

FIXING THE FMLA’S FLAWS: A FIGHT FOR CARE, ADULT CHILDREN, AND TAX INCENTIVES

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I. INTRODUCTION

Abigail's vision is blurry as she opens her eyes to a white hospital room. She sees a figure standing next to her, "Mom?" The nurse speaks, "No, I'm sorry. Your mother isn't able to leave work. You were involved in a car accident. Do you have a spouse that we can call?" Abigail shakes her head no. She is only 20 years old. Marriage is the last thing on her mind as a sophomore in college. The nurse leaves to check on another patient. Abigail is alone and panicking. Tears stream down her face as she examines her bandaged body and the needles stuck in her arms. She wants her mother, but she knows that as a single parent, her mom cannot afford to lose her job. Meanwhile, across town, Abigail's mother is sobbing in her workplace bathroom. She looks at her watch; five more hours until she can be by her daughter's side. She cannot bear to think of her daughter being all by herself during this traumatizing event.

Abigail and her mother's situation is emotionally tragic. Yet, it is exactly what the Family and Medical Leave Act ("FMLA" or the "Act") allows. In fact, the Department of Labor's "Frequently Asked Questions" webpage specifically addresses Abigail's predicament.¹ It states that if an adult daughter who suffers from epilepsy is admitted to inpatient care for a night due to a car accident, a parent cannot leave to care for the daughter because she is not considered a "daughter" under the FMLA.² Because Abigail is over the age of 18, and even though she has a serious health condition, she no longer qualifies as a "daughter" unless she meets other disability requirements.³ This cannot be what the FMLA's legislative drafters had intended when they preached a resolution to the work-family struggle.⁴ At a minimum, public policy would not dictate such a disturbing result.

This Note analyzes two major issues underlying the Family and Medical Leave Act: what does it mean to "care" for a family member with a

¹ Wage & Hour Div., *Questions and Answers Concerning the Use of FMLA Leave to Care for a Son or Daughter Age 18 or Older*, U.S. DEP'T OF LAB., www.dol.gov/whd/fmla/adultchildFAQs.htm (last visited Mar. 31, 2016) [hereinafter *Questions and Answers*].

² *Id.*

³ See MARY BETH MAXWELL, U.S. DEP'T OF LABOR, ADMINISTRATOR'S INTERPRETATION NO: 2013-1, at 2 (2013), https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2013/FMLAAI2013_1.pdf.

⁴ See Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 45 (2004).

serious health condition, and what constitutes a “son or daughter” under the Act? This Note argues for amendments to the FMLA’s legislation and regulations, including a broader definition of “care,” an elimination of age distinctions in the definition of “son or daughter,” and the creation of various tax credits to supplement these changes. Additionally, this Note emphasizes the need for a moderate approach. Attempting to satisfy both sides of the employer-employee spectrum ideally creates a solution that is realistic and implementable. Gridlock in the system hurts both sides and does little to effectuate any meaningful change.

Part II of this Note provides background information regarding the FMLA. First, the Act’s legislative history is discussed, showing how the FMLA evolved in Congress before its final passage in 1993. Next, Part II.B examines the basic structure of the FMLA, its statutory language, and judicial interpretations. Part II.C then addresses the FMLA’s purposes and goals, as well as the public’s criticism of the Act. Part II.C also looks at surveyed effects of the FMLA, with information regarding who takes leave, how much, and why. Part II.D reviews the FMLA’s regulations, highlighting issues such as the meaning of “son or daughter” and “care.” Part II.D then examines the judicial construction of the “care” regulation in various circuit courts. Part III provides an analysis of the “care” regulation, the meaning of “son or daughter,” and potential tax incentives. Part III.A addresses the ambiguous nature of the “care” regulation, why a broad interpretation is beneficial, and proposes an amended regulation. Part III.B argues for the omission of extra requirements in the FMLA’s definition of “son or daughter.” This section uses policy justifications for making the age of children irrelevant under the FMLA. Finally, Part III.C proposes several types of tax incentives to supplement the FMLA’s changes.

