMC). In 2006, *Saenz* applied for, and was granted, intermittent FMLA leave for a seizure condition from which she suffered. During each of her absences, she complied with an additional requirement instituted by the company through its insurer (Hartford), that she report the reason for her absence within two days of that specific absence. *Saenz* was warned that her failure to report within two days could cause the loss of her FMLA status. Between July 24 and December 26, 2006, *Saenz* was absent on nine different occasions, seeking and receiving approval within two days of each absence, consistent with HMC's heightened reporting requirement.

On December 25 and 26, *Saenz* missed work due to seizures, and reported appropriately. However, on December 29-31 and January 3-4, 2007, *Saenz* again missed work. This time, her absence was due to a psychological condition that ultimately required her to be hospitalized. *Saenz* did not, however, report her absences to Hartford within two days. Rather, *Saenz's* mother, Rhonda Galloway, contacted *Saenz's* supervisor and HMC's "house" supervisor about the situation, letting them know that *Saenz* would not be reporting to work. The house supervisor visited *Saenz* in the emergency room. *Saenz* subsequently was admitted to a behavioral clinic until January 2, after which she went to her mother's home to recover. Galloway then called *Saenz's* supervisor to report *Saenz's* status and to make HMC aware that *Saenz* would not be reporting to work. In total, *Saenz* missed work on December 29-31, and January 3 and 4 due to her illness.

On January 9, Saenz called Hartford to report her diagnosis (bipolar disorder and depression) and to ask for intermittent leave associated with that condition. Saenz then received a letter dated January 18, 2007 from HMC informing her that her employment was terminated due to non-FMLA approved absences. The letter explained that Saenz should have reported her absences to Hartford within two days after her release from the hospital on January 2, and that her failure to do so created unexcused absences.

Saenz sued HMC, claiming violation of her rights under the FMLA. The district court granted summary judgment in favor of HMC, but that decision was reversed by the Fifth Circuit. The Court found that Saenz provided sufficient information for HMC to realize that she was requesting FMLA leave, and did so within two days of her illness. Saenz's mother contacted HMC to inform them of the new illness, and an HMC supervisor visited Saenz in the emergency room and saw her condition first-hand. In other words, HMC was not left to wonder whether Saenz was suffering from a serious health condition, or whether FMLA might apply. Thus, unlike the plaintiff in the *Greenwell* case, Saenz: (i) gave far clearer notice of the need for FMLA leave to her employer in the first place; (ii) eventually did comply with the company's policy by reporting her absences to Hartford on January 9; and (iii) did not intentionally refuse to comply with the policy in the first place, but instead was apparently unable to do so because of her psychological condition. *Id.* at 581-82.

Under the DOL's revised 2009 FMLA regulations, an employee must comply with an employer's usual and customary notice and procedural requirements for requesting FMLA leave, absent unusual circumstances. 29 C.F.R. §§ 825.302(d) & 825.303(c). Thus, an employee's failure to comply with his or her employer's leave procedures can be a ground for delaying or denying an employee's request for FMLA leave. To delay or deny leave on this basis, the employer must be able to demonstrate that the employee had actual notice of its procedures. 29 C.F.R. § 825.304(a).

The court in *Saenz* did not apply this regulation, because the facts giving rise to the case occurred before the revised regulations took effect. It did state in *dicta*, however, that "[w]ere we to apply the new regulations, Harlingen might very well be entitled to summary judgment." *Saenz*, 613 F.3d at 582 n. 9.

Regarding employer notice policies, in the case of *Millea v. Metro-North R.R. Co.*, 658 F.3d 154 (2d Cir. 2011), the employer's policy provided that the employee must notify his supervisor directly when FMLA leave is requested. The plaintiff had several panic attacks at work, and had coworkers tell his supervisor that he was leaving work due to an FMLA-qualifying event. The employer disciplined the plaintiff for violating its policy. The Second Circuit Court of Appeals affirmed a jury verdict for the plaintiff, concluding that:

The FMLA generally requires employees to "comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.303(c). However, this requirement is relaxed in "unusual circumstances" or where the company policy conflicts with the law. *Id.*

The regulations implementing the FMLA provide that when an employee's need for FMLA leave is unforeseeable (as Millea's was), "[n]otice may be given by the

employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the employee is unable to do so personally." *Id.* § 825.303(a). Because this regulation expressly condones indirect notification when the employee is unable to notify directly, Metro-North's policy conflicts with the FMLA and is therefore invalid to the extent it requires direct notification even when the FMLA leave is unforeseen and direct notification is not an option.

Id. at 161-62.

3. What Happens When Employees Put Their Employer On Sufficient Notice To Trigger The Employer's Informal Duty To Obtain Additional Information, But Then They Fail To Fully And Promptly Provide Their Employer The Requested Additional Information?

Once an employee properly invokes their FMLA rights by alerting his or her employer to his or her need for potentially qualifying leave, the regulations shift the burden to the employer to take certain affirmative steps to process the leave request. 29 C.F.R. § 825.301. In particular, after notice is given, the employer has a duty to provide a written explanation of the employee's rights and responsibilities under the FMLA, *id.*, and a duty to make further inquiry if additional information is needed before the employer can process the leave request, *see id.* §§ 825.302(c) ("[T]he employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought . . ."), 825.303(b) ("The employer will be expected to obtain any additional required information through informal means.").

a. Employers That Responded The Right Way, According To The Courts

The *Righi* case from February 2011 provides a common fact pattern. *Righi*, 632 F.3d at 410. In *Righi*, the plaintiff, a salesman for SMC Corp., was the primary caretaker for his mother, who regularly suffered complications from diabetes. As a result, Righi often took FMLA leave to care for her. On the occasion at issue, however, he asked for time off after his mother accidentally overdosed on her medication. After leaving work mid-shift on July 11, he sent an e-mail to his supervisor the morning of July 12, stating:

I need the next couple days off to make arrangements in an intermediate care facility for my Mother. . . . I do have the vacation time, or I could apply for the family care act, which I do not want to do at this time.

I hope you can understand my situation and approve this emergency time off. I will be very busy the next couple of days . . . so I might be slow getting back to you.

Upon receipt of the e-mail, Righi's supervisor made more than ten attempts to contact Righi on his cell phone over the following seven days. On July 19, Righi finally returned his calls, admitting that he turned off his cell phone for a week. Righi subsequently was terminated for violating SMC's call-in policy. Righi sued, alleging that SMC interfered with his right to take FMLA leave.

First, the Seventh Circuit found that Righi had not waived his right to claim FMLA leave in his e-mail, when he said that he did not want to take FMLA “at this time.” Although an employee may waive his FMLA rights if he “clearly expresses to his employer that he does not wish to use the protections of the FMLA,” this was not necessarily the case here, since Righi simply stated that he did not want to use FMLA at this time. The court reasoned that this phrase could be interpreted to imply that Righi might change his mind and opt to exercise his FMLA rights after all.

Second, the court found that, given Righi’s initial ambiguous notice to SMC, his failure to respond to his supervisor’s many telephone calls doomed his FMLA claim. Under the FMLA, the employee has an obligation to respond to an employer’s questions that are designed to determine whether an absence is potentially FMLA-qualifying. When an employee does not respond, it may result in denial of FMLA protection. According to the court, Righi’s failure to respond to any of his supervisor’s calls for more than seven days “doomed” his FMLA claim. As the court stated:

The FMLA does not authorize employees to “keep their employers in the dark about when they will return” from leave. *Gilliam v. United Parcel Serv., Inc.*, 233 F.3d 969, 971 (7th Cir. 2000). Indeed, employers are “entitled to the sort of notice that will inform them not only that the FMLA may apply *but also when a given employee will return to work.*” *Collins v. NTN-Bower Corp.*, 272 F.3d 1006, 1008 (7th Cir. 2001) (emphasis added). This principle derives from the applicable regulatory scheme, which imposes certain duties on employees requesting FMLA leave. In all cases, the employee must give his employer notice about the “anticipated timing and duration of the leave.” 29 C.F.R. § 825.302(c). This requirement also applies where, as here, the need for leave is unforeseeable. *See id.* and 29 C.F.R. § 825.303(a) (specifying notice requirements where need for leave is unforeseeable); *Collins*, 272 F.3d at 1008 (explaining that even in situations where FMLA leave is unforeseeable, the employee’s notice must conform with the substantive requirements of 29 C.F.R. § 825.302(c)). In cases (like this one) involving unforeseeable leave, the employee must provide notice to his employer about the anticipated duration of his leave “as soon as practicable.” 29 C.F.R. § 825.303(a). Under the regulations in effect at the time of the events in this case, “as soon as practicable” meant “within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.” *Id.* An employee who fails to comply with this notice requirement is not entitled to FMLA protection. *See Brown*, 622 F.3d at 689-90.

Another case along these lines is *Brown v. Auto. Components Holdings, LLC*, 622 F.3d 685, 689 (7th Cir. 2010). Brown, a Ford assembly-line worker, provided the Company medical certification from her primary-care physician on August 21 indicating that she was unable to work until August 29 as a result of “stress.” Also on August 21, Brown scheduled an appointment with a psychiatrist for August 29, the next available date. In the meantime, she asked her primary care physician to pass this information to her employer. Her doctor failed to

do so, and Brown made a fatal mistake – she never followed up with Ford to ensure that a leave extension had been requested and granted.

Brown claimed to have contacted Ford on August 30 to inform the Company that she now would be out until September 16. Ford had no record of this call and sent her certified mail (per Ford’s policy) notifying her that she had five days to return to work or provide proper verification of her illness or else she would be fired. Although Brown received notice of the certified mailing, she never picked up the letter, which was waiting for her at the post office. On September 11, when she failed to report to work or provide documentation supporting her need for continued leave, Brown was terminated for failing to follow Ford’s procedures for seeking an extension of her initial FMLA leave. Later that same day, Brown’s psychiatrist faxed a leave extension request to Ford. By this time, it was too late.

Brown filed suit, claiming that Ford interfered with her FMLA rights. The Court, interpreting pre-2009 FMLA regulations, upheld summary judgment in favor of Ford for two reasons. First, an employee who seeks extension of FMLA leave must notify the employer within two working days of learning the need for the extension, and not within two days of the expiration of the initial leave. Second, Brown failed to follow Ford’s usual and customary policies for reporting absences and seeking leave. Notably, she knew as of August 21 that she would have an appointment with a specialist on August 29, one day after her current FMLA leave was set to expire. Consequently, she could not establish any extenuating circumstances that made timely notice impracticable. (Note that the revised regulations delete the reference to working days and replaced it with “as soon as practicable under the facts and circumstances of the particular case.” 29 C.F.R. § 825.303(a)).

b. Employers That Responded The Wrong Way, According To The Courts

In *Branham v. Gannett Satellite Information Network, Inc.*, 619 F.3d 563 (6th Cir. 2010), the result for the employer stands in contrast to the cases cited in the previous section. The plaintiff-employee in *Branham* sought leave for potentially FMLA qualifying reasons. Her employer responded by requesting that the employee produce a medical certification confirming her inability to work. However, the employer’s request was not made in writing, it did not expressly provide the employee with 15 days to comply, and it did not expressly inform her that a failure to certify an FMLA-qualifying reason for the absence would result in a denial of the leave. These requirements for a proper request for medical certification are all set forth in 29 C.F.R. § 825.305, as well as to the “Notice of Eligibility and Rights & Responsibilities” form attached to the DOL’s regulations as Appendix “D.”

The employee returned a medical certification from her treating physician, but the certification actually undermined her claim, denying that the employee was incapacitated and indicating that she could return to work. The employer relied on this “negative certification” and, when the employee failed to return to work, terminated her employment under its absenteeism policy before the 15 day period applicable to medical certification requests had run out. In the meantime, the employee had found another health care provider willing to certify her

absence as FMLA-qualifying, and she provided it to the employer within the 15 day period. Her employer nevertheless upheld her termination.

The District Court dismissed the employee's FMLA claim on summary judgment, holding that the employer had a right to rely on the first medical certification submitted. However, the Sixth Circuit reversed. According to the Sixth Circuit, the employer's oral request "never properly triggered the [employee's] additional duty to provide a medical certification" in the first place. So despite the fact that the employee's treating physician volunteered that she was medically able to work (and, thus, not entitled to FMLA leave), the employer's failure to follow the strict requirements of 29 C.F.R. § 825.305(b) left the employer at the mercy of a jury trial on the issue of whether it had interfered with the employee's FMLA rights. The Sixth Circuit also noted that the second certification was completed and received by the employer within the applicable time period.

In *Parsons v. Principal Life Ins. Co.*, 686 F. Supp. 2d 906 (S.D. Iowa 2010), the 30 year employee-plaintiff took leave for mental health problems, including suicidal ideation. She indicated that she would be unable to work until June 30, 2008. Her employer properly sought medical certification. She submitted a medical certification from her doctor that was incomplete, confusing, and unclear. In response, the employer denied her FMLA leave request and terminated her employment for her failure to call in her absences or report to work from June 17 through June 20, 2008. *Id.* at 909. Her employer told her that "her job was terminated due to "job abandonment" and that the termination had "nothing to do with FMLA."” *Id.*

The court denied the employer's motion for summary judgment against the plaintiff's FMLA interference claim for two reasons. First, the court held that, "while Defendant was entitled to receive additional information in the form of a complete certification meeting all of the statutory requirements, its appropriate course of action was not to deny Plaintiff's FMLA request; rather, it had an obligation to grant Plaintiff a "reasonable opportunity to cure" the certification. The Court believes that the factual progression in this case clearly raises a jury question as to whether Defendant violated Plaintiff's FMLA rights by failing to provide her with an adequate opportunity to cure the defects in the certification."

