# COMMENTARIES

# EVALUATING THE CURRENT JUDICIAL INTERPRETATION OF "SERIOUS HEALTH CONDITION" UNDER THE FMLA*

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## I. INTRODUCTION: BACKGROUND AND NEED FOR LEGISLATION

On February 5, 1993, a new era dawned for the American worker. On that day, President Clinton signed into law the Family Medical Leave Act of 1993 ("FMLA" or the "Act").[1] Effective later that year,[2] the Act represents a signifi-

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[1] Family Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1994). The final regulations for the FMLA survived at least two significant delays; a congressional challenge alleging undue influence, and calls by private organization to delay the effective date. *See* Jay M. Rector, *Family and Medical Leave Act of 1993*, 64 (4) J. KAN. B. 2 (1995). The regulations were originally slated to be effective February 6, 1995; however, due to public response, the Department of Labor (DOL) postponed formal implementation until April 6, 1995. *See* United States Department of Labor, *News Release*, USDL 95-118 (April 6, 1995). *See also* Michelle D. Bayer et. al., *The Family Medical Leave Act: The Final Regulations*, 28 URB. LAW. 93 (1996) (hereinafter Final Regulations). The Final Regulations replaced the "interim-final" regulations which had been issued two years previously. *See id.* The FMLA represents President Clinton's first major legislative accomplishment of his administration. *See* Lawrence B. Fine et al., *Family, Medical Leave Legislation: Ensuring Corporate Compliance*, NAT'L L. J., Mar. 8, 1993, at S7. Reintroduced by Senator Christopher Dodd (D-Conn), the FMLA was "President Clinton['s] [] first piece of major legislation enacted during . . . [his] administration." *Id.* Two times previously, similar family and medical leave bills had been vetoed by President Bush over concerns that the early versions of the FMLA were over broad, or because of apprehensions over increased costs of doing business. *See, e.g.*, Gerald T. Dunne, *Family and Medical Leave — Invisible Changes*, 110 BANKING L.J. 291, 291 (1993) (fearing costs arising from direct charges for the hire of replacement workers and continued coverage of health benefits, as well as invisible slippages in efficiency, routine, promptitude and the additional bureaucracy costs). President Bush vetoed the Family and Medical Leave Act of 1990 because of his concern that the costs associated with mandatory family and medical leave would impair the ability of corporate America to compete in the international marketplace and to create jobs. The President also stated his preference for normal marketplace forces in this area, rather than mandated leave policies. *See* Message to the

cant landmark in employee benefit legislation through the establishment of a minimum labor standard for leave, and by the accommodation of the important societal interest in assisting families.[3] Passed primarily to establish a national policy on family and work life, advocates considered the enactment of the FMLA long overdue.[4] Prior to the Act, when disaster or misfortune struck an employee, or another member of the family (such as a parent, spouse, or child), the result was frequently the same: the loss of indispensable income or employment benefits followed by devastating financial and emotional consequences to the family.[5] The Act was also a recognition that work-family conflicts, as well

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House of Representatives Returning Without Approval the Family and Medical Leave Act of 1990 (June 22, 1990), *reprinted in* PUB. PAPERS 890 (1991). For a survey of the early legislation, *see* Donna R. Lenhoff and Sylvia M. Becker, *Family and Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 HARV. J. ON LEGIS. 403, 412 (1989).

[2] The Act became effective on August 5, 1993.

[3] Typically, American workers were exposed to forces that could spell disaster to the family in the event of tragedy. Despite health insurance, the worker who suffered a serious accident or illness had no safeguards to employment or the retention of long-term benefits. The consequences were often dependence of the family on welfare or reliance on unemployment assistance. Congress also found that the American worker was frequently faced with painful choices between job security and fulfilling family responsibilities. In articulating the reasons for the law, Congress noted that the United States has experienced a demographic revolution in the composition of the workforce, with profound consequences for the lives of working men and women and their families. *See* S. REP. NO. 103-3, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7 (hereinafter Senate Report). Hence, Congress saw a distinct need to provide protection to the American family. The Senate Report noted that "private sector practices and government policies had failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family." *Id.* at 4. The Senate Report further noted that "[t]his failure continues to impose a heavy burden on families, employees, employers and broader society. [The FMLA] provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act." *Id.* The legislative history indicates that Congress intended the FMLA to cover serious illnesses that last for more than a few days. Minor illnesses should be addressed through the company's sick leave policy. *See* Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028 (M.D. Tenn. 1995).

[4] *See* Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 HARV. J. ON LEGIS. 311 (1989) (noting that the United States was virtually the last industrialized country to address work-family policy and even lagged behind the policies of numerous Third World countries prior to the enactment of the FMLA).

[5] The protection of the individual and family is the controlling force of the Act, and it is based on the same principle as child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and benefit laws, and other labor laws which establish minimum employment standards. *See* Senate Report, *supra* note 3, at 4. The Senate Report further notes that a common set of principles exists which underlies each of these labor standards. Every Federal labor standard directly addresses an important societal problem, such as the exploitation of child labor, or the exposure of workers to toxic

as the absence of adequate parental leave policies, hindered women's roles in the workplace.[6] Congress developed the FMLA in response to the previously ne-

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substances. The voluntary corrective efforts of employers have not proven adequate. In addition, Congress enacted each law to complement the needs of the employer. *See id.* at 5. Congress drafted the FMLA with these principles in mind and it fits squarely within the tradition of preceding labor standards laws. Congress made the following findings:

> (1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
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> (2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early child rearing and the care of family members who have serious health conditions;
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> (3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;
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> (4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;
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> (5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and
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> (6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

29 U.S.C § 2601(a).

Congress has historically responded to evolving economic realities by promulgating labor standards that are now widely accepted. In this tradition, the FMLA proposes a minimum labor standard to address significant new developments in today's workplace. *See* Senate Report *supra* note 3, at 5. Hence, during the employee's leave, any pre-existing health benefits provided to the employee by the employer must be retained. *See id.* at 3. The employer, however, is under no obligation to allow the employee to accrue seniority or other employment benefits during the leave period. Upon return from leave, the employee must be restored to the same or equivalent position. The taking of leave cannot deprive employees of any benefit earned before the leave, nor can it entitle employees to any other right or benefit other than that to which they would have been lawfully entitled had the employee not taken the leave. *See id. See also* Dowd, *supra* note 4.