II. THE STATE OF THE FMLA

Before proposing any solutions to the FMLA, this Note begins with a discussion of the Act’s background. The FMLA is legislation that allows employees to request and take leave for a number of medically-related reasons.⁵ The FMLA has been amended various times, been subjected to harsh criticism, and caused much confusion among judges and employers. Despite this, the Act remains an important piece of legislation that has allowed employees to safeguard their employment, while simultaneously being able to care for themselves and their family members.

This Note first examines the legislative history of the FMLA, from the early, proposed bills to its passage in 1993. Next, Part II.B explains the basic provisions underlying the modern-day FMLA, including what is required in order to be eligible for leave. Part II.C then explores the regulations implemented by the Department of Labor for the FMLA, with an emphasis on the ambiguous definition of “care,” as well as what it means to be a “son or

⁵ See *infra* Part II.B.

daughter.” Finally, the background portion of this Note concludes by reviewing case law that has surfaced in recent years, showing conflicting interpretations of “care” under the FMLA.

A. *The FMLA’s Journey Through Congress*

The Family and Medical Leave Act of 1993 had to travel a long road in Congress before becoming what it is today.⁶ Its enactment was largely in response to a change in societal dynamics, with more and more women entering the workforce.⁷ The number of working women had increased by almost 200% from 1950 to 1990.⁸ There had also been a significant rise in single-parent households, with an increase from 16% in 1975 to 27% in 1992.⁹ This alerted legislators to the need for job-secure leave due to the financial difficulties that single heads-of-households could face.¹⁰ Furthermore, the elderly population was continuing to grow, with adult children more commonly providing basic care for their terminally ill parents in lieu of institutionalization.¹¹ Due to these factors, balancing the needs of maintaining strong families and remaining employed had become increasingly burdensome.¹²

Before the federal statute’s enactment, a majority of states had already passed legislation that provided leave for certain parental and medical issues.¹³ However, these state statutes were not nearly as expansive as the later enacted FMLA.¹⁴ Employers had also started to offer family leave policies;

⁶ See generally H.R. REP. NO. 101-28, pt. 1, at 2–3 (1990).

⁷ See *id.* at 5.

⁸ Maegan Lindsey, Comment, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. TEX. L. REV. 559, 562 (2009).

⁹ William J. Clinton, *Statement on Signing the Family and Medical Leave Act of 1993*, AM. PRESIDENCY PROJECT (Feb. 5, 1993), www.presidency.ucsb.edu/ws/?pid=46777.

¹⁰ See H.R. REP. NO. 103-8, pt. 1, at 23 (1993) (“Divorce, separation, and out-of-wedlock births have left millions of women to struggle as single heads of households to support themselves and their children. These women often cannot keep their families above the poverty line.”).

¹¹ See H.R. REP. NO. 101-28, pt. 1, at 6.

¹² See *id.* at 5.

¹³ See Cheryl L. Cooper, *Family Leave and Family Law*, 27 FAM. L.Q. 461, 461 (1993); Kristin M. Malone, *Using Financial Incentives to Achieve the Normative Goals of the FMLA*, 90 TEX. L. REV. 1307, 1310 (2012) (“By 1993, thirty-four states offered family leave policies, although the scope of benefits varied widely across jurisdictions.”).

¹⁴ See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 731 (2003) (stating that 15 states gave women up to one year of maternity leave, without any comparable provision for men); H.R. REP. NO. 103-8, pt. 1, at 21 (“Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family.”).

unfortunately, many of these policies were available only to female employees.¹⁵ There was much to improve upon.

1. The Parental and Disability Leave Act of 1985

The FMLA's journey through Congress began in 1985, when Representative Patricia Schroeder (D-CO) introduced H.R. 2020: the Parental and Disability Leave Act ("PDLA").¹⁶ This bill required employers to provide employees with parental leave for the birth, adoption, or serious illness of a child, as well as temporary leave for cases involving the inability to work due to medical reasons.¹⁷ The PDLA was broader than the subsequently enacted FMLA, as it provided for 18 weeks of parental leave every two years, as well as 26 weeks for serious illness each year.¹⁸ The bill also ensured that an employee would be able to keep her health insurance while on leave and return to her previous position post-leave.¹⁹ The PDLA applied to all companies, regardless of size.²⁰ However, this bill was met with fierce opposition in the business world, with an overwhelming fear that the proposed legislation would impose serious financial burdens on employers.²¹ Accordingly, the bill never saw the light of day.