Second, the court noted that, while the FMLA regulations (29 C.F.R. § 825.311(a)) permit employers to "require an employee on FMLA leave to report periodically on the employee's status and intent to return to work," the employer "must take into account all of the relevant facts and circumstances related to the individual employee's leave situation." *Id.* The court held that, "[i]n the present factual context, the Court finds that a reasonable jury could conclude that Principal's insistence that Plaintiff continue to call in on a daily basis, despite Plaintiff's unwavering reports that she would be unable to return to work prior to June 30, 2008, ran afoul of the requirement . . . that the employer "take into account all of the relevant facts and circumstances" in requiring periodic status reports." *Parsons*, 686 F. Supp. at 920 (citing *Call v. Fresenius Med. Care Holdings, Inc.*, 534 F. Supp. 2d 184, 198 (D. Mass. 2008)) (finding a factual issue under the predecessor to this regulation where the employer required the employee to call in every day despite having already been granted leave for certain days). The court concluded that, "there is a genuine issue of material fact as to whether Principal was permitted to require Plaintiff to comply with its absence reporting policy in this case since the policy arguably

failed to “take into account all of the relevant facts and circumstances related to [Plaintiff’s] leave situation,” as required by [the law].” *Id.* In reaching this conclusion, the court observed that:

The provision permitting employers to obtain periodic status reports from an absent employee was designed to permit employers to obtain information sufficient to meet their staffing needs, without being wholly dependent on the whims of the employee. *See Jones v. Denver Pub. Schs.*, 427 F.3d 1315, 1320 (10th Cir. 2005) (finding that employers may request periodic status updates so that they are not placed “in a position of grave uncertainty in complying with their obligations under the FMLA”); *see also Gilliam v. United Parcel Serv., Inc.*, 233 F.3d 969, 971 (7th Cir. 2000) (noting that the FMLA does not “authorize employees on leave to keep their employers in the dark about when they will return”). The Court is dubious that Principal’s policy of rote adherence to daily call-in provisions in situations where it has already been notified that an employee will be absent furthers any legitimate purpose of the employer.

Parsons, 686 F. Supp. 2d at 920 n. 10.

4. The Wise Approach: When In Doubt, Send The Notice Of Eligibility And Rights Out, With The Request For Certification Of A Serious Health Condition, Then Wait At Least 15 Days

Pursuant to the FMLA and related regulations, when an employee provides notice of the need for FMLA leave, the employer shall provide the employee with notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. 29 C.F.R. § 825.300(c)(1).

Under the FMLA, following an employee’s notice of the need for leave, employers are required to designate leave as FMLA and provide written notice to the employee of such designation and that the leave will be counted as FMLA leave. The regulations require employers to provide employees with individualized notice of the designation to the employee. Specifically, the regulations provide that: “[w]hen an employee requests FMLA leave, or when the employer acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee’s eligibility to take FMLA leave within five business days, absent extenuating circumstances.” 29 C.F.R. § 825.300(b)(1). If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible. Notification of eligibility may be oral or in writing, and employers may use Appendix D of part 825 of the FMLA regulations, entitled “Notice of Eligibility and Rights & Responsibilities,” to comply with this obligation. 29 C.F.R. § 825.300(b)(2). An employee’s eligibility is determined the first time such leave is requested in the applicable twelve-month period. If any employee provides notice of a subsequent need for leave during that year for a different reason and the employee’s eligibility has not changed, the employer need not provide a new eligibility notice. If, however, the employee’s eligibility status has changed, the employer must notify the employee of the change within five days of the leave request. *See* 29 C.F.R. §§ 825.300(b)(1)-(3).

Along with the eligibility notice, an employer must provide the employee with a notice containing his or her FMLA rights and responsibilities, such as submitting medical certification, requiring substitution of paid leave, requiring a fitness-for-duty certificate upon return from FMLA leave, etc. 29 C.F.R. § 825.300(c)(1). So long as the employer complies with this requirement, then pursuant to 29 C.F.R. § 825.305(a), an employer may require an employee to furnish certification issued by a health care provider in order to support his or her request for FMLA leave, and the certification must include such information as the name, address and telephone number of the health care provider. *See also* 29 C.F.R. § 825.306. This request should be part of the packet associated with the “Notice of Eligibility and Rights & Responsibilities,” found at Appendix D to the FMLA regulations. The “Certification of Health Care Provider for Employee’s Serious Health Condition” and “Certification of Health Care Provider for Family Member’s Serious Health Condition” are found at Appendix B to the FMLA regulations. The “Certification of Health Care Provider for Employee’s Serious Health Condition” and “Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave” is found at Appendix H to the FMLA regulations.

Under the FMLA, a “health care provider” who may provide medical certification, includes: (1) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (2) any other person “capable of providing health care services,” which includes only:

- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law.
- Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law.
- Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.
- Any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.
- A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that

country, and who is performing within the scope of his or her practice as defined under such law.

29 C.F.R. § 825.125.

Chiropractors sometimes provide certifications. But, as the regulation notes, chiropractors are only authorized “health care” providers if their treatment consists of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist. Thus, for example, in *Kline v. Checker Notions Co., Inc.*, No. 3:09 CV 283, 2010 WL 750149, at *3 (N.D. Ohio Mar. 1, 2010), the court found that the chiropractor’s alleged certification was not valid, because the chiropractor did not qualify as a health care provider since he did not diagnose the employee with a subluxation.

There is some safety to be gained by following the advice to send employee’s notice of their eligibility and rights, along with a request for certification of a serious health condition. Specifically, if the employee fails to timely provide the completed medical certification form indicating that they have a covered serious health condition, then, general speaking, they are no longer protected by the FMLA and the employer’s customary and usual nondiscriminatory disciplinary action may be administered to them for their absences from work. *See, e.g., Verkade v. United States Postal Service*, No. 1:07-cv-531, 2009 WL 279048, at *7 (W.D. Mich. Feb. 5, 2009) (“In this case, the Court concludes that the Postal Service did not unlawfully deny plaintiff FMLA benefits to which he was entitled. Rather, the Court concludes that plaintiff failed to give the Postal Service complete and sufficient certification of a “serious health condition.”); *Kobus v. College of St. Scholastica, Inc.*, No. Civ. 07-3881JRT/RLE, 2009 WL 294370, at *4 (D. Minn. Feb. 5, 2009) (rejecting FMLA interference claim where the employee failed to provide medical certification of his serious health condition), *aff’d*, 608 F.3d 1034 (8th Cir. 2010). On the other hand, if the employer does not require an employee to provide medical certification of their serious health condition, then the employee’s “failure” to do so is no defense to an FMLA action. *See, e.g., Govea v. Landmark Industries, Ltd.*, No. SA-10-CV-200-XR, 2011 WL 632858, at *4 (W.D. Tex. Feb. 10, 2011).

The FMLA regulations generally concur with the notion that if the employee fails to timely provide the completed medical certification form indicating that they have a covered serious health condition, then, generally speaking, they are no longer protected by the FMLA and the employer’s customary and usual nondiscriminatory disciplinary action may be administered to them for their absences from work. They provide:

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave*. In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

29 C.F.R. § 825.313(a) and (b).

V. AFTER REQUESTING MEDICAL CERTIFICATION OF A SERIOUS HEALTH CONDITION, EMPLOYERS SHOULD NOT TERMINATE THE EMPLOYEE FOR TAKING TIME OFF WORK FOR THE ALLEGED REASON THEY NEEDED THE FMLA LEAVE FOR AT LEAST 15 DAYS

The FMLA regulations permit an employee at least 15 days to provide certification of a serious health condition after a request from an employer. *See Lubke v. City of Arlington*, 455 F.3d 489, 496-97 (5th Cir. 2006) (stating that 29 C.F.R. § 825.305(b) “requires” that the employer allow the employee at least 15 days to respond to the medical certification request). An employer that terminates an employee for taking time off work that is the basis for the FMLA request during those 15 days, violates the FMLA. *See Saenz v. Harlingen Med. Ctr., L.P.*, 613 F.3d 576, 581 n.7 (5th Cir. 2010) (“In fact, termination during the mandatory 15-day compliance period could itself be deemed a FMLA violation.”); *Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 554-55 (6th Cir. 2006) (termination of employee six days into 15-day compliance period “was clearly a violation of the FMLA”); *Cooper v. Fulton County, GA.*, 458 F.3d 1282, 1286 (11th Cir. 2006) (termination of employee before the lapse of the 15-day compliance period deemed impermissible under FMLA); *Muhammad v. Ind. Bell Tel. Co.*, 182 Fed. Appx. 551, 553 (7th Cir. 2006) (unpublished) (describing the 15-day compliance period as a prerequisite to adverse employment action); *Rhoads v. FDIC*, 257 F.3d 373, 383 (4th Cir. 2001) (“[T]he employer must allow the employee at least fifteen calendar days to submit [certification].”).

For example, in the *Cooper v. Fulton County* case cited above, Cooper brought suit against Fulton County, his former employer, for violations of the FMLA after the County terminated him for failing to provide medical certification for an absence within six days of the County’s written request. In late June, Cooper went to the hospital complaining of chest pains. The County informed him that he would need to provide a doctor’s note and that if he complied by July 8, he would be placed on 12 weeks FMLA leave. Cooper provided the requisite notes and returned to work on July 13, however he became ill that day and left work. On July 14, Cooper requested further medical leave. On August 4, the County informed Cooper that he had to provide medical certification for his absence by August 10. Cooper obtained a doctor’s note dated August 7 but did not immediately deliver it, and on August 10, the County terminated him. The trial court found that the County had not complied with either the notice requirement or the allotted time period allowed for a medical certification response required by the statute. The

Court of Appeals held that the County violated FMLA when it gave the employee only six days to provide documentation, rather than the fifteen days allowed. Cooper was awarded \$248,828.41 in back pay and \$58,031.59 in liquidated damages. FMLA requires that the employee receive written notice of the employer's medical certification requirements after an employee requests FMLA leave. Oral notice is acceptable if written notice was received by the employee within the preceding six months. Additionally, the employee is given 15 days to respond to any request for certification. Liquidated damages are presumptively awarded to an employee when the employer violates FMLA. The Court affirmed the ruling in favor of Cooper as well as the liquidated damages, finding that the award was not erroneous. Although the County acted in good faith, it did not have a reasonable basis for believing its conduct was lawful where its decisionmakers did not read the FMLA or its regulations or consult an attorney before terminating Cooper.

An exception to this rule -- though one that should be relied on rarely, if at all -- is if an employer properly requests medical certification of a serious health condition, and receives an unequivocal "negative certification" within the 15 days. In such an instance, the Fifth Circuit has held that the employer could terminate the employee before the expiration of the 15-day period. *See Boyd v. State Farm Ins. Co.*, 158 F.3d 326, 332 (5th Cir. 1998).

Finally, the "15-day" rule does not mean that an employee is entirely immune from termination during the 15-day period. For example, in *Wierman v. Casey's General Stores*, 638 F.3d 984 (8th Cir. 2011), the plaintiff, Wierman, was terminated during the 15-day compliance period. The court correctly observed that the employer "cannot use Wierman's termination before this deadline to argue that she never exercised her FMLA rights." *Id.* at 1000 (citing *Caldwell v. Holland of Tex., Inc.*, 208 F.3d 671, 677 (8th Cir. 2000) ("An employer does not avoid liability by discharging an employee who takes leave in order to seek treatment for a condition that is later held to be covered by the FMLA.")). However, the court still dismissed Wierman's FMLA retaliation claim, because the evidence was undisputed that the employer terminated her employment because she had stolen her employer's property, not because of her potentially qualifying FMLA condition of pregnancy. *Id.* at 1001.

VI. AN EMPLOYEE SHOULD NOT BE TERMINATED FOR FAILING TO CURE A DEFICIENCY IN THEIR MEDICAL CERTIFICATION WITHOUT A PRIOR WRITTEN WARNING THAT (A) SUCH A FAILURE WILL RESULT IN THEIR TERMINATION; AND (B) PROVIDING THEM AT LEAST SEVEN DAYS – IF NOT MORE – TO CURE THE DEFICIENCY

A. General Rules

An employee's medical certification is considered sufficient if it contains certain information, including: (1) the date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and (4) if the leave is for the employee's own serious health condition, a statement that the employee is unable to perform the functions of his or her job. 29 U.S.C. § 2613(b); *Brenneman v. MedCentral Health System*, 366 F.3d 412, 422 (6th Cir. 2004) (citing 29 U.S.C. § 2613(b)).

29 C.F.R. § 825.305(b) provides that “[i]n most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter . . . The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer’s request, unless it is not practicable under the particular circumstances to do so despite the employee’s diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.” *See also Urban v. Dolgencorp of Tex., Inc.*, 393 F.3d 572, 574 (5th Cir. 2004) (“If the employer does require medical certification, it must give the employee at least 15 calendar days in which to submit the certification.”) (citing 29 C.F.R. § 825.305(b) (2002)).

The Fifth Circuit has held that the retroactive denial of FMLA status to leave already in progress may allow the employer to deem those days to be unexcused absences and accordingly discipline the worker under the employer’s usual attendance policies. *See Urban*, 393 F.3d at 576. However, 29 C.F.R. § 825.305(c) of the FMLA regulations provides that an employee whose certification is deemed inadequate must be informed what additional information is needed to make the certification complete and sufficient, and “[t]he employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee’s diligent good faith efforts) to cure any such deficiency.” Moreover, 29 C.F.R. § 825.305(d) provides that an employer must “advise an employee of the anticipated consequences of an employee’s failure to provide adequate certification.” *See also Urban*, 393 F.3d at 574 (“If an employer requests such documentation, it is required to notify the employee of the consequences for failing to provide an adequate certification. If the employer finds the certification form incomplete, the employer must advise the employee of the deficiency and provide the employee a reasonable opportunity to cure any such deficiency.”). If an employee then fails to correct the deficiency, the employer may deny him FMLA benefits. 29 C.F.R. § 825.305(c).

The Fifth Circuit has held that an employer must comply with these cure provisions in order to retroactively deny leave based on an employee’s failure to provide adequate certification. In *Lubke v. City of Arlington*, the plaintiff’s employer fired him for missing two days of work without providing adequate medical certification to justify his absence, and plaintiff sued his employer under the FMLA. 455 F.3d 489, 494-94 (5th Cir. 2006). The district court held that the employer could not rely on the plaintiff’s failure to provide medical certification because the employer had not complied with the provisions of 29 C.F.R. § 825.305(b)-(d), stating: “[i]f an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.” *Id.* at 497. On appeal, the Fifth Circuit upheld the district court’s decision. *Id.* at 500; *see also Downey v. Strain*, 510 F.3d 534, 539-540 (5th Cir. 2007).