[6] Prior to the enactment of the FMLA, federal law on the issue of maternity leave and medical leave was scarce. *See* William R. Huffman, *The Family and Medical Leave Act of 1993 and the Current State of Employee Protection: What Type of Protection Can an Employee Expect Upon Taking Work Leave for Family or Medical Problems?*, 15 MISS. C. L. REV. 97 (1994). The primary federal influence on the subject came through amendments to Title VII of the Civil Rights Act of 1964. In enacting the FMLA, Congress specifically found that the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women much more than men. *See* Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1048 (1994) (citations omitted). This commentator punctuated his assertion with the notation that former Supreme Court Chief Justice Warren Burger reportedly stated that he would never hire a female law clerk because her family responsibilities would interfere with her job. *See id.* at 1047 n.1. Indeed the Burger Court once suggested in dicta that an employer could lawfully refuse to hire women with preschool-aged children, although it hired similarly-situated men, if the employer could show that the existence of "conflicting family obliga-

glected interest in protecting the American worker. The Act provides for up to twelve weeks of unpaid medical leave per year, under particular circumstances that are "critical to the life of an eligible employee."[7] In order to aid the American workforce, Congress sought to accommodate the legitimate interests of employers as well.[8] Congressional concern regarding the demands and expectations

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tions" was "demonstrably more relevant" to a woman's job performance than a man's. *Id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam)). The author suggested that the former Chief Justice's outrageous personnel practices and the Court's incredible suggestion that a policy against hiring women with preschool-aged children could ever be lawful under Title VII of the 1964 Civil Rights Act indicate a characterization of work-family conflicts as "women's issues." *Id.* The recognition that the absence of the parental leave policies inhibited women's roles in the workplace was a major motivation for the enactment of the FMLA. *See id.* at 1047-48. *See also* Dowd, *supra* note 4 (explaining that how we envision the work-family relationships affects how we determine the direction and shape of public policy).

[7] Congress enacted the FMLA out of concern for the needs of the American workforce, and the development of so-called "high performance" organizations. *See* Rector, *supra* note 1 (citing 60 Fed. Reg. 2180-01, 2239 (1995) (codified at 29 C.F.R. § 825.101b) (1996)). The Act was designed to grant employees family and medical leave in certain cases involving a birth, an adoption, or a serious health condition of the employee, a child, a spouse or parent with adequate protection of the employees' employment and health benefit rights.

The FMLA has not been the only national mandate of the 1990s affecting employees and employers. The Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994), stands as another milestone to aid employees. Congress intended the Americans With Disabilities Act ("ADA") to provide a national policy to end discrimination against disabled persons and to articulate clear standards for identifying discrimination. *See* Eric Wade Richardson, *Who Is a Qualified Individual With a Disability Under the Americans With Disabilities Act,* 64 U. CIN. L. REV. 189 (1995). Under Title I of the ADA, an employer may not discriminate against a disabled employee or job applicant regarding any of the terms, conditions, or privileges or employment. *See id.* (citations omitted). Although different than the FMLA, the intent is the same: to prevent discrimination and to aid the employee in the workplace. Similar to the ADA, the FMLA established a minimum standard and alleviated any undue burdens on employers.

[8] The FMLA is both intended and expected to benefit employers as well as their employees. The Department of Labor believes that a direct correlation exists between stability in the family and productivity in the workplace. *See* 29 C.F.R. § 825.101(a). FMLA uses the Fair Labor Standard's Act's ("FLSA") definition of "employer," and directs considerations regarding the definition of "employer" to the FLSA. *See* 29 C.F.R. § 825.104(d). The definition of "employer" thus includes any person who acts directly or indirectly in the interest of an employer with respect to any of the employer's employees. *See* FLSA at 29 U.S.C. § 203(d) (1994). The definition of employer also includes successors in interest, which is based on Title VII of the Civil Rights Act of 1964. *See* 29 C.F.R. § 825.107(a)-(c). For purposes of FMLA, the employer will usually be the legal entity that employs the individual, although there may be certain instances where two corporations are so closely related that they will be called a single employer and their employees will be added together to determine if they have the requisite 50 employees, thus coming under the scope of the Act. *See id.* § 825.104(c)(2).

of contemporary high-performance organizations were also considered as part of the basis for the Act.[9] Congress found that employers would benefit equally from the FMLA as a result of a determination that a significant correlation existed between "stability in the family and worker productivity."[10] Thus, the FMLA theoretically achieves major policy goals without unduly disrupting business operations.[11]

This Article provides an overview of the current judicial interpretation of what constitutes a "serious health condition" under the FMLA. Since its implementation, the FMLA has altered the field of labor and employment law significantly. Over the past few years, increasing litigation under the Act has helped to define its standing within the courts. Having started with a blank judicial slate in 1993, the tablet of precedent is being written, providing up-to-date guidelines for other jurisdictions. Given the relative newness of the Act, and as litigation proceeds

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[9] *See* 29 C.F.R. § 825.101(c). "FMLA will encourage the development of high-performance organizations." *Id.* "The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness." *Id.* Thus, the main purposes of the Act "to balance the demands of the workplace with the needs of families," and "to entitle employees to take reasonable leave for medical reasons . . . [is accomplished] in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(1)-(3).

[10] *See* 29 C.F.R. § 825.101(c). Not all employers are confident about the legislative assessment regarding the positive benefits to employers. *See, e.g.*, Julia Lawlor & Rhonda Richards, *Landmark Act Leaves Some Businesses Fuming*, USA TODAY, Feb. 8, 1993, at B4.

[11] Prior to the enactment of the FMLA, the United States was among the last industrialized countries in the world without a family leave law that protected the rights of employees of private businesses. *See* Stephen A. Mazurak, *Comparative Labor and Employment Law and the American Labor Lawyer*, 70 U. DET. MERCY L. REV. 531 (1993) (providing a guide to other countries' employment regulations). Whether the FMLA is as good as family laws found in other countries has not been left unchallenged. As one commentator states about the Act's shortcomings:

> The limited number of employees who are eligible, coupled with the fact that most leave is unpaid and most workers will have to pay sizable insurance premiums suggests that the FMLA will not alleviate the problems raised in this article. Furthermore, the Act's terms and conditions precedent are subject to interpretation by litigation, as happened with the terms of ERISA, Title VII, the ADA, and state family leave acts. The statutory period, as it is no more than twelve weeks, will make most expensively ill patients ineligible. Finally, the typical defenses which serve as a proxy for discrimination against the unhealthy worker, such as legitimate business reasons, will work to disqualify many employees from proving their competence and ability to work.

Lorraine Schmall, *Toward Full Participation and Protection of the Worker With Illness: The Failure of Federal Health Law After McGann v. H & H Music Co.*, 29 WAKE FOREST L. REV. 781, 850 (1994).

through the judicial system, issues are surfacing and some guidance as to the interpretation of the Act is emerging.

Part II of this Article provides a brief overview of the FMLA and consideration of what constitutes a "serious health condition." This section is not intended to be a comprehensive analysis of the Act, but rather aims to highlight the basic elements necessary to understand the analysis of the existing case law. Part III begins with an understanding that there exists a small, but developing body of case law on the FMLA. The latest decisions make it possible to take a critical look at what constitutes a "serious health condition." This Article focuses on the question of whether a discernable trend has emerged, or if judicial interpretation of this issue has only produced an unintelligible precedential tablet. Determining whether the courts have developed a standard as well as a consistent interpretation of a "serious health condition" provides predictability and guidance to practitioners. Specifically, it aids in establishing whether a given set of circumstances will sustain protection of the law to a given plaintiff-employee. This Article concludes that the courts are indulgent in their interpretation of a "serious health condition," and that such accommodation signals that the courts are trying to provide and promote the equitable relief that Congress envisioned by enacting the FMLA. Far from being an unstable or capricious application of the law by the courts, this mutability indicates a compliance with congressional intent under the FMLA to provide much-needed relief to the American worker.