2. The Shape-Shifting Leave Legislation

The PDLA was not the end of the line in regard to family leave legislation. Determined to pass a bill, leave-proponents continued to chip away at the controversial legislation until it became agreeable to the other side. In 1986, Representatives Schroeder and William Clay (D-MO) introduced H.R. 4300, the Parental and Medical Leave Act ("PMLA").²² This new bill imposed additional restrictions on the family leave legislation to appease opponents. The size requirement of companies that had to comply with the legislation increased from no requirement to companies with at least 15 employees.²³ Furthermore,

¹⁵ See Malone, *supra* note 13, at 1310; see also Grossman, *supra* note 4, at 25–26 (“[A] Bureau of Labor Statistics survey show[ed] that while thirty-seven percent of private-sector employees had access to maternity leave, only eighteen percent had access to paternity leave.”).

¹⁶ H.R. REP. NO. 101-28, pt. 1, at 3.

¹⁷ *Id.*

¹⁸ Grossman, *supra* note 4, at 36.

¹⁹ Michael Selmi, *Is Something Better Than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL’Y 65, 69 (2004).

²⁰ STEVEN K. WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 139 (2001).

²¹ See *id.* (explaining that The National Federation of Independent Business ran a poll and reported consistently that 85% of its members opposed the bill); Selmi, *supra* note 19, at 69.

²² H.R. REP. NO. 101-28, pt. 1, at 3.

²³ WISENSALE, *supra* note 20, at 143.

employees had to have worked 500 hours or three months to be eligible for leave, and the total allowance of leave, parental or medical, was set at 36 weeks over a two year period.²⁴

Still with no luck, Representatives Schroeder and Clay next introduced H.R. 925, the Family and Medical Leave Act, in 1987 ("1987 FMLA").²⁵ This bill provided unpaid leave for the birth or adoption of a child, to care for a seriously ill child or parent, and for an employee's own serious illness.²⁶ It sliced the 1986 proposal by allowing only 10 weeks of parental leave over a two year period, or 15 weeks of medical leave over a one year period.²⁷ Further, the bill increased the size requirement to companies with at least 50 employees.²⁸ Once introduced in the Senate, however, the 1987 FMLA was withdrawn from consideration because proponents failed to win a cloture vote to end a filibuster against the legislation.²⁹

3. President Bush's Proposal and President Clinton's Victory

Despite a rocky beginning, supporters of the legislation began to win over Republicans by characterizing the leave bill in a pro-life manner.³⁰ The Democrats argued that the rate of abortions would decline with the Act's passage because women could keep their careers and simultaneously raise children.³¹ With more bipartisan support, two subsequent versions of the Act were passed by Congress in 1989 and 1992.³² However, President George H.W. Bush vetoed both pieces of legislation, citing concerns that the bills would negatively affect employers.³³

The President followed his 1992 veto with an alternative plan to create a refundable tax credit for businesses with less than 500 employees, if the businesses provided 60 days of family leave for their employees.³⁴ The tax credit would have given \$1,200 per employee to complying employers.³⁵ Congress ultimately rejected this proposal, while both chambers fervently, but

²⁴ *Id.*

²⁵ H.R. REP. NO. 101-28, pt. 1, at 4.

²⁶ *Id.*

²⁷ Maureen Porette & Brian Gunn, *The Family and Medical Leave Act of 1993: The Time Has Finally Come for Governmental Recognition of True "Family Values,"* 8 ST. JOHN'S J. LEGAL COMMENT. 587, 590-91 (1993).

²⁸ WISENSALE, *supra* note 20, at 144.

²⁹ H.R. REP. NO. 101-28, pt. 1, at 5.

³⁰ WISENSALE, *supra* note 20, at 146.

³¹ *Id.*

³² Porette & Gunn, *supra* note 27, at 592-94.

³³ *Id.*

³⁴ *Id.* at 593.