Courts have also held that 29 C.F.R. §§ 825.305(c) and (d) mean an employer may not terminate an employee for failing to cure a deficiency in their medical certification unless and until the employer has warned them that they will be terminated if they fail to cure the deficiency. *See, e.g., Picarazzi v. John Crane, Inc.*, 2011 WL 486211, at *13-14 (S.D. Tex. Feb.

7, 2011) (denying summary judgment in FMLA case where employer did not inform plaintiff that if he did not comply with its request for additional clarification of his medical certification, that he would be terminated); *Shtab*, 173 F. Supp. 2d at 266-67 (denying summary judgment where employer may not have given the employee a specific warning that the consequences of not curing an allegedly defective medical certification was going to be termination); *Washington v. Fort James Operating Co.*, 110 F. Supp. 2d 1325, 1332 (D. Or. 2000) (“The record before the court indicates that Ft. James may have violated the FMLA by failing to adequately notify Washington of the consequences for failing to submit timely certification . . .”). To avoid any dispute over whether or not it complied with this requirement, employers should provide such a warning to employees in writing.

As mentioned, the FMLA regulations also provide that before an employer may treat a certification as defective, and take adverse actions based on that, it must also give the employee an opportunity to cure the deficiency. See 29 C.F.R. § 825.305(c). The employer must give the employee at least seven days to cure the deficiency. Further, the employer must give the employee more than seven days if that employee is making diligent, good faith efforts to cure the deficiency, but finds that it is not practicable to do so within the required time frame. See, e.g., *Picarazzi v. John Crane, Inc.*, 2011 WL 486211, at *12-14 (S.D. Tex. Feb. 7, 2011) (denying summary judgment in FMLA case where there was a dispute as to whether the employer gave the plaintiff sufficient opportunity to cure any defects in his medical certification); *Wellman v. Sutphen Corp.*, No. 2:08-CV-557, 2010 WL 1644018, at *10 (S.D. Ohio, Apr. 23, 2010) (denying employer’s motion for summary judgment because, “even if the court found Wellman’s certification to be “incomplete,” it could not say, based on the record before it and as a matter of law, that Sutphen satisfied its obligation to provide Wellman with a “reasonable opportunity to cure [the incompleteness].”); *Smith v. CallTech Communications, LLC*, No. 2:07-cv-144, 2009 WL 1651530, at *8 (S.D. Ohio June 10, 2009) (holding that employer did not provide employee with a reasonable opportunity to cure where employer gave employee only three days to obtain additional medical documentation despite employee’s protest that she would not be able to schedule a doctor’s appointment within three days); *Austin v. Jostens, Inc.*, No. 07-2380-JAR, 2008 WL 4642277, at *9 (D. Kan. Oct. 16, 2008) (whether the employer provided its employee a reasonable opportunity to cure a deficiency in an incomplete FMLA certification is a material fact question); *Novak v. MetroHealth Med. Ctr.*, 503 F.3d 572, 579 (6th Cir. 2007) (holding that employer provided employee a reasonable opportunity to cure deficiency where it held a meeting with the employee so that it could explain the deficiency to the employee and allowed employee an additional week to obtain other certification); *Brady v. Potter*, 476 F. Supp. 2d 745, 758 (N.D. Ohio 2007) (holding that employee could not state a claim for FMLA interference because she failed to cure deficiency in her certification despite being provided 15 days to cure the deficiency); *Jiminez v. Velcro USA, Inc.*, No. 01-001-JD, 2002 WL 337523, at *4 (D. N.H. Mar. 4, 2002) (“Velcro has not shown, based on undisputed facts, that it complied with the FMLA requirement to allow Jiminez to cure any deficiency in the certification”); *Marrero v. Camden County Bd. of Soc. Servs.*, 164 F. Supp. 2d 455, 466 (D. N.J. 2001) (“termination is not an appropriate response for an inadequate certification” because “[s]ection 825.305(d) provides that where an employer finds a certification incomplete, it must give the employee a reasonable opportunity to cure any deficiencies”).

An example of this situation is the *Picarazzi* case. There, the employer claimed the the plaintiff's medical certification was deficient. The employer asked him to cure the alleged deficiencies, and gave him seven days to present a full and complete certification. When the plaintiff failed to comply with this deadline, the employer terminated his employment. 2011 WL 486211, at *13. The court found that the employer was not entitled to summary judgment based on the plaintiff's allegedly deficient medical certification because: (i) the evidence showed that the plaintiff and his health care providers were trying to comply with the employer's request, so there was a fact issue over whether or not "Plaintiff received sufficient opportunity to correct the deficiency in his certification, or whether he was unable to comply despite his good faith efforts"; and (ii) in addition, the record suggested "that Plaintiff was not appropriately informed of the consequences of his failure to comply" in that the company never informed the plaintiff that if he did not cure the alleged deficiencies in his medical certification that "would mean a discharge from JCI due to an accumulation of absence points." *Id.*; see also *Fischbach v. City of Toledo*, 798 F. Supp. 2d 888, 893 (N.D. Ohio 2011) ("... there is no indication that Defendant informed Plaintiff of any alleged deficiencies in the certification, or provided him a "reasonable opportunity" to cure it. Thus, the Court cannot grant summary judgment in favor of Defendant on the issue of whether Plaintiff had a "serious health condition" for purposes of the FMLA.").

Note that the rules regarding clarification for medical certifications also apply to recertifications and fitness-for-duty certificates. See 29 C.F.R. § 825.305(d). See, e.g., *Folts v. South Lyon Senior Care and Rehab Center, L.L.C.*, No. 10-CV-13774, 2012 WL 995209, at *6 (E.D. Mich. Mar. 23, 2012) ("Viewing the evidence as a whole, and in the light most favorable to plaintiff, the court finds a genuine issue of material fact on plaintiff's claim that defendant interfered with her rights by failing to provide adequate warning [of termination] regarding the December 2009 recertification.").

B. Steps Employers May Take To Affirmatively Seek Clarification Of A Deficient Medical Certification

It is the employee's obligation to submit a complete and sufficient medical certification. 29 C.F.R. §§ 825.305(c) & 825.306(e). Nonetheless, the revised FMLA regulations give employers some power to seek clarification of a medical certification themselves. Specifically:

- The employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c).
- To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.
- For purposes of these regulations, "authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized

by the health care provider who signed the document; no additional medical information may be requested. “Clarification” means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response.

- Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Rule (*see* 45 C.F.R. parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. *See* 29 C.F.R. § 825.305(d). It is the employee’s responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

29 C.F.R. § 825.307(a).

Along the same lines, employers also have the right to request documentation to verify family relationships, when FMLA leave is requested for a family member’s “serious health condition.” 29 C.F.R. § 825.122(j). Specifically, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. *Id.* According to the regulations, “[t]his documentation may take the form of a simple statement from the employee, or a child’s birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.” *Id.*

VII. EMPLOYERS SHOULD PROVIDE EMPLOYEES WITH TIMELY WRITTEN DESIGNATION OF THEIR FMLA LEAVE

Section 29 C.F.R. § 825.208 of the DOL’s initial regulations provided that employers could not retroactively designate FMLA leave and count that time against the employee’s FMLA entitlement. In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), the Supreme Court invalidated that DOL regulation. In *Ragsdale*, the Supreme Court concluded that the regulation was incompatible with the FMLA’s remedial mechanism and contrary to Congress’ intent because it unfairly punished employers who failed to provide timely notice of the FMLA designation with a penalty that was unconnected to any prejudice an employee might have suffered. The Court concluded that employers should not automatically be liable to provide additional leave when a designation error or oversight occurs, but that they could be liable (and required to provide additional leave) if the employee is able to establish that he or she was actually harmed or prejudiced by the employer’s failure to designate the prior leave as FMLA leave. The Supreme Court, however, did “not decide whether the notice and designation

requirements are themselves valid or whether other means of enforcing them might be consistent with the statute.” 535 U.S. at 96.

In the DOL’s revised regulations, which took effect on January 16, 2009, the DOL relocated the section addressing retroactive designation of leave from 29 C.F.R. § 825.208 to 29 C.F.R. § 825.301, and revised it to be consistent with the *Ragsdale* decision. Specifically, in the revised regulations.

- An employer may retroactively designate leave as FMLA qualifying unless the employee is able to demonstrate harm or injury from the employer’s failure to timely designate. *See* 29 C.F.R. § 825.301(d).
- An employer may be liable under the FMLA if the employee suffered an actual injury due to the employer’s failure to timely designate the leave as FMLA qualifying. *See* 29 C.F.R. § 825.301(e).

The Fifth Circuit case of *Downey v. Strain*, 510 F.3d 534 (5th Cir. 2007) is instructive. *Downey* was decided after *Ragsdale*, and before the revised regulations were issued. In this case, the Court held that Downey had met her burden of showing that she had been prejudiced by a lack of individualized FMLA notice. Given that the revised regulations are in line with *Ragsdale*, *Downey* would likely have been decided the same way today. Accordingly, it is worth reviewing, in order to understand how to avoid the problem the employer there encountered.

Downey, an employee working in the crime lab of the St. Tammany Parish Sheriff’s office, was on paid leave from November 7, 2002 through March 16, 2003 due to knee and shoulder injuries she sustained in 2000 and 2001. On December 29, 2002, Sheriff Rodney Strain notified Downey that he was designating this leave as an FMLA leave and charged her 424 hours of FMLA leave for the period December 29, 2002 to March 17, 2003. This left Downey with 52 hours of FMLA leave remaining through December 28, 2003, the last day of the 365-day FMLA leave period. However, on July 18, 2003, Downey suffered an additional injury to her knee and took a second period of leave beginning July 30, 2003, and lasting through October 3, 2003, for surgery on her knee. Strain treated this second period of leave as FMLA leave, but did not provide additional notice to Downey that he was doing so. Because the second period of leave took Downey beyond her 12-week allotment of FMLA leave, upon returning to work, she was reassigned to another position in the corrections department that did not have some of the fringe benefits she had in her previous position, such as overtime pay and use of a car. Downey sued Strain for his failure to provide her with individual written notice that the July 2003 leave would be designated as FMLA leave. Specifically, Downey contended that had she been notified that her July 2003 leave would be counted as FMLA leave, she would have postponed her knee surgery to a time when it would not have caused her to exceed her FMLA allowance.

The District Court entered an order noting that it was undisputed that Downey did not receive individualized written notice that the July 2003 leave would be treated as FMLA leave and left for the jury the question as to whether Downey was actually prejudiced by the lack of notice. The District Court instructed the jury that in order to prove prejudice, Downey had to

show that: (1) she could have delayed the knee surgery until December 22, 2003; (2) she would have been able to perform her full duties in the crime lab; and (3) either it would have not been necessary for her to take any FMLA leave before December 22, 2003, or any leave would not have exceeded the amount of FMLA leave time she had available until December 22, 2003. The jury found that Downey had met her burden and awarded her back-pay damages.

Strain appealed the jury's finding on the ground that the regulations requiring individualized notice are invalid and that therefore he was not required to provide Downey with individualized notice regarding the July 2003 leave, but rather that the notice he provided Downey regarding the December 2002 leave was sufficient to inform her of her rights under the FMLA. Thus, on appeal, the Fifth Circuit was called upon to decide if Strain was required to give Downey individualized notice that her July 2003 absence would be counted as FMLA leave or whether it was sufficient that he gave notice of FMLA leave in December 2002.

The Court noted that the regulations could not be deemed arbitrary, capricious or manifestly contrary to the FMLA as long as they are enforced in a manner that is consistent with the FMLA's remedial scheme, which requires an employee to prove prejudice as a result of an employer's noncompliance. It further noted that in *Ragsdale*, the Supreme Court stated that a regulation must not "relieve employees of the burden of proving any real impairment of their rights and resulting prejudice," and that courts evaluating an FMLA claim must conduct a "retrospective, case-by-case examination" that addresses "whether the employee would have exercised his or her FMLA rights in the absence of the employer's actions." *Id.* at 90-91.

Applying this reasoning, the Fifth Circuit found that the individualized notice regulations were valid as enforced in this case. Specifically, it held that the District Court had properly enforced the regulation by conducting the case-by-case examination described in *Ragsdale* and requiring Downey to prove that the noncompliance interfered with her rights under the FMLA and thereby caused her prejudice before providing her with a remedy. The Court went on to note that, in this case, Downey proved that she was actually prejudiced by her employer's noncompliance with the regulations; specifically, she was able to show that had she received individualized notice, she would have been able to postpone her surgery to another FMLA period. This would have allowed her to exercise fully her right to take 12 weeks of protected leave each year under the FMLA and her position in the crime lab would not have been jeopardized. Because Downey showed that Strain's non-compliance with the individualized notice regulations impaired her ability to exercise her rights under the FMLA and caused her prejudice, the jury was justified in finding for Downey and awarding her damages.

The Fifth Circuit's decision serves as a reminder to employers to designate employee leave, paid or unpaid, as FMLA-qualifying and to give notice of the designation to the employees. As previously mentioned, the "Notice of Eligibility and Rights & Responsibilities," found at Appendix D to the FMLA regulations is designed to comply with this requirement.