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

### A. *Overview*

Although, the Family and Medical Leave Act applies equally to workers across the economic spectrum, it is expressly designed to protect low-wage earners because these workers are the least likely to be protected under any existing company policies.[12] Employers covered by the FMLA must provide eligible employees with at least twelve weeks of medical leave for serious health conditions or certain family situations.[13] An eligible employee is entitled to FMLA leave for any of the following events: (1) the birth of a child or to care for the newborn infant; (2) the adoption of a child or the placement of a child in the employee's home for foster care; (3) the serious health condition of the employee's spouse,[14] son, daughter,[15] or parent;[16] or (4) a serious health condition that ren-

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[12] *See* S. REP. No. 103-3, at 16 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 18.

[13] *See* 29 C.F.R. § 825.100(a). To qualify for FMLA leave, the employee must: (1) have worked for the employer for at least twelve months (may be non-consecutive), *see* 29 C.F.R § 825.110(b); (2) have worked at least 1,250 hours during the preceding year, *see id.* § 825.110(a)(1)-(2); and (3) have been "employed at a worksite" where the employer employs at least fifty employees within a seventy-five mile radius, *see id.* § 825.110(a)(3). "The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll." *Id.* § 825.111(c).

[14] "Spouse means a husband or wife as defined or recognized under State law for pur-

ders the employee unable to perform the essential functions of the job.[17] This leave may be paid or unpaid.[18] In addition, employers are required to provide sufficient notice explaining the FMLA, and must incorporate information on the rights and responsibilities provided under the Act.[19] Employers must abide by the terms of the FMLA and may not interfere with or deny the employee's use of qualified FMLA leave.[20] Any violations of the FMLA incurs on an employer liability for civil damages.[21]

The Act also requires employers to maintain an employee's coverage under any "group health plan" during his absence.[22] Upon return from FMLA leave,

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poses of marriage in the State where the employee resides, including common law marriage in States where it is recognized." *Id.* § 825.113(a).

[15] "Son or daughter means a biological, adopted, or foster child, a step-child, 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 or self-care because of a mental or physical disability.' " *Id.* § 825.113(c).

[16] A "[p]arent means a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter . . . . This term does not include parents 'in law.' " *Id.* § 825.113(b).

[17] *See* 29 U.S.C. § 2612(a)(1) (1994); 29 C.F.R. § 825.200(a)(1)-(4).

[18] Neither paid nor unpaid leave is included in the calculation of "hours of service" which provides that an employee must have worked at least 1,250 hours during the preceding year. *See* Robbins v. Bureau of Nat. Affairs, Inc., 896 F. Supp. 18, 21 n.8 (D.D.C. 1995).

[19] *See* 29 C.F.R. § 825.300(a); § 825.301(a)(1).

> Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, whether or not it has any 'eligible' employees, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be seen by employees and applicants for employment. *Id.* § 825.300(a). "If an FMLA-covered employer . . . has any written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning FMLA entitlements and employee obligations under the FMLA must be included in the handbook or other document." *Id.* § 825.301(a)(1).

[20] *See* 29 U.S.C. § 2615(a)(1). It is also unlawful for employers to retaliate against employees who take qualified medical leave. *See id.* § 2615(a)(2).

[21] *See* 29 U.S.C. § 2617(a).

> Any employer who violates this section shall be liable for damages equal to (1) any wages, salary, employment benefits, or other compensation denied or lost to the employee by virtue of the violation; or (2) any actual monetary losses sustained by the employee as a direct result of the violation, up to a sum equal to 12 weeks of the employee's wages or salary. Furthermore, the employer is subject to additional amounts as liquidated damages, interest, and other equitable relief as may be appropriate, including employment, reinstatement, and promotion.

*Id.* § 2617(a)(1)(B).

[22] *See id.* § 2614(c)(1). The FMLA requires the employer to maintain coverage, for the duration of the employee's leave, of any group health plan [as defined in the Internal Revenue Code of 1986 at 26 U.S.C. § 5000(b)(1)] under the terms and conditions of cov-

an employee is entitled to reinstatement to the same position which the employee held, or to an equivalent position which provides the same pay, benefits, working privileges and status.[23] The position "must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."[24]

To ensure compliance with the FMLA, employers must keep detailed records,[25] and the Secretary of Labor has the authority to investigate alleged violations.[26] To ensure the validity of claims, an employer may require certification by the health care provider of the employee's serious health condition, which the employee must provide in a timely manner.[27] The employer may also request a second medical opinion of the seriousness of the employee's medical condition.[28]

### B. *Serious Health Condition*

The FMLA defines a "serious health condition" as a condition[29] that involves: (1) inpatient care in a hospital; (2) inpatient care in a hospice; (3) inpatient care in a residential medical care facility; or (4) continuing treatment by a health care

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erage that would have been provided had the employee remained in continuous employment. *See id.* The Final Regulations explain, however, that the employer is not required to provide health benefits during the FMLA leave unless the employer already does so. *See* 29 C.F.R. § 825.209.

[23] *See* 29 C.F.R. § 825.214(a).

> If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA).

*Id.* § 825.214(b).

[24] 29 C.F.R. § 825.215(a).

[25] *See* 29 U.S.C. § 2616(b).

[26] *See* 29 U.S.C. § 2616(a). The Secretary "shall receive, investigate, and attempt to resolve complaints of violations . . . [and] may bring an action in any court of competent jurisdiction to recover the damages . . ." *Id.* § 2617(b)(1)-(2). Individuals seeking enforcement of the Act may file a complaint with the Department of Labor or pursue a private cause of action, as long as the complaint or private cause of action is filed within two years of the last action which an employee contends was in violation of the Act. *See generally* §§ 2617(a)(2), 2617(c)(1).

[27] *See* 29 U.S.C. § 2613(a). Certification shall be deemed sufficient if it states the date on which the serious health condition commenced; the probable duration of the condition; and the appropriate medical facts within the knowledge of the health care provider regarding the condition. *See id.* § 2613(b)(1)-(3).

[28] In any case in which the employer has reason to doubt the validity of the certification provided by the employee, the employer may require (at the employer's expense) that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer. *See id.* at § 2613(c).