³⁵ *Id.* at 356 n.37.

unsuccessfully, attempted to override the presidential veto.³⁶

After many committee hearings and a change in administration from Republican to Democrat, the FMLA was finally signed into law by President Bill Clinton on February 5, 1993.³⁷ At the signing ceremony, he eloquently summarized the purpose of the Act, “American workers will no longer have to choose between the job they need and the family they love.”³⁸

B. A Characterization of the 2016 FMLA

Societal trends have held strong from 1993 to 2016. Women are still trying to balance the dual roles of full-time employee and full-time caretaker-mother.³⁹ Additionally, the United States’s population continues to age, with a prediction that the number of adults 65 and over will double by 2050.⁴⁰

The modern day FMLA is a remedial statute⁴¹ that allows eligible employees to take up to 12 workweeks of unpaid leave each year for various medical reasons.⁴² These reasons include the birth, adoption, or fostering of a child; caring for a spouse, child, or parent with a serious health condition; a serious health condition of the employee herself; and any qualifying demand from a spouse, child, or parent that is on active duty in the military.⁴³

A serious health condition is defined by the statute as “an illness, injury, impairment, or physical or mental condition that involves- (a) inpatient care in a . . . medical care facility[,], or (b) continuing treatment by a health care provider.”⁴⁴ For a serious health condition, the regulations require there be either of the following: at least three consecutive days of incapacity and two or more times of treatment by a healthcare provider; or a chronic serious health condition that results in a period of incapacity.⁴⁵ Incapacity is defined as the “inability to work, attend school or perform other regular daily activities due to

³⁶ *Id.* at 593–94.

³⁷ 159 CONG. REC. 463 (2013), <https://www.congress.gov/crec/2013/02/04/CREC-2013-02-04-pt1-PgS463-6.pdf>; Grossman, *supra* note 4, at 47.

³⁸ Grossman, *supra* note 4, at 45.

³⁹ Kathryn A. Devinney & Asafu Suzuki, *Family and Medical Leave Act*, 14 GEO. J. GENDER & L. 449, 464 (2013) (“The traditional stereotypes of women as primary caretakers in the domestic sphere and of men as the principal income-earners in the family structure remain deeply entrenched in American culture.”).

⁴⁰ JENNIFER M. ORTMAN ET AL., U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES: POPULATION ESTIMATES AND PROJECTIONS 1 (2014), www.census.gov/content/dam/Census/library/publications/2014/demo/p25-1140.pdf.

⁴¹ *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 734 (2003).

⁴² 29 U.S.C. § 2612(a)(1) (2014).

⁴³ *Id.*

⁴⁴ *Id.* § 2611(11).

⁴⁵ 29 C.F.R. § 825.115 (2015).

the serious health condition, treatment therefor, or recovery therefrom.”⁴⁶ Children, under the FMLA, include biological children, adopted or foster children, step children, or children of a person with an “in loco parentis” relationship.⁴⁷

The FMLA imposes numerous requirements before an employee can be eligible to take leave. Eligible employees must have worked for at least 12 months for the employer, and at least 1250 hours the prior year.⁴⁸ Additionally, the employee must work at a worksite with 50 or more employees within a 75 mile radius.⁴⁹ The FMLA places duties on those private sector employers that employ at least 50 employees, while public sector employers have no size requirement.⁵⁰ Employees requesting leave for purposes of a serious health condition can choose to take it intermittently or by working a reduced schedule.⁵¹ Intermittent leave is leave taken in different blocks of time, but for the same qualifying reason.⁵²

To protect against abuse, employers may require multiple certifications from healthcare providers before granting leave to an employee.⁵³ Furthermore, if an employer suspects that an employee may be abusing the FMLA based on a pattern of absences, such as Mondays and Fridays, the employer may ask the employee’s healthcare provider whether the pattern is consistent with the employee’s need for leave.⁵⁴ Finally, employers may deny leave to salaried employees in the top 10% of the company’s paid workers.⁵⁵

Post-leave, the FMLA ensures that employees will be restored to their same or comparable positions, continue to receive benefits, and not be penalized for taking statutorily authorized leave.⁵⁶ Employers have no discretion to deny leave if the employees are both eligible and taking leave for a qualifying reason.⁵⁷ If employees believe that their employers have violated the FMLA, they can file a complaint with the Department of Labor’s Wage and

⁴⁶ *Id.* § 825.113(b).