VIII. EMPLOYERS SHOULD USE THE SECOND AND THIRD OPINION PROCESS WHEN THEY HAVE GOOD REASON TO DOUBT THE VALIDITY OF THE EMPLOYEE'S MEDICAL CERTIFICATION

The FMLA's second and third opinion process that applies to medical certifications from employees states, in relevant part:

(b) *Second opinion.* (1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion.* If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical

information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions.* The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses.* If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable “out of pocket” travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

29 C.F.R. § 825.307(b)-(e).

If an employer does not obtain a second opinion after receiving certification of a serious health condition from the employee’s health care provider, several circuit courts have held that the employer may still later challenge whether the employee or family member had a “serious health condition,” and such a challenge leaves for the jury the determination of whether the leave was needed for a “serious health condition.” *Rhoads v. FDIC*, 257 F.3d 373, 386 (4th Cir. 2001); *see also Novak v. MetroHealth Med. Ctr.*, 503 F.3d 572, 579-80 (6th Cir. 2007) (in the event an employer does not request a second opinion, the employer is “not preclude[d] . . . from contesting the employee’s certification.”); *Stekloff v. St. John’s Mercy Health Sys.*, 218 F.3d 858, 860 (8th Cir. 2000) (reaching same result, and noting that the right to require a certification, like the right to challenge the certification through acquisition of a second opinion, are permissive rather than mandatory). However, not all courts are in complete agreement on this point. *See Miller v. AT&T*, 60 F. Supp. 2d 574, 580 (S.D. W. Va. 1999) (“An employer who wishes to contest the validity of a medical certification must use the second-opinion procedures of § 2613(c)-(d).”); *Sims v. Alameda-Contra Costa Transit Dist.*, 2 F. Supp. 2d 1253, 1260 (N.D. Cal. 1998) (noting it is “not clear” from the statute whether an employer wishing to challenge an employee’s certification must obtain a second or third opinion).

Employees are obligated to cooperate in the second or third opinion process. The Seventh Circuit has stated that an “employee who fails to cooperate with the second-opinion process under § 2613(c) loses the benefit of leave under § 2612(a)(1)(C) or (D).” *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997). Similarly, in *Chapen v. Munoz*, No. 3:06-cv-00353-BES-VPC, 2009 WL 511114 *4 (D. Nev. Feb. 25, 2009), the court dismissed a plaintiff’s claim that by requiring a second opinion, the employer effectively constructively discharged him. The court noted that the employer’s request was entirely lawful under the FMLA, and could not be used as a basis to claim constructive discharge. *Id.*

In *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788 (1st Cir. 2011), the court determined that an employer faced with a questionable medical certification supporting the need to care for a

family member did not violate the FMLA by requesting the employee to submit a second medical certification from another health provider that was treating the family member and was more familiar with the potential need for medical leave. Maria Tayag worked for Lahey as a health management clerk. From 2003 to July 2006, under its FMLA policy, Lahey approved Tayag's requests for leave, which typically lasted one or two days, to care for her husband. Tayag's husband, Rhomeo Tayag, suffered from serious medical conditions, including gout, chronic liver and heart disease, rheumatoid arthritis, and kidney problems. He had a kidney transplant in 2000. Tayag had looked after him by transporting him to medical appointments, helping him with household activities, preparing his food, aiding him in moving around the house, providing medication, and giving psychological comfort. In May 2006, Tayag used her vacation time to travel to Lourdes, France — "a major site for Roman Catholic pilgrimage and reputed miraculous healings."

In June 2006, Tayag submitted a vacation request for seven weeks, August 7 to September 22, 2006. Her supervisor told her this would leave the department with inadequate coverage. Tayag indicated it was for her husband's medical care, and her supervisor provided the paperwork for her to request an FMLA leave. On July 8, Tayag requested FMLA leave to assist Rhomeo while he traveled. She did not inform Lahey that they were going to the Philippines for a spiritual pilgrimage. She also failed to provide Lahey with any contact information to reach her during the trip.

On July 11, Rhomeo underwent an angioplasty procedure. That month, Lahey's benefits administrator requested new FMLA certification from Rhomeo's doctor. In early August, Tayag gave the benefits administrator a note and then a certification from Rhomeo's primary care physician, Stephen Dong. Dr. Dong stated in his note that Rhomeo's liver, kidney, and heart diseases "significantly affect his functional capacity to do activities of daily living" and advised that Tayag receive medical leave "to accompany Mr. Tayag on any trips as he needs physical assistance on a regular basis." The doctor did not provide an explanation of why a seven-week leave would be needed. Not finding this adequate to support Tayag's leave request, Lahey requested a certification from Rhomeo's cardiologist.

On August 8, Rhomeo's cardiologist submitted a certification form to Lahey stating that Rhomeo was "presently . . . not incapacitated" and that Tayag would not need leave. Lahey mailed Tayag letters on August 10 and 14 notifying her that her leave request was not approved, and Lahey representatives left phone messages at Tayag's home on August 8 and 17. Tayag was unaware of Lahey's letters and phone messages as she was in the Philippines from August 7 to September 22. Receiving no response from Tayag, Lahey then sent a letter, dated August 18, terminating her employment.

Tayag filed suit against Lahey alleging that her termination violated the FMLA, among other things. The district court granted summary judgment for the employer. Tayag appealed only the FMLA claim.

Tayag argued that Lahey violated the FMLA's second opinion regulation by seeking the second opinion from Rhomeo's cardiologist. The First U.S. Court of Appeals noted that when faced with a questionable medical certification, an employer may require the employee to

produce certification from one of her other health care providers who possessed more relevant information about the medical condition at issue. In this case, the employer obtained information from a cardiologist. The court held that this was consistent with the statute, which allows for a second opinion if the employer has “reason to doubt the validity of a medical certification.” Specifically, the court held:

Intermittent leave periods may be of any length (less than the twelve-week total allotment), 29 C.F.R. § 825.203(a), (d), but the requested seven-week leave was different from the brief leaves taken by Tayag over the previous four years and suggested by earlier certifications. When Dr. Dong provided a new certificate in August 2006, he included “coronary artery disease” for the first time as a listed condition, but said only that Rhomeo’s incapacity would occur “intermittently” and for his “lifetime” and provided no explanation as to why a seven-week leave would be needed. The omissions gave Lahey “reason to doubt the validity of the certification,” 29 U.S.C. § 2613(c)(1), permitting Lahey to designate another health care provider for a second opinion, *id.*

Id. at 792-93.

On the other hand, employers should proceed with some caution before invoking the second opinion process. In *Albert v. Runyon*, 6 F. Supp. 2d 57, 64 (D. Mass. 1998), the employer tried to claim that it was invoking the “second opinion” process after an employee attempted to return to work from FMLA leave with a fitness-for-duty certification that it found to be questionable. The court rejected the employer’s effort because the employer never had any reason to doubt the validity of the employee’s original medical certification. *Id.*

Finally, an interesting case in this area is *Harnan v. University of St. Thomas*, 776 F. Supp. 2d 938 (D. Minn. 2011). In that case, the plaintiff’s doctor concluded that she needed leave and provided certification. The employer had the plaintiff go for a second opinion to another doctor, Dr. Bushara, who concluded that the plaintiff did not need leave. But, the employer chose not to request a third opinion. The court held that:

Because the third opinion is binding, the only logical reading of the statute is that the second opinion is not. Further, nothing about Harnan’s specific medical condition, severe headaches, prevent it from being a serious health condition as a matter of law. See *Branham v. Gannett Satellite Info. Network, Inc.*, 619 F.3d 563, 570–71 (6th Cir. 2010) (holding that a genuine issue of material fact existed as to whether migraines, anxiety, depression, and insomnia constituted a serious health condition). Therefore, given the conflicting medical opinion, Dr. Bushara’s conclusion does not determine whether Harnan had a serious health condition and a genuine issue of material fact remains.

Id. at 946.

IX. EMPLOYERS SHOULD RELY ON THE REVISED REGULATION'S RECERTIFICATION RULES, BUT NOT SEEK INFORMATION FROM AN EMPLOYEE'S HEALTH CARE PROVIDER THAT THE REGULATIONS DO NOT EXPRESSLY ALLOW AN EMPLOYER TO SEEK

A. When An Employer May Seek Recertification

Under the revised regulations, the general rule is that an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee. 29 C.F.R. § 825.308(a). There are, however, four possible exceptions to this general rule.

First, the employer must wait longer than 30 days to seek recertification if the medical certification indicates that the minimum duration of the condition is more than 30 days. In such a case, an employer must wait until that minimum duration expires before requesting a recertification, unless another exception applies. 29 C.F.R. § 825.308(b). For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification, unless one of the other three exceptions mentioned below apply.

Second, an employer may request recertification in less than 30 days if the employee requests an extension of leave. 29 C.F.R. § 825.308(c)(1).

Third, an employer may request recertification in less than 30 days if circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days. 29 C.F.R. § 825.308(c)(2). For example, the Department of Labor has recognized that a "Friday/Monday absence pattern" can constitute information that casts doubt upon an employee's stated reason for absences, especially when there is no evidence that provides a medical reason for the timing of such absence. *See* DOL Op. Ltr., FMLA 2004-2-A, at 1 (May 25, 2004).

Fourth, if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days. 29 C.F.R. § 825.308 (c)(3).

If an employee's pattern of absences is often inconsistent with the information provided on the medical certification, that gives the employer the right to seek recertification immediately. Seeking recertification: (1) ensures that the employee's absence actually is covered by the FMLA and that you are properly tracking and designating these absences; and (2) puts the employee on notice that he or she will be expected to provide continued and accurate certification about their medical condition. This is an effective way to ferret out FMLA abuse.

A good example of an employer using the recertification process to weed out FMLA abuse is the recent case of *Harrison v. Greater Dayton Regional Transit Authority*, No. 3:10-cv-430, 2012 WL 1987108 (S.D. Ohio June 4, 2012). In that case, the plaintiff, Harrison, had a pattern of using FMLA leave on Fridays and Mondays. Harrison worked only five of thirteen scheduled Friday shifts from March to June 2007; missed Friday, Monday, or both on twenty separate occasions from March 2007 to September 2007; and used FMLA leave on three of the four Fridays prior to September 10, 2007. *Id.* at *7. As a result, his employer sought recertification. The district court noted that "Department of Labor regulations allow an employer to seek recertification when confronted with such a pattern of using FMLA leave on Fridays and Mondays." *Id.* Harrison did not produce a recertification within the allotted time of 15 days. At that point, the employer retroactively redesignated absences Harrison had incurred during the 15 days from FMLA-protected, not unprotected. *Id.* at *4. A couple weeks later, Harrison produced a recertification form and a cover letter from his doctor stating that his "need for leave on Fridays and Mondays was purely coincidental." *Id.* The employer approved his recertified FMLA leave, but continued to count the redesignated absences against him. As a result, when Harrison incurred a few more absences, he was terminated. *Id.* Harrison sued, claiming that the employer violated the FMLA by counting the absences against him that he incurred during the 15-day period that he had to obtain recertification. Because Harrison sued more than two years after his termination, he had to prove that the employer willfully violated the FMLA, or else his claim was time-barred. The district court found that the law was unclear regarding whether or not the employer had the right to redesignate the at-issue absences as FMLA unprotected, and therefore its alleged violation could not have been willful. *Id.* at *9. As a result, the court granted summary judgment for the employer. Here is what the court found:

The RTA clearly had the right to delay Harrison's continuation of FMLA leave until he submitted a recertification from his mother's physician. *See, e.g., Wiseman v. United Distributive Works Council 30*, No. 08-11879, 2009 WL 4360085 (E.D. Mich. Aug. 31, 2011), *Washington v. Fort James Operating Co.*, No. CIV.99-1300-JO, 2000 WL 1673134 (D. Or. Nov. 7, 2000). What is unclear is whether the RTA could retroactively suspend FMLA certification on September 10, 2007 for leave taken on Friday, September 7, 2007 and Monday, September 10, 2007. The RTA had the right to delay his continuation of FMLA leave until Harrison did submit a recertification on October 4, 2007.

Employers may require an employee to submit a recertification every thirty days in order to continue taking FMLA leave. 29 C.F.R. § 825.308(c). The employer must give the employee at least fifteen days to submit such recertification. *See* 29 C.F.R. § 825.308(d). "If the employee fails to provide the recertification and continues to take leave, her leave is no longer covered under the FMLA." 29

C.F.R. § 825.311(b). *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996, 1002 (6th Cir. 2005). Two courts have stated that when recertification papers are not timely submitted, the cessation of FMLA coverage runs from the date of the employer's recertification request. *Killian v. Yorozu Automotive Tennessee, Inc.*, 2004 WL 4737654, 5 (E.D. Tenn. 2004) (citing *Alexander v. Ford Motor Co.*, 204 F.R.D. 314 (E.D. Mich. 2001)). These cases cite to 29 C.F.R. § 825.308(c) to support their determination of when FMLA coverage is revoked, but this Court finds no support for their determination in that regulation. Alternatively, it might well also be that Friday, September 7, 2007 and Monday, September 10, 2007 might properly not be counted because of Harrison's failure to comply with the June 21, 2007 warning that notice be given 30 days in advance of doctor appointments that fall unavoidably on a Friday or Monday.

This Court need not resolve this question, however, as it suffices to note that what is clear is that the question is obscure. Absent a clearly demarcated authority, even if the Court were to determine that the RTA had no authority to not count Friday, September 7 and Monday, September 10, 2007 as days that should have been covered by the FMLA for Harrison, there is still no evidence that the RTA willfully violated any of Harrison's FMLA rights, and his claims are thus time-barred.

Id.

In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (*e.g.*, for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

B. The Employee's Deadline To Provide Recertification

The employee must provide the requested recertification to the employer within the timeframe requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. 29 C.F.R. § 825.308(d).

If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. 29 C.F.R. § 825.313(c). If the employee never produces the recertification, the leave is not FMLA leave. *Id.* Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember. The rules regarding clarifications of medical certifications also apply to unclear recertifications. *See* 29 C.F.R. § 825.305(d).

C. What Information Employers May Seek In Recertification Requests

The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in 29 C.F.R. § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* 29 C.F.R. § 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern. 29 C.F.R. § 825.308(e).