[29] A condition meaning an "illness, injury, impairment, or physical or mental condition . . . ." 29 U.S.C. § 2611(11).

provider.[30] The final regulations allow FMLA leave for "chronic conditions," as well as for "serious health conditions."[31] In defining "chronic conditions," the regulations include a non-exhaustive list that includes "asthma, migraine headaches, chronic back pain, diabetes, epilepsy, chronic fatigue syndrome, and periods of incapacity due to pregnancy."[32] Common colds, flu, ear aches, upset stomachs, minor ulcers, headaches other than migraines, routine dental or orthodontia problems, and periodontal disease[33] are specifically excluded from coverage of the Act, unless serious complications arise. Where in-patient care is not required, a serious health condition must involve continuing treatment by a health care provider and must be accompanied by a period of incapacity.[34] The Act excludes routine, preventative, physical examinations and the like.[35]

As previously stated, the FMLA provides that an eligible employee may take leave to care for the employee's spouse, child, or parent with a serious health condition, or because of the employee's own serious health condition that impairs the employee's ability to work.[36] Since the legislative history does not clarify the broad terms of the Act, much of the debate surrounding the Act involves ambiguity as to what constitutes a "serious health condition."[37] Litigation con-

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[30] *See id.* § 2611(11)(A)(B).

[31] *See* Final Regulations, *supra* note 1, at 95.

[32] *Id.* (citing 29 C.F.R. § 825.114(a)(2)-(iii)(C)).

[33] *See id.* at 95-96 (citing 29 C.F.R. § 825.114(c)). "Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop." 29 C.F.R. § 825.114(c).

[34] *See* 29 C.F.R. § 825.114(a)(2). For purposes of the FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition involving an incapacity which includes, for purposes of this section, the "inability to do work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom." *See id.* § 825.114(a)(1).

[35] *See* 29 C.F.R. § 825.114(b).

[36] *See* 29 U.S.C. § 2612(a)(1).

[37] See Schmall, *supra* note 11, at 848-49. "[P]roponents of the bill argued that the term 'serious' does not cover short-term conditions that typically do not involve hospitalizations, while opponents contended that 'continuing treatment' is so broad that it could encompass ongoing visits for allergies, stress, and the like." *Id.* The legislative language at issue states that:

> The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period . . . . It is intended that in any case where there is doubt whether coverage is provided by this [A]ct, the general tests set forth in this
> paragraph shall be determinative.

S. REP. NO. 103-3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30.

cerning what constitutes a "serious health condition" has begun to surface,[38] and courts are slowly providing guidance as to what constitutes a "serious health condition."

## III. JUDICIAL DETERMINATION OF A "SERIOUS HEALTH CONDITION"

Serious health conditions arise under circumstances in which an eligible employee is entitled to what may be referred to as "medical leave." Medical leave involves circumstances in which the employee has reason to: 1) care for a spouse, son, daughter or parent who has a serious health condition; or 2) attend to the employee's own serious health condition.[39] In a case involving the employee's own health, however, the Act imposes an additional requirement. Not only must the employee suffer from a serious health condition, but the condition must also affect the employee's ability to fulfill the duties of that position.[40] Courts recognize this distinction by considering the different treatment of a "serious health condition" in cases involving an illness of a family member and cases dealing with an employee's own illness.

### A. *The "Serious Health Condition" of a Family Member*

The courts first dealt with the "serious health condition" of a family member in *Seidle v. Provident Mutual Life Insurance Co.*[41] In *Seidle*, the court had to determine whether an ear infection suffered by the employee's son constituted a "serious health condition" that entitled her to FMLA leave.[42] Late in the evening of October 11, 1993, the plaintiff's four-year old son, Terrance, awoke with a 100 degree temperature and began vomiting.[43] The next afternoon, plaintiff took the child to his pediatrician, who diagnosed him as suffering from a "right otitis media" (commonly known as an ear infection).[44] The doctor prescribed a ten-day regimen of antibiotics, which alleviated the child's fever by that evening.[45] The child received no further medical treatment for this illness, and his mother took him back to the day care center on October 18.[46] The mother reported to work seven days later, only to find that she had been terminated for

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[38] Commentators anticipated litigation because of the ambiguity of the Act's terms. *See, e.g.*, Michele Galin, *Sure, 'Unpaid Leave' Sounds Simple, But . . . the Family Medical & Leave Act May Give Employers a Headache*, BUS. WK., Aug. 9, 1993, at 32 (indicating that "serious health condition" will be litigated); Dorothy J. Stephens, *How the New Family and Medical Leave Act Affects Employee Health Leave and Benefits*, 4 HEALTHSPAN 16 (1993) (noting that such terms as "health care provider" and "serious health condition" will likely be litigated).

[39] *See supra* text accompanying notes 14-17.

[40] *See* 29 C.F.R. §§ 825.114, 825.115 (1996).

[41] 871 F. Supp. 238 (E.D. Pa. 1994).

[42] *See id.* at 239; *see also* 29 C.F.R. § 825.114.

[43] *See* Seidle, 871 F. Supp. at 240.

[44] *See id.*

[45] *See id.*

[46] *See id.* at 241.

excessive absenteeism.[47]

The court began its analysis of whether the FMLA protected the employee by examining the definition of "serious health condition" contained in the Act, concluding that it was ambiguous.[48] For clarification, the court turned to the legislative history, in particular the listing of examples of "serious health conditions." It noted that ear infections were "[c]onspicuously absent from the list of examples contained in the legislative history . . . ."[49] The court then turned to the Department of Labor regulations to determine the meaning of a "serious health condition." The court found that the regulations "require[d] that Terrance both undergo a period of incapacity requiring absence from his day care center for *more* than three days and be under the continuing treatment of a physician."[50] The court concluded that Terrance could have returned to his day care center on the fourth day but for a "runny nose" policy that prohibited his attendance.[51] In addition, since the child had been treated by his pediatrician on just one occasion, he did not meet the test of continuing treatment by a health care provider.[52] Accordingly, the court ruled that plaintiff failed to establish either prong under the Department of Labor regulations.[53]

The court in *Seidle* took a strict constructionist view in applying the Act and the regulations to the facts of this case. Since Congress did not include ear infections in the list of "serious health conditions," and since plaintiff's child did not satisfy what the court perceived to be a two-prong test mandated under the Department of Labor regulations, the plaintiff's child was found not to suffer from a "serious health condition."[54] Thus, the plaintiff was not entitled to an excused absence from work under the FMLA.

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[47] *See id.* at 240.

[48] *See id.* at 242. The court further lamented that "there is as of yet no body of law to provide guidance." *Id.; see also* 29 C.F.R. § 825.114 (1996).

[49] *See* Seidle, 871 F. Supp. at 242.

[50] *Id.* (emphasis in original).

[51] *See id.* at 244. The court also noted that "[a] runny nose can hardly be classified as an incapacity." *Id.*

[52] *See id.* The plaintiff argued that the child met the alternative definition of continuing treatment; i.e., treatment on one occasion which results in a regimen of continuing treatment (taking antibiotics) under the supervision of a health care provider. *See id.* The court rejected this argument because the child had no further contact with the doctor (his mother failed to make a follow-up appointment). *See id.* This case may have been decided differently under the final regulations which specifically include a course of prescription medication such as an antibiotic as constituting a regimen of continuing treatment. *See* 29 C.F.R. § 825.114(b) (1996).