⁴⁷ *Id.* § 825.122(d). An “in loco parentis” relationship means a person with daily responsibilities for the child or who financially supports the child. *Id.* § 825.122(d)(3).

⁴⁸ 29 U.S.C. § 2611(2)(A).

⁴⁹ *Id.* § 2611(2)(B)(ii); *see also* LISA GUERIN & DEBORAH C. ENGLAND, *THE ESSENTIAL GUIDE TO FAMILY & MEDICAL LEAVE* 37 (4th ed. 2015).

⁵⁰ 29 U.S.C. § 2611(4).

⁵¹ 29 C.F.R. § 825.202.

⁵² *Id.*

⁵³ 29 U.S.C. § 2613(c)(1).

⁵⁴ 29 C.F.R. § 825.308(e).

⁵⁵ *Id.* § 825.217; WISENSALE, *supra* note 20, at 144.

⁵⁶ 29 C.F.R. § 825.214 (right to reinstatement); *Id.* § 825.209 (maintenance of employee benefits).

⁵⁷ Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2197 (Jan. 6, 1995) (to be codified at 29 C.F.R. pt. 825).

Hour Division or institute a civil action.⁵⁸ Employees are entitled to receive equitable relief or monetary damages against a noncomplying employer.⁵⁹ The U.S. Supreme Court recently held in *Nevada Department of Human Resources v. Hibbs*⁶⁰ that state employees could constitutionally recover monetary damages for a state's violation of the Act's family-care provision.⁶¹

C. Purposes, Critiques, and Effects of the FMLA

Purposes of the FMLA include allowing employees to take leave for medical reasons, reducing the potential for employment discrimination, and promoting gender equality in the workplace.⁶² Congress drafted the FMLA to be gender-neutral in its efforts to ensure protection against workplace discrimination.⁶³ A statute that encompassed leave for both male and female employees would hopefully prevent employers from the temptation to only hire men due to a perception that women were more likely to require leave.⁶⁴ In its fight through Congress, feminist groups had argued for the law's gender-neutral status—emphasizing the importance of equality as opposed to “an accommodation for women.”⁶⁵ The legislation was also deemed to be pro-family.⁶⁶ Unstable families had been connected to crime, teen pregnancy, illiteracy, and homelessness.⁶⁷ Furthermore, workers without leave increased the cost of programs such as welfare and unemployment insurance.⁶⁸ Congress

⁵⁸ 29 C.F.R. § 825.400(a).

⁵⁹ *Id.* § 825.400(c).

⁶⁰ 538 U.S. 721 (2003).

⁶¹ *Id.* at 725.

⁶² 29 U.S.C. § 2601 (2014).

⁶³ Selmi, *supra* note 19, at 67.

⁶⁴ *See id.* at 66; *see also Hibbs*, 538 U.S. at 722–23 (“Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.”); Grossman, *supra* note 4, at 27 (“In the case of women-only leave policies . . . women become less attractive to employers because they are likely to cost more in terms of time off, lost productivity, and replacement workers, as well as make quicker exits from the workforce.”).

⁶⁵ Selmi, *supra* note 19, at 70.

⁶⁶ H.R. REP. NO. 103-8, pt. 1, at 24 (1993) (“Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults.”); H.R. REP. NO. 101-28, pt. 1, at 82 (1990).

⁶⁷ H.R. REP. NO. 103-8, pt. 1, at 17 (“When families fail to carry out these critical functions [of caregiving], the societal costs are enormous.”); H.R. REP. NO. 101-28, pt. 1, at 19.