D. Other Recertification Rules

Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

E. Employers Should Not Seek To Obtain Information From A Health Care Provider That The Regulations Do Not Expressly Allow The Employer To Seek – Such As A Doctor's Note Covering Each Absence From An Employee On Approved Intermittent FMLA Leave

In *Jackson v. Jernberg Indus. Inc.*, 677 F. Supp. 2d 1042 (N.D. Ill. 2010), the employer's attendance policy required not just verbal notification of a medically necessary absence, but also a written doctor's note. The company disciplined and then terminated Jackson based on absences that Jackson verbally told Jernberg were due to his intermittent FMLA-certified wrist condition, but for which he failed to provide individualized documentation. *Id.* at 1043. The court held that the employer's policy requiring a doctor's note for every absence the employee had while in intermittent FMLA leave violated the FMLA, and granted the plaintiff's motion for summary judgment. In so holding, the court observed that:

[C]ourts have found that a number of employer verification requirements are permissible under the FMLA. An employer may require that an employee call in to verify that his absence is FMLA-related, *see Callison v. City of Phila.*, 430 F.3d 117, 121 (3d Cir. 2005); *see also Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710 (7th Cir. 2002); may call the employee at home as means of verification, *Callison*, 430 F.3d at 121; and may require that an employee submit a written personal certification attesting that an individual instance of leave was FMLA-related. *See Sconfienza v. Verizon Pa., Inc.*, No. 05 C 272, 2007 WL 1202976, at *34 (M.D. Pa. Apr. 23, 2007), *aff'd*, 307 Fed. Appx. 619 (3d Cir. 2008). Each of these holdings is consistent with the Seventh Circuit's observation that "Nothing in the FMLA or the implementing regulations prevents an employer from enforcing a rule requiring employees on FMLA leave to keep the employer informed about the employee's plans." *Gilliam v. United Parcel Serv., Inc.*, 233 F.3d 969, 972 (7th Cir. 2000).

Jernberg's doctor's-note policy differs from those described above because it requires action not just by the FMLA-certified employee, but by the employee's doctor. . . . Jackson rightly argues that Jernberg's doctor's-note policy interfered with his exercise of FMLA leave. The FMLA explicitly provides for the way in which Jernberg can seek information from its employees' doctors regarding employee FMLA leave in the aforementioned recertification provisions. The statute and its regulations do not explicitly address a doctor's-note policy, *see McClain*, 458 F. Supp. 2d at 436, but do show an intent to limit medical verification to certification and recertification as delineated. Neither the FMLA nor its regulations provide for any other means by which an employer can require documentation from an employee's medical provider.

Id. at 1050-51 (footnoted omitted).

X. EMPLOYERS SHOULD REASONABLY INVOKE THEIR RIGHT TO REQUIRE AN EMPLOYEE TO REPORT PERIODICALLY ABOUT THEIR INTENT TO RETURN TO WORK, AND TO PROVIDE A FITNESS FOR DUTY CERTIFICATION BEFORE THEY RETURN TO WORK

A. Employers Should Require Employees To Report Periodically About Their Intent To Return To Work, But Should Also Be Reasonable

An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation. 29 C.F.R. § 825.311(a).

Courts are generally very deferential to employers with such policies, and often dismiss plaintiffs' FMLA claims where they failed to comply with them. For example, in *Bones v. Honeywell Intern., Inc.*, 366 F.3d 869 (10th Cir. 2004), the employer, Honeywell, had a policy that required employees to notify their department or supervisor of absences, in addition to notifying the company's medical department of any requested leaves of absence. *Bones*, 366 F.3d at 874. The plaintiff, Bones, was aware that the policy explicitly provided that employees were to follow the "call-in policy" for their department and that the medical department "would not call [an employee's] manager for [that employee]." *Id.* Bones took personal days on July 19-21, 1999, which she reported to a co-worker at Honeywell. *Id.* On July 22, 1999, Bones went to see her physician due to elbow and stress problems. *Id.* She did not phone in her absence that day, and neither reported to work nor called in absences for the next two work days, July 23 and July 26, 1999. *Id.* On Friday, July 23, however, Bones' boyfriend delivered a medical leave of absence request to Honeywell's medical department, which contained a form completed by Bones' doctor indicating that she had been seen on July 22 and would be unable to work from July 18 through August 16, 1999. *Id.* Pursuant to its normal practices, the medical department did not process Bones' leave request until July 29, 2009. *Id.* In a letter dated July 27, 1999, Bones was notified that she was terminated because she failed to report her absences to her supervisor for three consecutive work days. *Id.* at 878.

Bones asserted that her employer interfered with her rights under the FMLA by terminating her employment when she was entitled to FMLA leave. *Id.* at 877. The Tenth Circuit, proceeding on the assumption that Bones' absence would have been covered by the FMLA, affirmed the district court's entry of summary judgment in favor of Bones' employer. *Id.* The court found that "Bones' interference claim fails because Honeywell successfully established that Bones would have been dismissed regardless of her request for FMLA leave." *Id.* at 877 ("A reason for dismissal that is unrelated to a request for an FMLA leave will not support recovery under an interference theory."). Specifically, the court noted that Bones' "request for an FMLA leave does not shelter her from the obligation which is the same as that of any other Honeywell employee, to comply with Honeywell's employment policies, including its absence policy." *Id.* at 878 ("If dismissal would have occurred regardless of the request for an FMLA leave . . . an employee may be dismissed even if dismissal prevents her from exercise of her right to an FMLA leave.").

In *Bacon v. Hennepin County Med. Ctr.*, 550 F.3d 711 (8th Cir. 2008), the Eighth Circuit evaluated whether an employer interfered with an employee's right to FMLA leave by terminating her employment for failing to comply with the employer's absence policy. *Id.* at 712. On July 8, 2004, Bacon suffered an outbreak of hives and requested FMLA paperwork. *Id.* Her physician filled out a medical certification form on July 14, 2004, and Bacon submitted the form to her employer on July 19, 2004. *Id.* at 712-13. Bacon's supervisor accepted the paperwork, but did not indicate whether the leave was approved or denied, instead telling Bacon that she needed a note from her physician stating that she could not return to work until she saw an allergist. *Id.* at 713. When Bacon saw her physician later that day, her physician filled out a new certification form, indicating that Bacon would require intermittent leave when she suffered from a hives outbreak and stating that Bacon could not return to work until she saw an allergist. *Id.* For approximately one month, Bacon called in daily to report her absences. *Id.* During this one-month period, her employer reported her absences as FMLA leave. *Id.* On August 5, 2004, however, Bacon stopped calling in on a daily basis, purportedly because her supervisor told her she did not need to call in while on FMLA leave. *Id.* On August 11, 2004, Bacon was terminated for failing to call in for three consecutive workdays. In reviewing the district court's grant of summary judgment in favor of the employer, the Eighth Circuit noted that Bacon had failed to provide any probative evidence indicating that her supervisor had told her she did not have to comply with the company's standard absence reporting procedures. *Id.* at 716. Accordingly, "Because Bacon was terminated for failing to comply with [the employer's] call-in policy, and she would have been terminated for doing so irrespective of whether these absences were related to FMLA leave, the district court correctly held she did not state an interference claim under the FMLA." *Id.* at 714. The Court specifically found that the FMLA permits employers to require employees to report periodically on their status and intent to return to work, and that "[e]mployers who enforce such policies by firing employees on FMLA leave for noncompliance do not violate the FMLA." *Id.* at 715 (citing *Bones*, 366 F.3d at 878).

Many other courts have also upheld discipline of otherwise FMLA-protected employees who failed to comply with their employer's call in policies. *See, e.g., Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1009 (10th Cir. 2011) (affirming summary judgment against employee who was terminated for failing to comply with the company's call in policy); *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 710 (7th Cir. 2002) (holding that an employer did not

violate the FMLA by discharging an employee on FMLA leave when the employee failed to comply with a company call-in policy); *Chappell v. The Bilco Co.*, No. 3:09CV00016 JLH, 2011 WL 9037, at *4 (E.D. Ark., Jan. 3, 2011) (employee who failed to call in and speak personally to his supervisor violated company policy and was lawfully suspended, even though the days at-issue were FMLA-protected); *Hearst v. Progressive Foam Techs., Inc.*, 682 F. Supp. 2d 955, 965-66 (E.D. Ark. 2010) (employer did not interfere with employee's substantive rights under the FMLA by terminating his employment, since even if the employee was still on FMLA leave at the time of his termination, the employer would have reached the same decision because of the employee's failure to comply with the company's policy to provide notice of his intent to return), *aff'd*, 641 F.3d 276 (8th Cir. 2011); *Ritenour v. Tennessee Dept. of Human Services*, No. 3:09-0803, 2010 WL 3928514, at *11 (M.D. Tenn. Oct. 4, 2010) (granting employer's summary judgment motion where employee on FMLA leave failed to comply with employer's call in policy, and was terminated as a result), *aff'd*, No. 10-6366, 2012 WL 3806023 (6th Cir. Aug. 29, 2012).

In *Ritenour*, the plaintiff, Amy Ritenour, required time off to care for her child. In the midst of taking several days off to attend to her son, she was absent for four straight workdays without calling in to report her absence. The employer's call-in policy provided:

If you must be late for work or absent because of illness or for an unforeseen circumstance, personally notify your appropriate manager or immediate supervisor as soon as possible by telephone. . . .

If you are not at work during your regular hours, you must be on authorized leave. This means that your supervisor knows of and has approved your absence. In accordance with the law and rules, job abandonment occurs when an employee is absent from work without approval for three consecutive workdays or two consecutive workdays following the expiration of any authorized leave.

As a result, Ritenour was obligated to follow her employer's policy unless she could establish that an "unusual circumstance" prohibited her from calling in her absences. As the Sixth Circuit Court of Appeals pointed out, Ritenour was well aware of the obligation to call in her absences, and when she failed to do so, she was in violation of her employer's reasonable call-in policy. *Id.* at *8. Her case was over when she failed to articulate an unusual circumstance that otherwise would have absolved her from following the employer's call-in policy. This is particularly true because the employer's policy required proper notice for an absence of any kind, not just those under FMLA. Therefore, when the employer disciplined Ritenour for violating the policy, it did not do so simply because of her rights under the FMLA. Rather, it applied its policy fairly to an employee who was absent from work, just as it would have done with another employee.

Employers should not blindly rely on such policies, however. For example, in *Parsons*, 686 F. Supp. 2d at 920, the court rejected the employer's reliance on a "call in every day" policy as applied to a 30 year employee who had clearly informed the employer she was on FMLA leave until a date certain. The court held that, "[i]n the present factual context, the Court finds that a reasonable jury could conclude that Principal's insistence that Plaintiff continue to call in

on a daily basis, despite Plaintiff's unwavering reports that she would be unable to return to work prior to June 30, 2008, ran afoul of the requirement . . . that the employer "take into account all of the relevant facts and circumstances" in requiring periodic status reports." *Parsons*, 686 F. Supp. at 920. The court also observed that, in its opinion, it was "dubious that Principal's policy of rote adherence to daily call-in provisions in situations where it has already been notified that an employee will be absent furthers any legitimate purpose of the employer." *Id.* at n. 10.

If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. 29 C.F.R. § 825.311(b). However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so. *Id.*

B. Employers Should Require Employees To Submit A Fitness-For-Duty Certification Before Returning Them To Work, But Should Not Require More Than That Unless The ADA Clearly Permits Them To Do So

1. General Rules For Requiring Fitness-For-Duty Certifications Before Returning An Employee To Work From An FMLA Leave

a. What Employers Are Entitled To Receive

Under 29 C.F.R. § 825.312(a), as a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. *See* 29 C.F.R. § 825.305(d).

An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. 29 C.F.R. § 825.312(b). The certification from the employee's health care provider must certify that the employee is able to resume work.

Additionally, under the revised regulations, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job before providing, or with the designation notice required by 29 C.F.R. § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in 29 C.F.R. § 825.307(a), the employer may contact the employee's health

care provider for purposes of clarifying and authenticating the fitness-for-duty certification. In other words, “[o]nce an employee submits a statement from her health care provider which indicates that she may return to work, the employer’s duty to reinstate her has been triggered under the FMLA.” *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996, 1004 (6th Cir. 2005). If an employer believes that the doctor’s note is insufficient as a “fitness-for-duty certification,” the employer should seek clarification from the employee’s doctor. *Id.*

Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee’s return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required. 29 C.F.R. § 825.312(b); accord *Jordan v. Beltway Rail Co. of Chicago*, No. 06 C 6024, 2009 WL 537053, at *6 (N.D. Ill. Mar. 4, 2009) (“An employer may not require an employee whose own physician has certified him fit to work to submit to a return-to-work physical prior to allowing the employee to return to work.”).

b. What Employers Are Not Entitled To Receive

The FMLA’s fitness-for-duty certification requirement is merely an inquiry to the employee’s health care provider. It is not an independent medical examination (“IME”). In fact, “[t]he FMLA does not authorize an IME to determine whether an employee can return to work from FMLA leave.” *Mahoney v. Ernst & Young LLP*, 487 F. Supp. 2d 780, 805 (S.D. Tex. 2006). Rather, under 29 C.F.R. § 825.312(a), “a simple statement of an employee’s ability to return to work” is all that is required unless the procedure for seeking a statement that the employee can perform the job’s essential functions, described above, is followed. Even then, an IME is not allowed under the FMLA, so employers should thus not demand that an employee undergo an IME in order to return from FMLA leave, unless the ADA independently permits such a demand. *See infra*.

Employers that exceed the limited nature of what they may seek pursuant to the fitness-for-duty regulation risk being held liable for refusing to restore the employee under the FMLA. *See, e.g., Carpo v. Wartburg Lutheran Home for the Aging*, No. 05 CV 1169(JG), 2006 WL 2946315, at *3-4 (E.D.N.Y. Oct. 16, 2006) (granting *pro se* plaintiff’s motion for summary judgment where employer refused to permit the plaintiff to return from FMLA leave because her fitness-for-duty certification did not “fully” release her to return to work, although it did state that she was able to attempt to resume work).