[53] *See* Seidle, 871 F. Supp. at 243. Plaintiff attached to her motion for summary judgment affidavits of several doctors who averred to the potential serious complications of otitis media. *See id.* at 244. The court concluded, however, that the FMLA regulations defining "serious health condition" are only concerned with the present state of an illness, not with its potential dangers. *See id.* at 246.

[54] *See id.* at 246.

Similarly, another court concluded that children afflicted with chicken pox failed to constitute a "serious health condition" when continuing treatment did not accompany the illness.[55] In *Reich v. Midwest Plastic Engineering, Inc.*,[56] the Department of Labor brought suit on behalf of the plaintiff who was terminated after missing work for her own and her two daughters' chicken pox.[57] In the case of the daughters, one was taken to a medical center where she was diagnosed with the illness; the other did not visit a doctor. Without any detailed analysis of the daughters' cases, the court summarily ruled that since the girls did not receive inpatient care and since only one daughter visited a health care provider, their cases of chicken pox did not constitute a "serious health condition."[58]

In *Sakellarion v. Judge & Dolph, Ltd.*,[59] the plaintiff claimed that caring for her emancipated asthmatic daughter caused her extended absence from work.[60] On Monday, June 3, 1994, Sakellarion notified her employer that she would be absent until Wednesday to take care of her 36-year old daughter who was hospitalized over the weekend for an asthmatic attack.[61] Although the daughter stayed in her own apartment and did not seek additional medical treatment, the plaintiff took leave for the entire week.[62]

The court rejected the plaintiff's contention that she was entitled to FMLA leave.[63] The court first concluded that the daughter did not suffer from a "serious health condition" since she did not require inpatient care nor continuing treatment by a health care provider after she was discharged from the hospital.[64] In addition, the court noted that the emancipated daughter was not incapable of self-care.[65] Accordingly, she failed to satisfy the definition of a "son or daughter" for whom an employee is allowed to render care under the Act.[66]

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[55] *See* Reich v. Midwest Plastic Eng'g., Inc., 934 F. Supp. 266, 268 (W.D. Mich. 1996).

[56] *Id.* at 266. This case generated another trial court opinion on the issue of the adequacy of notice of intent to take FMLA leave. *See* No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 12130 (W.D. Mich. July 22, 1995).

[57] Plaintiff's own case of chicken pox is discussed *infra* at Part III. B.

[58] The court did make reference to § 2612(1) of the Act and § 825.114 of the regulations. *See* Reich, 934 F. Supp at 267.

[59] 893 F. Supp. 800 (N.D. Ill. 1995).

[60] *See id.* at 807.

[61] *See id.* at 803.

[62] *See id.* The facts are unclear as to how long, if at all, the daughter stayed with the plaintiff and her husband, and if the plaintiff visited her daughter more than once after her daughter returned to her own apartment. *See id.*

[63] *See id.* at 807.

[64] *See id.* The court's comment appears to be inconsistent. One can only conclude that the court would not consider inpatient treatment before leave commenced, but only inpatient treatment during leave, in order to satisfy § 2611(11)(A) of the Act which includes inpatient care as a "serious health condition." *See* 29 U.S.C. § 2611(11)(A) (1994).

[65] *See* Sakellarion, 893 F. Supp. at 807.

[66] *See* 29 U.S.C. § 2611(12)(B). A son or daughter means a child who is "18 years of

Finally, in *Brannon v. Oshkosh B'Gosh, Inc.*,[67] the plaintiff's employer terminated her for accumulating too many points under the company's absentee policy.[68] The employee claimed that one of her absences should have been treated as FMLA leave, and thus should not have counted against her in the calculation of the points.[69] The plaintiff's three-year old daughter had become ill with a fever, sore throat, runny nose and vomiting on Thursday, January 6, 1994.[70] Three days later, on Sunday, her parents took her to the emergency room of a local hospital where she was diagnosed and treated for "acute pharyngitis (infected throat) and an upper respiratory infection."[71] The doctor directed plaintiff to keep her daughter home from day care until she was free from fever, and at least until Wednesday, January 12.[72]

The court looked to the Act and the legislative history for guidance on the definition of a "serious health condition." It noted that the legislative history revealed that Congress intended for the Act to cover serious illnesses that last more than a few days, while minor illnesses were to be covered through the employer's sick leave policy.[73] The court applied the standards found in the legislative history to the facts of the case, but it reached a startling conclusion by remarking that:

> If the court were to limit its inquiry to the plain wording of the statute and its accompanying legislative history, it appears as though . . . [the child's] illness in January 1994, do[es] not qualify as 'serious health conditions.' Intestinal infections, respiratory infections and sore throats are not listed among the examples of serious health conditions. And while the list is not exhaustive, a head cold accompanied by fever, sore throat, diarrhea and/or vomiting is not as grave as any of the health conditions listed. In fact, an upper respiratory infection, gastroenteritis and pharyngitis seem more akin to 'minor illness[es] which last only a few days,' something Congress

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age or older and incapable of self-care because of a mental or physical disability." *Id.; see also* 29 C.F.R. § 825.113(c)(1) (1996):

> '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.

*Id.*

[67] *See* 897 F. Supp. 1028 (M.D. Tenn. 1995).

[68] *See id.* at 1030-31.

[69] *Id.* at 1030.

[70] *See id.* at 1032. The plaintiff claimed that another period of absenteeism resulted from her own serious health condition, but this will be discussed in Part III of this article. *See id.* at 1031-32.

[71] *Id.* at 1032. The doctor prescribed antibiotics for the child. *See id.*

[72] *See id.* at 1037.

[73] *See id.* at 1035.

sought to exclude from FMLA coverage. The court's inquiry, however, cannot stop here.[74]

Turning to the regulations, the court opined that the Department of Labor had developed a sort of "bright line" test for determining what illnesses qualify as a serious health condition.[75] The test was comprised of the following elements: 1) incapacitation for more than three days; 2) at least one visit to a doctor; and 3) a course of prescribed medication.[76] Under the Department of Labor test, the court noted that many more ailments would be covered under the FMLA than Congress intended.[77] The Court concluded that under this test, the daughter's illness constituted a "serious health condition."[78] The daughter not only visited a physician, but she was also incapacitated for a period of more than three days (January 7 to January 12).[79] Thus, the FMLA negated this period of unexcused absences which entitled the plaintiff to FMLA leave.

### B. *The "Serious Health Condition" of an Employee*

The first cases involving the alleged "serious health condition" of an employee were cases involving pregnancy. In *Kindlesparker v. Metropolitan Life Insurance Company*,[80] the court granted the employer's motion for summary judgment, denying the FMLA claim of a discharged pregnant employee. Without elaboration, the court held that "the terms of the Act do not apply to pregnancy related conditions before birth unless the employee has a 'serious health condi-

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[74] *Id.* at 1035-36 (citations omitted).