⁶⁸ H.R. REP. NO. 103-8, pt. 1, at 31.

felt that legislation should address the cause of these issues to properly combat them, rather than focusing only on their effects.⁶⁹

1. A Minimum Standard and the FMLA's Critics

Despite being a carefully drafted piece of legislation, the FMLA is not without its opponents. Some immediately criticized the Act as being too limited; its unpaid leave and employer size-requirements were viewed as barriers to effective change.⁷⁰ Proponents countered that it was a necessary first step in Congress, and that subsequent amendments would alleviate the perceived drafting flaws.⁷¹ They argued that the FMLA only provided a minimum benefit, while state legislatures and individual employers could choose to implement more expansive policies.⁷² The House stated that the FMLA was to be used to “take broad societal concerns out of the competitive process” of businesses.⁷³ The thought was that employers would not be able to regulate themselves to strive for equality when they also had a competing goal of profit-making.⁷⁴ Thus, supporters felt that it was necessary to create a minimum standard for employers to follow, which would lessen the temptation to compete through a race to the bottom.⁷⁵ However, the FMLA drafters still attempted to ensure that businesses could meet the Act's standards.⁷⁶

Post-FMLA, states have expanded their family leave acts by extending coverage,⁷⁷ increasing the allowable leave time,⁷⁸ and including more family

⁶⁹ *Id.* (“The Government has in place extensive and often costly social welfare programs to deal with these social concerns.”).

⁷⁰ Selmi, *supra* note 19, at 71.

⁷¹ *Id.* at 72.

⁷² LINDA LEVINE, CONG. RESEARCH SERV., THE FAMILY AND MEDICAL LEAVE ACT: CURRENT LEGISLATIVE AND REGULATORY ACTIVITY 1 (2010).

⁷³ H.R. REP. NO. 103-8, pt. 1, at 22.

⁷⁴ *Legislative Hearing on H.R. 1, the Family and Medical Leave Act: Hearing Before the Subcomm. on Labor-Mgmt. Relations*, 103d Cong. 5 (1993) [hereinafter *Hearing on H.R. 1*] (statement of Hon. William D. Ford, Rep. from Michigan) (“The bill reflects a careful balance between the needs of America’s families and the interests of public and private employers.”); Malone, *supra* note 13, at 1311.

⁷⁵ H.R. REP. NO. 101-28, pt. 1, at 18 (1990).

⁷⁶ H.R. REP. NO. 103-8, pt. 1, at 29 (“[F]amily and medical leave encourages loyal and skilled employees to remain with the company—improving employee morale, reducing turnover, and saving on costs for recruitment, hiring, and training.”).

⁷⁷ Y. Tony Yang & Gilbert Gimm, *Caring for Elder Parents: A Comparative Evaluation of Family Leave Laws*, 41 J.L. MED. & ETHICS 501, 504 (2013) (explaining that Connecticut and D.C. have increased leave coverage by decreasing the minimum number of hours an employee must work to be eligible for leave).

⁷⁸ *Id.* at 504 (Massachusetts and Rhode Island).

members in the family-leave provision.⁷⁹ Certain states have even enacted paid family-leave policies,⁸⁰ in contrast to the FMLA's unpaid requirements. However, some employers oppose an expansion of the FMLA, believing that employees often misuse the Act to take unnecessary leave.⁸¹

The FMLA is further criticized for not being helpful to women because, as the average woman earns less than the average man, women are incentivized to take leave over men in a double-income household, due to the fact that they are the lower wage earners.⁸² Furthermore, studies have shown that men who request FMLA leave have been perceived as weaker and at a greater risk of being demoted.⁸³ This may help explain the hesitance that men feel toward taking FMLA leave and why statistically a woman is more likely to request caretaker leave.⁸⁴

Another one of employers' many concerns with the FMLA involves intermittent leave. Intermittent leave, often taken with little notice to employers, creates administrative difficulties such as recording FMLA leave, as well as finding ways to cover the work.⁸⁵ Absences often compel employers to shift the absentee's work burden to another, present employee.⁸⁶ This work-

⁷⁹ Arianne Renan Barzilay, *Back to the Future: Introducing Constructive Feminism for the Twenty-First Century—A New Paradigm for the Family and Medical Leave Act*, 6 HARV. L. & POL'Y REV. 407, 414 (2012).