The *Jernberg* decision (discussed earlier in this paper), and the *Carpo* decision cited above, point to a problem employers should avoid: Demanding medical information from employees that the FMLA does not permit employers to insist upon. The FMLA carefully regulates both the substance of the medical information employers have the right to demand, and the process for demanding it. When employers exceed those limits, they risk liability. Another decision that teaches this point is *Albert v. Runyon*, 6 F. Supp. 2d 57, 62 (D. Mass. 1998). There, the court held that the employer could not reject a fitness-for-duty report as “inadequate to allow it to assess whether [the employee] would be capable of performing all her duties,” because the report “need not contain . . . specific information about the employee’s condition.” The *Albert* court noted:

The Postal Service's criticisms of Dr. Smith's submissions may have stemmed from a misapprehension of its own role. At times, the Service writes as if it needs sufficient information to independently assess Albert's condition or to evaluate Dr. Smith's diagnosis. However, an employer is not entitled to require information beyond that allowed by 29 U.S.C. § 2613, in order to make its own assessment. *See* 29 C.F.R. § 825.306(b) (“[N]o additional information may be required.”). Moreover, the limited information that the FMLA permits an employer to demand shows that the statute does not authorize an employer to make an independent assessment of the employee's medical condition. Instead, the employer should determine whether the provided information demonstrates that the diagnosed condition is a serious health condition within the meaning of the FMLA. Much of the information the Postal Service now indicates it anticipates Dr. Strasburger's examination to provide falls outside the bounds of permissible inquiry set by the FMLA. Notably, Dr. Strasburger criticizes Dr. Smith's submissions for failing to address the stressors that precipitated Albert's leave and the frequency and specifics of Albert's treatment and medication, along with other “components of a standard psychiatric examination.” Strasburger Aff. ¶ 5. The Postal Service is not entitled to this information under the FMLA, and Dr. Smith's certification was not legally inadequate for failing to include it. *See Ellshoff v. Department of Interior*, 76 M.S.P.R. 54, 78 (although the certification requirements of the FMLA are “much less stringent” than the agency's leave requirements, the agency cannot deny FMLA leave based on alleged deficiencies in medical certification since the certification satisfied the FMLA requirements).

* * *

In providing that an employee's health care provider should furnish her medical certification, the FMLA does not contemplate an adversarial investigation into a patient's symptoms and complaints.

Id. at 64-65.

2. The Consequences Of An Employee's Failure To Provide A Fitness-For-Duty Certification

The cost of the fitness-for-duty certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. 29 C.F.R. § 825.312(c).

The designation notice required in 29 C.F.R. § 825.300(d) shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job. 29 C.F.R. § 825.312(d). If the employer does not comply with this rule, then it may be a violation of the FMLA to refuse to restore an employee to their job due to their failure to provide a fitness-for-duty certification. *See Truitt v. Doyon Drilling, Inc.*, 764 F. Supp. 2d 1167 (D. Alaska 2010) (employer violated FMLA by failing to inform plaintiff at

time he began FMLA leave that a fitness-for-duty certificate would be required of him before he could be returned to work).

An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in 29 C.F.R. § 825.312(d). If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* 29 C.F.R. § 825.313(d). *See, e.g., Dockens v. Dekalb Cnty. Sch. Sys.*, 441 Fed. Appx. 704, 709 (11th Cir. 2011) (employee's failure to provide fitness-for-duty certificate was a legitimate reason for termination); *Sterling v. City of New Roads*, NO. CIV.A. 08-424-JJB, 2010 WL 55333 (M.D. La. Jan. 6, 2010) (termination of employee proper where he failed to provide employer with fitness-for-duty certification at the end of his FMLA leave), *aff'd*, 384 Fed. Appx. 337 (5th Cir. Jun. 25, 2010). Indeed, even the regulations provide that "if the employer has provided the required notice (*see* § 825.300(e)); the employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* §825.213(a)(3)." 29 C.F.R. § 825.313(d).

While the foregoing cases provide substantial shelter to employers in situations where employees fail to provide any fitness-for-duty certification, employers should proceed cautiously when an employee presents a fitness-for-duty certification that they deem insufficient. In that situation, an employer has an obligation to seek clarification from the employee just like in a medical certification scenario, rather than simply terminate the employee. *See* 29 C.F.R. § 825.305(d) (stating that the clarification rules in the regulations on medical certifications also apply to fitness-for-duty certificates); *Carpo*, No. 05 CV 1169(JG), 2006 WL 2946315, at *3-4 (E.D.N.Y. Oct. 16, 2006) (holding that even if the employee's fitness-for-duty certification was deficient, the employer violated the FMLA because it fired her, rather than seeking clarification).

3. Fitness-For-Duty Certification In The Context Of Intermittent FMLA Leave

An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. 29 C.F.R. § 825.312(f). However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule

leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur. 29 C.F.R. § 825.312(f).

4. The FMLA's Fitness-For-Duty Limitations Do Not Trump An Employer's Right To Request Broader Information From The Employee Under The ADA, Where The Request Is Job-Related And Consistent With Business Necessity

After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. 29 C.F.R. § 825.312(h).

For example, in *Brownfield v. City of Yakima*, 612 F.3d 1140, 1148 (9th Cir. 2010), the plaintiff -- a former police officer to the city -- filed suit in federal court, alleging that the city: (1) violated the ADA by requiring him to submit to fitness-for-duty exams; (2) violated the FMLA by requiring an exam after his primary care physician allegedly cleared him for duty. Several incidents occurred that raised concerns about the plaintiff and his emotionally volatile behavior, which prompted the city to order that he undergo a fitness-for-duty exam. The doctor diagnosed the plaintiff with a mood disorder, found that he was unfit for police duty, and that his disability was permanent. As a result of this, and physical injuries from a car accident, the plaintiff was transferred to FMLA leave. While he obtained a release relating to his physical condition, he never obtained a release related to his mental condition. Later, the city ordered another fitness-for-duty exam. But, because the plaintiff refused to see this doctor as ordered, the city held a pre-termination hearing. Ultimately, the city terminated the plaintiff because the city found him to be unfit and insubordinate.

The Ninth Circuit held in favor of the city. The court held that the city did not violate the ADA by requiring a fitness-for-duty exam after the plaintiff repeatedly exhibited emotionally volatile behavior while serving as an officer. An employer cannot require a medical examination to determine whether an employee is disabled under the ADA unless the examination is shown to be job related and consistent with business necessity. In this case, the city met the business necessity standard because it had an objective, legitimate basis to doubt the plaintiff's ability to perform the duties of a police officer. The court also held that his FMLA claim lacked merit because no reasonable juror could misread the personal physician's letter as stating that the plaintiff had recovered from the psychological issues that rendered him unfit for duty.

On the other hand, in *Mahoney*, 487 F. Supp. 2d at 805 (S.D. Tex. 2006), it was far from clear that the employer’s demand that the plaintiff be examined and cleared by its doctor was job related and consistent with business necessity so as to be valid under the ADA. Thus, the court found “a question of fact and credibility prevents the court from determining whether the IME was authorized by the ADA. If the IME was not authorized by the ADA, Defendant violated Plaintiff’s FMLA rights by requiring clearance by its physician before allowing Plaintiff to reenter the workplace at the end of her FMLA leave.” *Id.*

XI. WHEN IS FMLA LEAVE PERMITTED TO CARE FOR A FAMILY MEMBER OR COVERED SERVICEMEMBER WITH A SERIOUS HEALTH CONDITION?

An eligible employee is entitled to FMLA leave, “[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.” 29 U.S.C. § 2612(a)(1)(C). 29 C.F.R. § 825.124 defines what it means to provide “care for” a family member or servicemember with a serious health condition (such as terminal cancer). It states in relevant part that:

- (a) The medical certification provision that an employee is “needed to care for” a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.
- (b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

29 C.F.R. §§ 825.124(a) and (b) (bold added).

Thus, as one court observed, under the FMLA, an employee may “care” for a seriously ill family member “in a number of ways, including by: providing physical care; providing “psychological comfort and reassurance”; discussing the family member’s medical condition and treatment with doctors; and authorizing medical procedures. Additionally, employees can provide care even if they are only “filling in” for the primary caregiver.” *Bell v. Prefix, Inc.*, 321 Fed. Appx. 423, 427 (6th Cir. 2009) (internal citations omitted). Consistent with this broad interpretation, another court held that, “. . . the FMLA permits an employee to take leave even when sharing responsibility for the injured person’s care. Additionally, an employee is caring for a sick or injured family member when providing emotional support.” *Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d 964, 966-67 (S.D. Tex. 2011). Because the “psychological care” component of the definition is so broadly defined, one court even held that an employee

provided “care for” her stepfather, when he left work to “stand vigil at her stepfather’s bedside” after his heart attack, even though the stepfather was unconscious at the time, so she could not appreciate the psychological care the employee was providing. *Schoonover v. ADM Corn Processing*, No. 06-CV-133-LRR, 2008 WL 282343, at *16 (N.D. Iowa Jan. 31, 2008).

The FMLA does not protect mere visitation. *See, e.g., Fioto v. Manhattan Woods Golf Enters., LLC*, 123 Fed. Appx. 26, 28 (2d Cir. 2005) (affirming district court’s decision to grant judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), where the plaintiff presented insufficient evidence that he was absent from work to care for his mother in the hospital while she underwent emergency brain surgery), *aff’g* 270 F. Supp. 2d 401, 406 (S.D.N.Y. 2003). That said, in the *Schoonover* case, *supra*, the court still found that the plaintiff was providing care based on evidence that, while she was absent from work, she was providing her stepfather with the requisite level of psychological care. *See, also, Bell v. Prefix, Inc.*, No. 05-74311, 2007 WL 2109569, at *4 (E.D. Mich. July 23, 2007) (characterizing as “untenable” the defendant’s argument that the plaintiff was not providing psychological care to her unconscious father, because, “[t]aken to its logical conclusion, [d]efendant’s argument would leave the FMLA without an allowance for psychological care if the loved one was unable to visibly react to it”).

That other family members may be available to care for the family member with a serious health condition is not relevant to the analysis. This is so because the FMLA regulations expressly state that “[t]he employee need not be the only individual or family member available to care for the family member.” 29 C.F.R. § 825.124(b); *see also Romans v. Mich. Dep’t of Human Servs.*, 668 F.3d 826, 840–41 (6th Cir. 2012) (stating that “plain language of the regulations” entitles an employee to FMLA leave even when other relatives are available to care for the sick family member).

In *Romans*, the plaintiff claimed he told his supervisor that he needed to leave work, saying, “I’m not staying. My mom’s dying. I’m leaving.” The plaintiff wanted to be at the hospital to confer with his sister in deciding whether to continue his mother on life support. He received a one-day suspension for leaving work. The trial court dismissed his FMLA interference claim, reasoning that, while the FMLA allows a family member “to care for” a family member, it does not provide for all family members to be present “to care for” a family member at the same time. The Sixth Circuit reversed, holding that the regulations do allow for more than one family member, and they provide for FMLA leave to make arrangements for changes in care. The appeals court reasoned that the decision between life and death fits within that rule. *Id.* at 841. The Sixth Circuit further held that these facts were sufficient to warrant denial of summary judgment on the plaintiff’s retaliation claim, as well. In summarizing its decision, the court stated, “[p]laintiff has demonstrated that he was suspended because he left work to go to the hospital, which caused him, at least, to lose pay for that day. This is sufficient to claim he was harmed by the alleged interference and retaliation. Plaintiff also claims that the suspension was later part of the basis on which he was terminated. Defendant claims that Plaintiff would have been fired even without that absence, but that is a factual dispute which goes to Plaintiff’s damages, not his ability to survive summary judgment.” *Id.* at 842.

Likewise, in *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294 (3d Cir. 2012), the Third Circuit found that the fact that the employee told her employer that her mother had been rushed to the Emergency Room in an ambulance and she was with her was sufficient to put the employer on notice that she would be caring for her mother – and thus the FMLA applied – because, “[a]n employer does not need a doctor’s report to realize that a person rushed to the hospital in an ambulance will likely receive “psychological comfort and reassurance” by the presence of their loved ones.” *Id.* at 306.

There are, however, limits. For example, in *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005), the plaintiff’s wife was having difficulties with her pregnancy and his vehicle broke down in Seattle, Washington. 414 F.3d at 1046. He owned another vehicle in Atlanta, Georgia, and decided to fly there to pick up the vehicle and drive it back to Seattle. *Id.* While the plaintiff was driving back to Seattle (a four-day trip), he regularly called his wife on the telephone to see how she was doing. *Id.* The Ninth Circuit Court of Appeals rejected the plaintiff’s claim that his cross-country trip and phone calls should be considered “caring for” his wife under the FMLA. *Id.* at 1048. The Ninth Circuit observed that “[c]ourts in this Circuit and other jurisdictions that have concluded a particular activity has constituted ‘caring for’ a family member under the FMLA have done so only when the employee has been in close and continuing proximity to the ill family member.” *Id.* at 1047. Because the plaintiff left his wife instead of staying with her, the Ninth Circuit Court of Appeals upheld dismissal of his FMLA claim. *Id.* at 1048. *See also Baham v. McLane Foodservice, Inc.*, 431 Fed. Appx. 345 (5th Cir. 2011) (affirming summary judgment for employer in similar case).

XII. THE ADA HAS MADE IT EASIER FOR AN EMPLOYEE TO BE ENTITLED TO FMLA LEAVE TO CARE FOR AN ADULT CHILD WITH A SERIOUS HEALTH CONDITION

FMLA leave may be taken to care for a son or daughter with a serious health condition. 29 C.F.R. § 825.112(a)(3). In this context, the FMLA regulations define “son or daughter” to mean “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.” 29 C.F.R. § 825.122(c). Therefore, under 29 C.F.R. § 825.122(c), for an employee to be entitled to take FMLA leave to care for a child of theirs who is over the age of 18, two conditions must be fulfilled: (1) the child must be incapable of self-care; and (2) the child must have a physical or mental disability.