[75] *See id.*

[76] *See id.* The court also noted that the regulations define "incapacity" as the "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." *Id.* at n.7 (citations omitted).

[77] *See id.* at n.8.

> Furthermore, the regulation excludes specific illnesses such as the flu, while providing FMLA protection to those that are arguably less serious. For example, strep throat is a serious health condition if an employee is incapacitated for more than three days. It is easily treatable with antibiotics, however, and the patient will likely see significant improvement within 48 hours of starting antibiotics. The flu can be more serious than strep throat, in that it is a viral infection and is often only treated symptomatically. A flu patient can be bedridden for a week, having visited the doctor and having been prescribed a decongestant, for example. Although the flu patient may pass the three-prong test, flu is specifically excluded from coverage.

29 U.S.C. § 824.114(c) (1994).

[78] *See* Brannon, 897 F. Supp. at 1037.

[79] *See id.* at 1037. Although the court does not mention it in applying the test, the doctor also prescribed a course of medication for the child, thus satisfying the third prong of the test. *Id.* at 1032.

[80] No. 94-C-7542, 1995 U.S. Dist. LEXIS 6164 (N.D. Ill. May 4, 1995). The case was actually premature. The court held that the events that led to the plaintiff's discharge occurred before the Act became effective on August 5, 1993, and that it could not be applied retroactively. *See id.* at *2.

tion' that makes the employee unable to perform the functions of the job."[81]

Another case involving pregnancy suffered a similar fate. In *Gudenkauf v. Stauffer Communications, Inc.*,[82] the plaintiff-employee, Michaela Gudenkauf, claimed that her termination was due to absenteeism related to her pregnancy, rather than to her alleged poor performance and unexcused absences.[83] During her pregnancy, Gudenkauf complained of morning sickness, stress, nausea, back pain, swelling and headaches.[84] Her obstetrician, however, testified that she did not experience any complications or conditions which were not normally expected with pregnancy and that her complaints did not indicate either unusual symptoms or unusually severe conditions.[85]

The court looked to the Act, the legislative history, and the regulations in its determination of what constitutes a "serious health condition."[86] The court was particularly persuaded by the "incapacity" requirement used in the regulations in connection with continuing treatment by a health care provider in the absence of inpatient care, noting that:

> The "incapacity" requirement in 29 C.F.R. § 825.114(a)(2) is consistent with the requirement in 29 U.S.C. § 2612(a)(1)(D) that the health condition be so serious that the employee is unable to perform the functions of his position. Though Congress listed "ongoing pregnancy" as an example of a serious health condition, pregnancy entitles the employee to FMLA leave only if prenatal care is needed or her condition makes her unable to work. 20 U.S.C. § 2612(a)(1)(D); 29 C.F.R. §§ 825.112(c), 825.114(a)(2).[87]

Despite her testimony as to back pain, nausea, headaches and swelling during her pregnancy, the court concluded that the evidence was insufficient to find that "the plaintiff's pregnancy and related conditions kept her from performing the functions of her job for more than one-half day."[88] Accordingly, the court granted the employer's motion for summary judgment on Gudenkauf's FMLA claim.[89]

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[81] *Id.* at *2 (citation omitted).

[82] *See* 922 F. Supp. 465 (D. Kan. 1996).

[83] *See id.* at 468-69.

[84] *See id.* at 469.

[85] *See id.* The obstetrician's records also failed to indicate that the employee suffered from any physiological disorder or condition. *See id.* Also, her nurse practitioner did not consider Gudenkauf a high-risk pregnancy, nor did she consider her complaints as significant enough to discuss with the obstetrician. *See id.* at n.5.

[86] *See id.* at 475. The court specifically noted that it found §§ 825.114(a)(2)(ii) and 825.800 which define "serious health condition," as "a reasonable interpretation of the FMLA scheme." *Id.*

[87] *Id.* at n.12.

[88] *Id.* at 475-76.

[89] *Id.* at 476. Specifically, the court noted that:

> First, neither Gudenkauf's obstetrician nor her ARNP corroborate her testimony that she was directed or authorized by them to take leave for her pregnancy-related conditions on February 21, 1994, and thereafter. Second, her obstetrician testified that

In addition to uncomplicated pregnancies, courts have looked unfavorably on cases in which there was no continuing treatment and/or significant incapacity. In *Oswalt v. Sara Lee Corp.*,[90] for example, the employee was fired after missing five days of work due to an episode of food poisoning.[91] Although he saw his doctor, Oswalt had a medical excuse for only one day.[92] The court concluded that food poisoning that required only one visit to a doctor "cannot possibly be construed as a serious health condition under the terms of the Act."[93]

Similarly, in *Brannon v. Oshkosh B'Gosh, Inc.*,[94] the court ruled that the employee who was diagnosed as suffering from gastroenteritis and an upper respiratory infection, did not have a serious health condition.[95] Although Mrs. Brannon saw a doctor and was given three prescriptive drugs, there was no proof that she was "incapacitated" for more than three days.[96] The court noted that, "[p]laintiff stayed home for more than three days, but plaintiff cannot show she was unable to work, or that her absence was 'due to' her illness."[97]

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the medical records do not show that Gudenkauf requested or that he supplied her with any written authorization to take leave prior to her delivery. Third, the obstetrician observed from Gudenkauf's medical charts that her pregnancy was normal and that her complaints about the symptoms and conditions commonly associated with pregnancy were not unusual or severe. Fourth, her obstetrician never noted any conditions during Gudenkauf's pregnancy that would have impaired her ability to work. Fifth, the ARNP avers that she signed a leave form so that Gudenkauf would receive maternity benefits after delivery and that she did not authorize and does not believe the leave form authorizes Gudenkauf to take either full or part-time leave prior to delivery. Sixth, the ARNP never considered Gudenkauf's complaints as significant enough to discuss with her obstetrician for purposes of authorizing leave from work. *Id.*

[90] 889 F. Supp. 253 (N.D. Miss. 1995).

[91] *See id.* at 255. Oswalt also missed a month while adjusting to medication for high blood pressure, but this occurred during July 1993 which was the month before the FMLA became effective. *Id.* at 258. On appeal, the Fifth Circuit, stated that the high blood pressure could be considered a "serious health condition" because it apparently involved continued treatment, but the period of time that the appellant missed as a result of his high blood pressure preceded the effective date of the Act. *See* 74 F.3d 91, 92-93 (5th Cir. 1996).

[92] *See* Oswalt, 889 F. Supp. at 255.

[93] *Id.* at 259. "The food poisoning did not require the plaintiff to receive inpatient care at a hospital, hospice, or residential medical care facility, nor did it require continuing medical treatment by a health care provider." *Id.*

[94] 897 F. Supp. 1028 (M.D. Tenn. 1995). The illness of plaintiff's daughter and the court's conclusion that the child did suffer a serious health condition due to acute pharyngitis and an upper respiratory infection which kept her out of day care for more than three days, is discussed *infra*, at Part III. A. *See supra* text accompanying notes 64-75.