⁸⁰ Bennett Pine, *United States: Recent Developments in Overtime Pay, Paid Family Leave and Paid Sick Time*, MONDAQ (Mar. 19, 2014), <http://www.mondaq.com/unitedstates/x/300942/employee+rights+labour+relations/Recent+Developments+In+Overtime+Pay+Paid+Family+Leave+And+Paid+Sick+Time> (stating that California, New Jersey, and Rhode Island guarantee paid family leave, while Nebraska and Minnesota have pending paid leave proposals).

⁸¹ Malone, *supra* note 13, at 1316.

⁸² *Id.* at 1313.

⁸³ Tom Spiggle, *Are Fathers Punished at Work Too?*, HUFFINGTON POST: THE BLOG (Apr. 7, 2014, 3:40 PM), http://www.huffingtonpost.com/tom-spiggle/are-fathers-punished-at-work-too_b_5106762.html.

⁸⁴ JACOB ALEX KLERMAN ET AL., ABT ASSOCS., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 60 (2012), <http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf> [hereinafter ABT TECHNICAL REPORT]; Kathryn A. Devinney & Asafu Suzuki, *supra* note 39, at 464.

⁸⁵ Carrie Lukas, *Who Pays for My Time Off? The Costs and Consequences of Government-Mandated Leave*, INDEP. WOMEN'S F. (Feb. 2008), www.iwf.org/files/bfdf657bd2feaeefc1aca0a9a134cbff.pdf (“[E]mployers report ‘job disruptions’ and ‘adverse effects on the workforce’ resulting ‘when employees take frequent, unscheduled, intermittent leave from work with little or no advance notice to the employer.’”); Allen Smith, *FMLA Continues to Challenge Employers*, SHRM (July 16, 2014), www.shrm.org/legalissues/federalresources/pages/fmla-challenges.aspx.

⁸⁶ *Employee Absences Have Consequences for Productivity and Revenue SHRM Research Shows*, SHRM (Dec. 15, 2014), www.shrm.org/about/pressroom/pressreleases/pages/employeeabsencesurvey.aspx [hereinafter *Employee Absences*]; *Improvements to the FMLA Regulations Are Urgently Needed—Protect FMLA by Clarifying “Medical Leave Provisions,”* NAT'L COALITION TO PROTECT FAM. LEAVE, www.protectfamilyleave.org/about/issue.cfm (last visited Mar. 31, 2016) [hereinafter

shifting can lead to a decrease in employee morale,⁸⁷ with employees consequently developing a negative view of the FMLA.

2. Surveyed Effects of the FMLA

In 1995, 2000, and, most recently, 2012, the Department of Labor (“DOL”) conducted surveys to determine the effects of the FMLA’s enactment.⁸⁸ In 2012, the survey found that 59% of all employees were eligible for the FMLA.⁸⁹ However, the number of employees who actually took leave for an FMLA reason was 13%.⁹⁰ Fifty-five percent of leave taken was for an employee’s own illness.⁹¹ Twenty-one percent of leave taken was for pregnancy or care of a new child.⁹² Finally, caring for a qualifying relative with a serious health condition trailed behind at 18%.⁹³

The 2012 survey further found that a little over half of leave-taking employees were female.⁹⁴ The survey also found that most FMLA leave is short, with 42% of leave taken for 10 days or less.⁹⁵ Additionally, most employees reported receiving either full pay or partial pay while on leave, confirming that some employers have chosen to expand the FMLA’s minimum requirement of unpaid leave.⁹⁶ Common reasons why employees returned to work after taking leave were that they no longer had a need for leave or could no longer afford it.⁹⁷ Most employers reported that they were only minimally burdened by complying with the FMLA.⁹⁸ Finally, only two percent of covered worksites reported confirmed misuse of the FMLA, while three percent reported suspicion of FMLA misuse.⁹⁹

Improvements] (“[B]y far the most prevalent method that employers use to cover work is to assign it temporarily to other coworkers.”).

⁸⁷ *Employee Absences*, *supra* note 86.

⁸⁸ ABT TECHNICAL REPORT, *supra* note 84, at i.

⁸⁹ *Id.*

⁹⁰ *Id.* at 161.