Regarding the first condition, the FMLA regulations provide that:

“Incapable of self-care” means that the individual requires active assistance or supervision to provide daily self-care in three or more of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation,

paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

29 C.F.R. § 825.122(c)(1).

This is far from a bright-line rule. Temporary conditions, such as minor pregnancy-related conditions, a bout with the flu, a broken bone or routine surgeries, typically would not result in being incapable of self-care. On the other hand, many others would: an adult child with Down syndrome, brain damage, serious illnesses or other developmental disabilities that are long term in nature. It also could include a child who is involved in a catastrophic accident that impacts activities of daily living. For example, in *Salas v. 3M Co.*, No. 08-C-1614, 2009 WL 2704580, at *13 (N.D. Ill. Aug. 25, 2009), a federal trial court refused to dismiss an FMLA lawsuit when the evidence showed that the employee's adult daughter had learning disabilities, was unable to cook, got lost easily and might have been harmed at birth by an oxygen shortage. And, a medical problem causing a hospitalization likely nearly always qualifies as well. See, e.g., *Bryant v. Delbar Prods., Inc.*, 18 F. Supp. 2d 799, 803 (M.D. Tenn. 1998) (“[I]t is only logical to conclude that [plaintiff’s son] could not cook, clean, shop or take public transportation . . . while he was in the hospital.”). Finally, it is worth noting that “incapable of self-care” is somewhat of a misnomer because, as one court observed, the law “does not indicate that an adult child will qualify if he is unable to perform certain daily activities, rather that he “requires active assistance or supervision.”” *Jackson v. Kansas City Life Ins. Co.*, No. 04-0779-CV-W-SOW, 2005 WL 2766492, at *4 (W.D. Mo. Oct. 25, 2005).

Regarding the second condition, the FMLA regulations provide that:

“Physical or mental disability” means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

29 C.F.R. § 825.122(c)(2).

Thus, the regulations also require that the adult child have a physical or mental disability as defined by the ADA regulations. Under the EEOC’s expanded interpretation of disability under the ADA Amendments Act of 2008 (“ADAAA”), an employee’s burden to establish a disability is much lower, and the revised ADA allows for the possibility that a short-term impairment lasting fewer than three to six months may even be considered a disability. Put differently, it has become much easier to establish that an adult child has a disability. In turn, it arguably is easier now for an employee to take FMLA leave to care for an adult child.

XIII. EMPLOYERS MAY RELY ON THEIR HONEST BELIEF OR SUSPICION TO TAKE ADVERSE ACTION AGAINST AN OTHERWISE FMLA PROTECTED EMPLOYEE, BUT SHOULD DO SO WITH SOME CAUTION

In *Seeger v. Cincinnati Bell Tel. Co., LLC*, 681 F.3d 274 (6th Cir. 2012), the Sixth Circuit U.S. Court of Appeals explained the “honest belief” defense in an FMLA case:

The ground rules for application of the honest belief rule are clear. A plaintiff is required to show “more than a dispute over the facts upon which the discharge was based.” *Braithwaite v. Timken Co.*, 258 F.3d 488, 493–94 (6th Cir. 2001). We have not required that the employer’s decision-making process under scrutiny “be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action.” *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998). Furthermore, “the falsity of [a] [d]efendant’s reason for terminating [a] plaintiff cannot establish pretext as a matter of law” under the honest belief rule. *Joostberns*, 166 Fed. Appx. at 794 (footnote omitted). As long as the employer held an honest belief in its proffered reason, “the employee cannot establish pretext even if the employer’s reason is ultimately found to be mistaken, foolish, trivial, or baseless.” *Smith*, 155 F.3d at 806; *see also Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001).

Id. at 285-86.

In *Seeger*, the Sixth Circuit concluded that the employer had an honest belief that the plaintiff had committed disability fraud, and so the plaintiff’s FMLA interference and retaliation claims were properly dismissed on summary judgment. *Id.* at 287. On the other hand, in *White v. Telcom Credit Union*, NO. 11-12118, 2012 WL 2324393, at * 18 (E.D. Mich. Jun. 19, 2012), the district court rejected the employer’s “honest belief” defense on summary judgment, stating, “[v]iewing the evidence in the light most favorable to Plaintiff, this Court cannot conclude that Defendant made a “reasonably informed and considered decision” before it disciplined and then terminated Plaintiff. Plaintiff here, unlike the plaintiff in *Seeger*, has presented evidence to allow a reasonable jury to conclude that Defendant’s decision-making process was not worthy of credence.” In *White*, the employer claimed that it terminated the plaintiff because of a disruptive outburst during a meeting. The Court concluded as follows:

As to the May 17th decision to terminate, Plaintiff presents the following evidence suggesting that it was not a reasonably informed and considered decision. Deposition testimony reveals that, immediately after the May 17th meeting where Plaintiff’s written warning was administered, Ms. Lang and Ms. LeSage agreed that Plaintiff should be fired because her conduct during that meeting was “very un-businesslike” and thus “insubordinate.” (LeSage Dep. at 28–31.) Ms. LeSage and Ms. Lang then went to Ms. LeSage’s manager, Craig Larson, and told him about the meeting and their conclusions. Ms. Lang and Mr. Larson then went to Defendant’s CEO, Thomas Reagan, and told him that they felt Plaintiff’s actions were insubordinate and that they wanted her terminated.

(Lang Dep. at 25.) Without ever asking Plaintiff about that meeting or conducting any investigation, Defendant's CEO simply agreed with the decision to terminate Plaintiff the next day. Plaintiff testified that, when she was terminated on May 18th, she was only told that she was no longer an adequate fit for Defendant Telcom Credit Union. She did not understand why she was being terminated on May 18th when the written warning she had received the day before stated that she would be fired if there were further occurrences and there were none. (Pl.'s Dep. at 24–26, 90–91.) Plaintiff also presents evidence that suggests Defendant did not have an “honest belief” that she was insubordinate but rather knew Plaintiff was attempting to go out on an extended FMLA leave after surgery on her ankle and simply decided to retaliate and terminate her rather than allow her to do so. This takes Plaintiff's proofs far outside those presented by the Plaintiff in *Seeger*. Viewing the evidence in the light most favorable to Plaintiff, this Court cannot conclude that Defendant made a “reasonably informed and considered decision” before it disciplined and then terminated Plaintiff. Plaintiff here, unlike the plaintiff in *Seeger*, has presented evidence to allow a reasonable jury to conclude that Defendant's decision-making process was not worthy of credence.

Id. at *18.

As *Seeger* demonstrates, “[a]n employer does not violate the FMLA by terminating an employee if the employer held an honest belief based on particularized facts that the employee abused that leave.” *Stanley v. Volvo Parts N. Am.*, No. 2:07-cv-602, 2008 WL 2473658, at *4 (S.D. Ohio June 17, 2008) (citing *Stonum v. U.S. Airways, Inc.*, 83 F. Supp. 2d 894, 903 (S.D. Ohio 1999)); *Smith v. Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998). Most courts have found that the “honest belief” defense applies to both FMLA interference and retaliation claims. See *Reinwald v. The Huntington Nat'l Bank*, 684 F. Supp. 2d 975, 984–85 (S.D. Ohio 2010); *Stanley*, No. 2:07-cv-602, 2008 WL 2473658, at *4; *Weimer v. Honda of Am. Mfg., Inc.*, No. 2:06-cv-844, 2008 WL 4332525, at *2 (S.D. Ohio Sept. 17, 2008); but see *Gurne v. Michigan Bell Telephone Co.*, Case NO. 10-14666, 2011 WL 5553817, at *10 f.2 (E.D. Mich. Nov. 15, 2011) (expressing skepticism that the defense applies to FMLA interference claims).

The Sixth Circuit's stated standard that the employer must show that it held an honest belief based on “particularized facts” is actually a more onerous standard than most other circuits have adopted. For example, in *Scruggs v. Carrier Corp.*, 688 F.3d 821 (7th Cir. 2012), the Seventh Circuit affirmed a summary judgment entered against an employee's FMLA interference and retaliation claims based on what it referred to as the “honest suspicion” defense. In 2006, Carrier Corporation set out to remedy an excessive employee absenteeism problem which had developed at its Indianapolis manufacturing plant. As part of its plan, Carrier hired a private investigator to follow approximately thirty-five employees who were suspected of abusing the company's leave policies. One of these employees was Daryl Scruggs, who was authorized to take intermittent leave under the FMLA to care for his mother in a nursing home. After surveillance revealed that Scruggs never left his home on a day he requested FMLA leave, Carrier suspended Scruggs pending further investigation. Scruggs submitted several documents to demonstrate that he picked up his mother from the nursing home on that day and took her to a

doctor's appointment, but Carrier believed the documents were suspicious and inconsistent. Accordingly, Carrier terminated Scruggs for misusing his FMLA leave. In applying the defense to the plaintiff's FMLA interference claim, the court wrote:

Here, Carrier suspected Scruggs was misusing his FMLA leave based upon his prior absenteeism. Accordingly, Carrier hired a private investigator to observe Scruggs on a day that he requested FMLA leave to care for his mother. The video surveillance revealed that Scruggs did not appear to leave his house that day. When Carrier questioned Scruggs, he could not recall what he did on that day, but stated that he did not misuse his FMLA leave. Although Scruggs later provided documentation from his mother's nursing home and doctor's office, this paperwork only raised further questions for Carrier. The documents Scruggs produced were facially inconsistent and conflicted with Carrier's internal paperwork. Taken together, this was enough for Carrier to have an "honest suspicion" that Scruggs misused his FMLA leave on July 24, 2007. Although Carrier could have conducted a more thorough investigation, as Scruggs fervently argues, it was not required to do so. *See Kariotis*, 131 F.3d at 681. Accordingly, Carrier did not violate Scruggs's FMLA rights because it honestly believed Scruggs was not using his leave for its intended purpose, *see Vail*, 533 F.3d at 909, and the district court properly granted summary judgment in favor of Carrier on Scruggs's interference claim.

Id. at 826.

The Eighth Circuit weighed in on the "honest belief" defense in *Pulczynski v. Trinity Structural Towers, Inc.*, 691 F.3d 996 (8th Cir. 2012). There, the plaintiff took FMLA leave to care for his son, who suffered from cerebral palsy and severe asthma. While on his purported FMLA leave, the plaintiff allegedly told coworkers that he was going to a casino that weekend, and also discouraged them from working overtime that same weekend, thus allegedly attempting to cause a work slowdown. After an investigation, the company terminated Pulczynski for his alleged misconduct. The company's investigation involved interviews of coworkers, but not Pulczynski himself. Pulczynski brought suit under, *inter alia*, the FMLA, alleging retaliation. Relying on Sixth Circuit case law, Pulczynski argued that the employer failed to demonstrate an honest belief that he engaged in misconduct based on "particularized facts." The Eighth Circuit rejected his argument, and the Sixth Circuit's standard, stating:

Pulczynski encourages us to adopt a modified "honest belief" rule employed by the Sixth Circuit. Under that approach, an employer must "establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 708 (6th Cir. 2006) (internal quotation omitted). In that circuit, an employer's failure to make that showing results in a finding that the employer's proffered nondiscriminatory explanations for its actions were pretextual. *Id.* Like the Seventh Circuit in *Little v. Illinois Department of Revenue*, 369 F.3d 1007, 1012 n. 3 (7th Cir. 2004), we reject Pulczynski's suggested approach as inconsistent with the statute. . . "[E]ven if the business decision was ill-considered or unreasonable, provided that the

decisionmaker honestly believed the nondiscriminatory reason he gave for the action, pretext does not exist.” *Id.* at 1012.

Id. at 1003.

As the above-mentioned cases demonstrate, the “honest belief” or “honest suspicion” defense provides employers substantial basis to implement a vigorous FMLA fraud investigation program, and take adverse employment actions based on the results of those investigations, without being held liable for FMLA interference or retaliation, when they make reasonable and informed decisions in good faith. While the law on this point is not as pro-employer in the Sixth Circuit, even there the *Seeger* case demonstrates that employers can take considerable shelter in the “honest belief” doctrine in most circumstances.

XIV. DO NOT PENALIZE EMPLOYEES FOR TAKING FMLA LEAVE

In *Pagel v. TIN Inc.*, ___ F.3d ___, NO. 11-2318, 2012 WL 3217623 (7th Cir. Aug. 9, 2012), the Seventh Circuit U.S. Court of Appeals held that employers may be required to adjust their performance standards so an employee will not be penalized for taking qualified leave under the FMLA.

In *Pagel*, the defendant, a manufacturer and supplier of containerboard, hired the plaintiff as an outside salesman. The plaintiff then started having chest pain and labored breathing. As a result, he was in and out of work for testing and surgery. In between absences, the plaintiff was notified that his sales revenue and volume had declined over the past two years, and if he did not improve, he could be fired. While the plaintiff was out on leave, the regional sales manager notified him that he would do a sales ride-along the following day to view the plaintiff’s performance; normally these are scheduled in advance. The plaintiff conducted the sales ride-along with the manager and was subsequently terminated, in part for poor performance on the sales ride-along.

The plaintiff filed suit under the FMLA. The plaintiff claimed interference and retaliation. The Court reversed the lower court’s grant of summary judgment in favor of the employer on both claims, and remanded the case. Referring to the interference claim, the Court explained that the FMLA does not require an employer to “adjust its performance standards for the time an employee is actually on the job, but it can require that performance standards be adjusted to avoid penalizing an employee for being absent during FMLA-protected leave.” In this case, the employer did not adjust the performance requirements to take into account the FMLA leave. With respect to the retaliation claim, the Court was persuaded there was a genuine issue of material fact primarily because the evidence showed that account managers need one week to schedule and prepare for customer visits, and in giving the plaintiff one day’s notice, it was possible the defendant was setting the plaintiff up to fail.

Shaffer v. Am. Med. Ass’n, 662 F.3d 439 (7th Cir. 2011) is another example of an employer that took action against an employee under circumstances that very foreseeably landed them in a difficult to defend FMLA lawsuit. In that case, Shaffer first worked for the American Medical Association (AMA) in 1999. Although he resigned a year later, the AMA rehired him

in 2004 as a contract employee. In 2005, he was hired as a full-time employee, and advanced to become the AMA's Director of Leadership Communications, reporting to supervisor Michael Lynch.