[95] *See* Brannon, 897 F. Supp. at 1037.

[96] *See id.*

[97] *Id.* (citing 29 C.F.R. § 825.114(a)(2)(i) (1996)). The court applied the same Department of Labor "bright line" test to the illness of the plaintiff's daughter. *See id; see also supra* text accompanying notes 64-75.

In *Hott v. VDO Yazaki Corporation*,[98] the court granted the employer's motion for summary judgment for reasons similar to those in Mrs. Brannon's case. Ms. Hott left work on March 2, 1994, two days after returning from a two month disability leave.[99] Although she later produced a Family and Medical Leave Certification Form that indicated that she was suffering from "sinobronchitis," the Certification Form merely stated "that the condition would likely last for seven to ten days and that the plaintiff was able to perform the functions of her position."[100]

The court relied upon § 825.114 of the Family and Medical Leave Act regulations for a definition of "serious health condition."[101] Seizing upon the fact that the health care provider can be required to certify that the employee is unable to perform the functions of the job, and not finding such a statement in the employee's Certification, the court concluded that sinobronchitis did not constitute a "serious health condition."[102] The court noted, however, that the result could be different "if she proved that sinobronchitis is an illness that, if not treated, would likely result in a period of incapacity of more than three days."[103]

Courts have also faced the question of whether migraine headaches constitute a "serious health condition." In *Hendry v. GTE North, Inc.*,[104] the employer terminated the plaintiff on February 24, 1994, for exceeding the company's standard permissible absenteeism rate.[105] The plaintiff-employee claimed to suffer from migraine headaches as often as three to four times a week, which were occasionally so severe that she could not work.[106]

The court applied the definition of "serious health condition" contained in the Act, particularly emphasizing the part of the definition regarding "continuing treatment by a health care provider."[107] Next, the court noted that "[t]he applicable regulations . . . further refine the term 'continuing treatment' as including instances where the employee 'is treated two or more times for the injury or ill-

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[98] 922 F. Supp. 1114 (W.D. Va. 1996).

[99] *See id.* at 1119.

[100] *Id.* at 1128. She was terminated on March 8, 1994. *See id.* at 1119.

[101] *See id.* at 1127. The court applied the interim regulations to this case since it arose before the final regulations went into effect on February 6, 1995. *See id.* The final regulations are not retroactive. *See generally* Robbins v. Bureau of Nat'l. Affairs, 896 F. Supp. 18 (D.D.C. 1995) (holding that the final regulations, which became effective in 1995, cannot be applied retroactively).

[102] *See Hott*, 922 F. Supp. at 1128 (citing Seidle v. Provident Mut. Life Ins., Co., 871 F. Supp. 238 (E.D. Pa. 1994) and Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1994) for precedent).

[103] *Id.* The final regulations do not provide for such a contingency. Except for a period of incapacity due to pregnancy or to a chronic serious health condition, the regulations require actual incapacity of more than three consecutive days. *See* 29 C.F.R. § 825.114(a)(2).

[104] *See* 896 F. Supp. 816 (N.D. Ind. 1995).

[105] *See id.* at 819.

[106] *See id.* at 820.

[107] *See id.* at 827 (citations omitted).

ness by a health care provider.' 29 C.F.R. § 825.114(b)(1)."[108] The court reasoned that the migraine headaches both necessitated continuing medical treatment and rendered the employee unable to perform the functions of her job, thus concluding that the plaintiff had a serious health condition.

The way in which the courts are determining what constitutes a "serious health condition" is best illustrated by *Reich v. Midwest Plastic Engineering., Inc.*[109] In *Reich*, both the employee mother and her two daughters contracted chicken pox.[110] The court, solely focusing on the treatment received, rejected the claim that the daughters suffered from a serious health condition.[111] The court, however, arrived at a completely different conclusion regarding the mother. Approximately twenty-five weeks pregnant and suffering from nausea, vomiting and dehydration, she was hospitalized overnight on account of her condition.[112] Reviewing the employee's course of treatment, the court concluded that:

> Ms. Van Dosen was clearly under the continuing treatment of a health care provider, within the meaning of the Act, because she was treated for chicken pox on three separate occasions. The first was her visit to Dr. Keaffaber on November 15. Regardless of whether this visit was a scheduled prenatal visit, Dr. Keaffaber treated her chicken pox as is clearly demonstrated by the facts that she was diagnosed as having chicken pox and that she was prescribed medication for that condition. The second time she was treated for chicken pox involved her overnight stay at the hospital. The third was her visit to Dr. Keaffaber on November 22. That she was treated for chicken pox during this visit is evident from Dr. Keaffaber's notation in the hospital records regarding a follow-up visit on "Monday or Tuesday," as well as from the notes from the November 22 visit in which Dr. Keaffaber indicated that her condition was better.
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> Furthermore, there is no genuine issue as to the fact that Ms. Van Dosen was admitted into the hospital and retained overnight as a direct result of her having chicken pox. This fact alone sufficiently establishes that Ms. Van Dosen's condition constituted a "serious health condition."[113]

In short, the inpatient care (overnight stay) in a hospital and the continuing treatment by a health care provider sufficiently differentiated her situation from her daughters', to convince the court that her case of chicken pox qualified as a "serious health condition" while her daughters' did not.[114]

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[108] *Id.* This regulation is codified under the Final Regulations at 29 C.F.R. § 825.114(a)(2)(i)(A) (1996).

[109] No. 1-94-CV-525, 1995 U.S. Dist. LEXIS 8772 (W.D. Mich. June 6, 1995).

[110] *See id.*

[111] For a discussion of the court's rejection of the daughters' "serious health condition," *see* discussion *infra* at Part III.A.

[112] *See* Reich, 1995 U.S. Dist. LEXIS 8772, at *1, *3.

[113] *Id.* at *20-21 (citations omitted).

[114] *See* Reich, 1995 U.S. Dist. LEXIS 8772, at *24 n.2. Unfortunately, Ms. Van Dosen's case was subsequently dismissed for failure to give adequate notice of her FMLA leave to her employer. *See* Reich, No. 1-94-CV-525, 1995 U.S. Dist. LEXIS 12130, at *14-15 (W.D. Mich. July 22, 1995).