In August 2008, the AMA began cost-saving measures, including a request to all departments to reduce budgets and, ultimately, to eliminate positions. In October 2008, Lynch was contacted by the Chief Marketing Officer, Marietta Parenti, who requested a recommendation regarding the elimination of one position in Lynch's group. It was Lynch's plan to eliminate the Communication Manager position held by Peter Friedman, based on certain business-related reasons. On October 28, Parenti asked Lynch whether it made sense to eliminate Shaffer's position, as well. Lynch responded that further eliminations would not be in the AMA's best interest at that time.

On November 20, 2008, Shaffer informed Lynch that he was planning to take 4 to 6 weeks off in January in order to undergo and recover from knee replacement surgery. Just two days later, on November 30, Lynch sent an e-mail to Parenti, explaining that he had re-thought his recommendation, and now believed that the AMA should eliminate Shaffer's position and retain Friedman. The e-mail apologized for his "11th hour change of heart," and specifically stated that the team already was "preparing for [Shaffer's] short-term leave in January, so his departure should not have any immediate negative impact." On December 4, Shaffer was notified by Lynch and Harvey Daniels, an AMA HR representative, that his position was being eliminated and that his employment would end on January 4, 2009.

Less than a month later, an after receiving a letter from Shaffer's attorney, the AMA's in-house lawyer met with Daniels to let him know that litigation was possible on the matter. The next day, Daniels typed up handwritten notes that he had taken regarding his earlier discussions with Lynch, back-dating them to November 25, 2008 – five days before Shaffer told him about his plan to take FMLA leave. The typed notes stated that Shaffer's position was eliminated because Lynch could have the speech writing staff report directly to him, making Shaffer's position redundant. Daniels then shredded the original notes.

Shaffer filed a lawsuit in federal court. The lower court granted summary judgment in favor of the AMA, and dismissed his claim. Shafer then appealed to the Seventh Circuit, which analyzed the case to determine whether or not there was a genuine factual issue for trial. The Court found that Shaffer was eligible for FMLA leave, and that he had provided notice to Lynch of his intention to take that leave. Prior to that notice, there was no mention of elimination of Shaffer's position; after that notice, he was targeted for termination. Based upon those facts, coupled with Lynch's e-mail to Parenti in which the proposed leave was mentioned, the Seventh Circuit determined that a reasonable jury could conclude that Shaffer's exercise of his right to take leave under the FMLA was a motivating factor in the decision to eliminate his position. It then reversed the lower court's dismissal of the case.

XV. TOP TWELVE FMLA COMPLIANCE TIPS DERIVED FROM THIS PAPER

1. When in Doubt, Send the Notice of Eligibility and Rights Out
2. Provide Written Notice Of Approval Or Disapproval To The Employee

3. Have a Specific, Formal Policy to Request Leave
4. Terminate Employees on FMLA Leave With Extreme Caution
5. Train Managers on FMLA Basics
6. After an FMLA Leave, Return the Employee To Their Same Job – Don't Try The "Equivalent Position" Exception If The Same Position Still Exists. *See, e.g., Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 766-67 (5th Cir. 2001) (whether night shift position offered by medical center was equivalent of day shift position that she formerly held was a material issue of fact for the jury to decide, even though the duties, pay, and benefits were the same); *Wanamaker v. Westport Bd. of Educ.*, No. 3:11-cv-1791 (VLB), 2012 WL 4445314, at *11 (D. Conn. Sept. 25, 2012) (offer of a full-time classroom position may not have been equivalent to position teacher had before FMLA leave of computer teaching position, especially with regard to the skills and responsibilities).
7. Invoke Your Rights In Intermittent Leave Situations
8. Select Your Twelve Month FMLA Period in Writing
9. Don't Terminate Employees Employed Less Than One Year To Try To Avoid Giving Them FMLA Leave
10. Do An "FMLA Scrub" Before Each Termination
11. Don't Forget About "No Retaliation"
12. Appoint an FMLA Leave "Czar"

Bonus No. 1: Don't Penalize Employees For Taking FMLA Leave

Bonus No. 2: When defending an FMLA interference claim, focus on whether – even if the defendant violated the FMLA – the plaintiff can prove prejudice, because the FMLA “provides no relief unless the employee has been prejudiced by the violation.” *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89, 122 S. Ct. 1155 (2002); *Hearst v. Progressive Foam Technologies, Inc.*, 641 F.3d 276, 280 (8th Cir. 2011) (affirming summary judgment for employer where employee failed to establish prejudice in termination since employee had medical condition that rendered him unable to work for substantially longer than the FMLA 12-week period).

XVI. PROPOSED REGULATIONS

On February 15, 2012, the DOL published a Notice of Proposed Rulemaking (NPRM) that proposes changes to the FMLA regulations related to military family leave and the hours of service eligibility criteria for airline flight crew attendants. *See* 77 Fed. Reg. 8960 (Feb. 15, 2012). These proposed changes seek to implement and interpret statutory amendments to the

FMLA pursuant to the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA) and the Airline Flight Crew Technical Corrections Act (AFCTCA). Public comment on these proposed changes closed on April 30, 2012. The DOL has not issued any final regulations as of yet.

The FY 2010 NDAA extended qualifying exigency leave under the FMLA to employees who are covered family members of the Regular Armed Forces and expanded the use of military caregiver leave to employees who are covered family members of recent veterans. AFCTCA established a special hours of service eligibility requirement for airline flight crew members. The NPRM proposes to update the regulations to correspond to the FMLA amendments. In addition, the DOL proposed a few unrelated changes, including the manner in which an employer calculates FMLA usage by all employees.

A. Military Leave Issues

1. Military Qualifying Exigency Leave

In 2008, the FMLA was amended to permit eligible employees to take FMLA leave because of any qualifying exigency that arises out of the active duty or call to active duty of a spouse, child or parent who is a member of the National Guard or Reserves components.

The FY 2010 NDAA expanded qualifying exigency leave so that eligible employees with a spouse, child or parent in all military components, including the Regular Armed Forces, would be eligible to take FMLA leave under qualifying circumstances. FY 2010 NDAA also added a new condition that the military member's deployment must be to a foreign country in order for an eligible employee to be able to take qualifying exigency leave. These changes went into effect immediately upon the enactment of the FY 2010 NDAA, despite the fact that the regulations did not reflect these changes.

The NPRM proposes corresponding changes to the regulations to reflect the FY 2010 NDAA. In addition, with respect to the requirement that the deployment must be to a foreign country, the NPRM proposes that "foreign country" include deployment in international waters.

Further, the NPRM clarifies several categories of covered qualifying exigencies. Current FMLA regulations list eight categories of reasons for which an eligible employee may take a qualifying exigency leave: short-notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities and additional activities. The NPRM proposes to clarify that for exigency leave related to childcare and school activities, the child for whom childcare leave is sought need not be a child of the employee requesting leave. Thus, a parent of a military member could take a protected leave to care for the child of the military member. The NPRM proposes to expand the maximum duration of the rest and recuperation leave from the current five days to 15 days. The NPRM further proposes to add attending funeral services as an example of a post-deployment activity for which an eligible employee may take qualifying exigency leave.

2. Military Caregiver Leave

The 2008 FMLA amendments now enable an eligible employee who is the spouse, child, parent or next of kin of a covered servicemember to take up to 26 workweeks of FMLA leave during a single 12-month period to care for a covered servicemember with a serious injury or illness.

The FY 2010 NDAA expanded the definition of covered servicemember to include veterans who were active members of the military within the past five years. It also changed the definition of serious injury or illness, for both current members of the Armed Forces as well as certain veterans, to include preexisting conditions that were aggravated by service in the military. All of these changes went into effect upon the enactment of the FY 2010 NDAA, with the exception of the extension of military caregiver leave to family members of veterans with serious injuries or illnesses, pending the DOL's defining through the NPRM what constitutes a serious injury or illness for a veteran.

The NPRM proposes that the following qualify as serious injuries or illnesses of a veteran:

1. A serious injury or illness of a current servicemember that continues after the servicemember becomes a veteran;
2. A physical or mental condition for which the covered veteran has received a Department of Veterans Affairs (VA) Service Related Disability Rating (VASRD) of 50 percent or higher; and
3. A physical or mental condition that (a) substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a service-connected disability or (b) would substantially impair said ability, absent treatment.

The NPRM also seeks public comment on whether enrollment in the VA's Program of Comprehensive Assistance for Family Caregivers should alone meet the requirements of having a serious injury or illness.

It is important to note that the NPRM proposes that a healthcare provider who is not affiliated with the military would be permitted to complete the medical certification related to an employee's request to care for a covered servicemember. Current FMLA regulations limit the type of healthcare providers who may complete a medical certification under these circumstances to those affiliated with the military.

B. Expanded Hours of Service Definition for Airline Flight Crew Members

Currently, to be eligible for FMLA leave, an employee must be employed by the employer for a total of at least 12 months; must be employed for at least 1,250 hours of service in the 12-month period immediately preceding the commencement of the leave; and must work at a worksite where 50 or more employees work within 75 miles.

The AFCTCA altered the hours of service eligibility requirements for airline flight crew employees to take into account their unconventional work schedules. Under the AFCTCA, the hours of service criteria are met if, during the 12-month period, the airline flight crew employee has worked or has been paid for not less than 60 percent of the applicable monthly guarantee and has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation leave or sick or medical leave).

The NPRM proposes to interpret the 504 hours requirement to constitute 504 hours of duty time, which includes flight or block time as defined by the Federal Aviation Administration and any additional time before and after the flight as determined by employer policy or applicable collective bargaining agreement. The NPRM also proposes the minimum monthly guarantee to be determined by employer policy or applicable collective bargaining agreement and would depend on whether the employee is on reserve status.

C. Additional Proposed Changes to the FMLA Regulations

In addition to the changes for military family leave and the airline flight crew member eligibility requirement, several other unexpected proposals appear in the NPRM.

First, the NPRM proposed changes to the manner in which employers calculate increments of leave. In 2009, the DOL amended the FMLA regulations to provide:

When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.

29 C.F.R. § 825.205(a)(1).

The NPRM proposes adding a clarifying statement that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave, subject to the physical impossibility rule as well as the situation where an employee elects to substitute paid leave for FMLA and must use a larger amount of leave in order to satisfy the employer's paid leave policy. In such instance, the employer may either require the employee to use more FMLA leave than is necessary in order to substitute paid leave, or the employee may elect to take unpaid FMLA leave in the smallest increment of leave used by the employer.

Additionally, the NPRM proposes changes to the physical impossibility provisions of the FMLA regulations, which allow an employer to delay an employee's reinstatement by providing a larger period of leave where it is physically impossible for the employee to return to the job in the middle of the shift. The DOL has been concerned with employer interpretation of this provision as requiring only mere "inconvenience." Therefore, the NPRM clarifies that this provision applies in "only the most limited circumstances and only where it is, in fact, physically impossible to allow the employee to leave his or her shift early or to restore the employee to his

or her same position or to an equivalent position at the time the employee no longer needs FMLA leave.”

Finally, the DOL proposes a standard recordkeeping provision that would reiterate the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA).

D. Changes to Model FMLA Forms

Once the NPRM review period has expired and the revised FMLA regulations go into effect, it can be anticipated that the DOL’s model FMLA certification and other forms will be updated with corresponding changes to the eligibility criteria for airline flight crew employees; the definition of a covered servicemember; the definition of a serious illness or injury for a veteran; and the requirement that qualifying exigency leave arises from a foreign deployment. The DOL has also proposed that it may prepare a separate model form related only to caregiver leave for veterans.

Interestingly, the NPRM proposes to remove the model forms from the final regulations’ appendices, but to continue to make them available on the Wage and Hour Division (WHD) website. The DOL has suggested that the purpose of this change will be to enable the DOL to more expeditiously amend its forms in response to statutory and other changes without creating the confusion that has typically resulted from having updated forms on the WHD website, but not in the final regulations. The forms that the DOL proposes to eliminate from the final regulations’ appendices are:

WH-380-E Certification of Health Care Provider for Employee’s Serious Health Condition;

WH-380-F Certification of Health Care Provider for Family Member’s Serious Health Condition;

WH-381 Notice of Eligibility and Rights & Responsibilities;

WH-382 Designation Notice;

WH-384 Certification of Qualifying Exigency for Military Family Leave; and

WH-385 Certification for Serious Injury or Illness of Covered Servicemember – for Military Family Leave.

In the meantime, employers can note that the model forms on the WHD website have been reissued with an extended expiration date of February 28, 2015. It is reasonable to suppose that employers may continue to use these forms, pending further updates by the DOL. Of course, to the extent an employer receives a request for family military leave or leave by an airline flight crew employee, such requests should be evaluated under the now-in-effect statutory requirements, notwithstanding any inconsistencies in the model forms.

E. Employers Should Update FMLA Certification Requests to Include GINA Safe Harbor Disclaimer

On a related issue, to ensure compliance with the Genetic Nondiscrimination Act of 2008 (GINA), employers are required to provide employees with the GINA “safe harbor” language in conjunction with any request for health-related information to support an employee’s request for FMLA leave for medical reasons.

The EEOC’s regulations implementing GINA provide that when an employer makes a request for health-related information, it should warn the employee and/or healthcare provider from whom it requested the information not to provide genetic information. If employers give this warning, any resulting acquisition of genetic information is considered inadvertent and is not a violation of GINA. The safe harbor language recommended by the EEOC is as follows:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information,” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

The current FMLA certification forms do not contain this GINA safe harbor language. Therefore, employers should provide this language in conjunction with any FMLA medical certification forms or other similar employer request for health-related information to support an employee’s FMLA leave for medical reasons.

XVII. CONCLUSION

Effectively managing the medical process and leave under the FMLA requires a combination of deep knowledge of the FMLA, its complex regulations and case law, and good judgment. Employers that implement procedures incorporating these concepts will generally find themselves in compliance with the FMLA. Those that do not will likely encounter substantial problems. This paper should help employers remain in the former category rather than the latter. In addition, this paper should assist employers and their legal counsel in defending against any FMLA claims that are brought against them.