### C. *An Analytical Approach to the FMLA*

Based on the newly emerging case law, it seems that courts are beginning to provide some guidance as to what constitutes a "serious health condition." In analyzing claims for FMLA leave based upon a "serious health condition," a court must first distinguish between family members and the employee.[115] When an employee requests leave to care for a family member, a court need only examine the question whether the condition is a "serious health condition," except in cases of emancipated children who must, in addition, be incapable of self-care. When the employee's own medical condition is at issue, the court must further consider whether the "serious health condition" actually makes the employee unable to perform any one of the essential functions of the employee's job.[116]

Focusing on the serious health condition issue, the court should begin with a determination of whether the person for whom medical leave is requested actually has an illness, injury, or impairment. While this is usually easy to discern, one can imagine a case where an employee seeks medical leave for no apparent reason except that the person merely did not feel up to working. In questionable cases, the employer will likely request a certificate from a health care provider that will settle the issue.[117]

Once the existence of a bona fide illness, injury, impairment, or physical or mental condition is established, the court must next address the type of treatment involved. Admission to a hospital, hospice, or residential care facility and an overnight stay, ordinarily qualifies as a "serious health condition." Nevertheless, even a case which includes hospitalization may not qualify absent some evidence of continuing incapacity after discharge.[118] Following discharge there must be a period of inability to work, attend school, or otherwise perform one's regular daily activities due to the condition, its treatment, or recovery.[119]

In cases where there is no inpatient care, the court must determine whether there was continuing treatment by a health care provider coupled with a period of incapacity. In order to be "continuing," treatment should consist of at least two consultations with a health care provider, including an examination and an evaluation of the condition.[120] If there is only one such treatment, then it must be accompanied by a regimen of continuing treatment under the supervision of a

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[115] *See* introductory discussion *infra* at Part III.

[116] *See* 29 C.F.R. § 825.115 (1996). "Essential functions" of the job is to be defined pursuant to the Americans With Disabilities Act. *See* 42 U.S.C. § 12101-12213; *see also* 29 C.F.R. § 1630.2(n).

[117] *See* 29 U.S.C. § 2613(a) (1994). An employer may require that a request for medical leave be supported by a certification from a health care provider detailing the medical facts and stating that either the employee is unable to perform the functions of the employee's position or that the employee is needed to care for the family member. *See id.*

[118] *See, e.g.*, Sakellarion v. Judge & Dolph, Ltd., 893 F. Supp. 800, 807 (N.D. Ill. 1995).

[119] *See* 29 C.F.R. § 825.114 (1996).

[120] *See id.* § 825.114(a)(2)(i)(A).

health care provider consisting of either a course of prescription medication or therapy which requires special equipment.[121] Cases decided thus far make it clear that without continuing treatment, a court cannot consider an illness, injury or impairment as a "serious health condition."[122]

In cases involving pregnancy, the court will need to find a bona fide period of incapacity or necessary prenatal care. The woman's incapacity cannot stem merely from the normal discomforts associated with child-bearing. Rather, the incapacity must be the result of symptoms so severe as to render her unable to perform the functions of her job.[123] If this condition is met, any period of incapacity will qualify for FMLA leave even if it is less than three days.[124]

In the case of a chronic condition, the employee must submit medical evidence verifying the need for periodic treatments by a health care provider which continue over an extended period of time.[125] Incapacity due to chronic conditions need not be continuous, but can be episodic, such as asthmatic attacks or epileptic fits.[126] There is no requirement that the treatment be effective where the incapacitating condition is permanent or long-term, such as a terminal illness.[127] Absences due to essential maintenance treatments, like chemotherapy for cancer or dialysis for kidney disease, also meet the requirement that a period of incapacity accompany the continuing treatment by a health care provider.[128] Finally, "the common cold,[129] the flu, ear aches,[130] upset stomach,[131] minor ulcers, headaches other than migraine,[132] routine dental or orthodontia problems, and periodontal

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[121] *See id.* §§ 825.114(a)(2)(i)(B), 825.114(b). Over-the-counter medications like aspirin or prescriptions for bed-rest, drinking fluid, and exercise do not constitute a regimen of continuing treatment. *See id.* This is the "bright line" test established by the court in Brannon, 897 F. Supp. 1028, 1036-37.

[122] *See, e.g.*, Seidle, 871 F. Supp. 238; *see also supra* text accompanying notes 41-54 (one treatment for an ear infection). *See also* Reich, 934 F. Supp. 266; *see also supra* text accompanying notes 55-58 (one treatment for chicken pox).

[123] *See, e.g.*, Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465 (D. Kan. 1996); *see also supra* text accompanying notes 82-89. *See also* Kindlesparker v. Metropolitan Life Ins. Co. No. 94-C-7542, 1995 U.S. Dist. LEXIS 6164 (N.D. Ill. May 1995); *see also supra* text accompanying notes 80-81.

[124] *See* 29 C.F.R. § 825.114(e) (1996). A disabling bout with morning sickness will qualify. *See id.*

[125] *See id.* § 825.114(a)(2)(iii).

[126] *See id.* § 825.114(a)(2)(iii)(C).

[127] *See id.* § 825.114(a)(2)(iv).

[128] *See id.* § 825.114(a)(2)(v). Restorative surgery after an accident or injury also qualifies under this prophylactic provision. *See* 29 C.F.R. § 825.114(c).

[129] *See, e.g.*, Brannon, 897 F. Supp. 1028; *see also supra* text accompanying notes 94-97 (gastroenteritis and upper respiratory infection did not qualify).

[130] *See, e.g.*, Seidle, 871 F. Supp. 238; *see also supra* text accompanying notes 41-54 (ear infection did not qualify).

[131] *See, e.g.*, Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1995); *see also supra* text accompanying notes 90-93 (food poisoning did not qualify).

[132] *See, e.g.*, Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D. Ind. 1995); *see also*

disease, etc."[133] do not qualify as serious health conditions in the absence of complications.[134]

## IV. CONCLUSION

The policy of the FMLA, as articulated by Congress, is to provide broad protection of the American worker within the framework of the Act. It has been left to the courts to interpret the Act as cases make their way through the court system. The litigation process establishes policy decisions which are carried out to a practical end, and have a real impact on the lives of American workers. The judicial framework thus far reflects differing interpretations that depend primarily upon whether the "serious health condition" applies directly to the employee or a family member. This trend is likely to continue in the future, as other courts ruling on cases of first impression look to the law of other jurisdictions for guidance in interpreting the Act under similar sets of circumstances. Ultimately, this will develop into a cognizable national framework of established law. The courts' understanding of what constitutes a "serious health condition" is still in the early stages and the parameters are still being defined. As time passes, however, the courts will undoubtedly continue to refine their understanding of what constitutes a "serious health condition," using the case rulings up to this point as guiding precedence. As greater numbers of FMLA cases wind their way through the system, courts will increasingly provide clarity and guidance in answering key questions surrounding the ambiguity of what constitutes a "serious health condition."

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*supra* text accompanying notes 104-108 (migraine headaches qualified).

[133] 29 C.F.R. § 825.114(c).

[134] *See* 29 C.F.R. § 825.114(c) (1996). *See also,* Reich, No. 1:94-CV-525, 1995 U.S. Dist. LEXIS 8772; *see also supra* text accompanying notes 55-58 (chicken pox of a pregnant employee which resulted in hospitalization).