⁹¹ *Id.* at ii.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 60.

⁹⁵ *Id.* at ii.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at iii.

⁹⁹ WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FMLA IS WORKING (2013), http://www.dol.gov/whd/fmla/survey/FMLA_Survey_factsheet.pdf.

D. Regulations Under the FMLA

At its enactment, Congress authorized the DOL to issue regulations to implement the FMLA.¹⁰⁰ The DOL went through several years of notice-and-comment rulemaking, with its final regulations being published on January 6, 1995.¹⁰¹ The regulations were then revised in 2008, 2010, and 2013 to create and expand military leave provisions in the FMLA.¹⁰² In 2010 and 2013, the DOL added and revised special eligibility requirements for airline flight crews, changing the hours of service that they have to work to be entitled to FMLA leave.¹⁰³ This allowed for more flight crew employees to be eligible for FMLA leave because of their different work schedules.¹⁰⁴

In light of recent Supreme Court decisions regarding same sex marriage,¹⁰⁵ the DOL also broadened the definition of “spouse” to include “a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including ‘common law’ marriage and same-sex marriage.”¹⁰⁶ Finally, in a recent presidential memorandum, President Barack Obama directs agencies to ensure that various workplace flexibilities, including FMLA leave, are “available to the maximum extent practicable, in accordance with the laws and regulations governing these programs and consistent with mission needs.”¹⁰⁷ As shown above, the many facets of government ensure that the FMLA continues to change.

1. “Son or Daughter”

The Wage and Hour Division’s Administrator recently clarified what it means to be a “son or daughter” under the FMLA.¹⁰⁸ When a “son or daughter” is under the age of 18, the inquiry is the same as it is for spouses and parents: is the employee needed to care for the family member with a serious health

¹⁰⁰ Lindsey, *supra* note 8, at 566–67.

¹⁰¹ *Id.* at 566.

¹⁰² Wage & Hour Div., *Family and Medical Leave Act: Protections Expanded for Military Families and Airline Flight Crews*, U.S. DEP’T OF LAB., <http://www.dol.gov/WHD/fmla/2013rule/> (last visited Feb. 17, 2016) [hereinafter *Military and Airline Protections*].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating the DOMA provision that defined marriage as between one man and one woman).

¹⁰⁶ Wage & Hour Div., *Fact Sheet #28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act*, U.S. DEP’T OF LAB. (July 2015), <http://www.dol.gov/whd/regs/compliance/whdfs28f.pdf> [hereinafter *Fact Sheet #28F*].

¹⁰⁷ Enhancing Workplace Flexibilities and Work-Life Programs: Memorandum for the Heads of Executive Departments and Agencies, 79 Fed. Reg. 36,625, 36,625–26 (June 23, 2014), www.gpo.gov/fdsys/pkg/FR-2014-06-27/html/2014-15334.htm.

¹⁰⁸ MAXWELL, *supra* note 3, at 1.

condition?¹⁰⁹ However, additional requirements are necessary to qualify for FMLA leave when a child is over the age of 18.¹¹⁰ To qualify for leave, the adult child must be “incapable of self-care because of [a] mental or physical disability.”¹¹¹ The Administrator recently interpreted that the age of the child at the onset of disability is irrelevant when determining whether the child meets the disability requirement.¹¹²

The DOL regulations use the Americans with Disabilities Act’s (“ADA”) (expanded by the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”)) definition of “disability” as a physical or mental impairment that substantially limits a major life activity.¹¹³ To be considered “incapable of self-care” due to the disability, the child must “require[] 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).”¹¹⁴ Examples of these activities include bathing, dressing, eating, taking public transportation, and paying bills.¹¹⁵ In sum, for a parent to be eligible to take FMLA leave to care for an adult child, the child must meet all of the following prerequisites: (1) have a disability as defined by the ADA; (2) be incapable of self-care due to that disability; (3) have a serious health condition; and (4) need to be cared for because of that serious health condition.¹¹⁶

The ADAAA and the Equal Employment Opportunity Commission (“EEOC”) state that the definition of disability should be construed broadly, and should not invite “extensive analysis.”¹¹⁷ While pregnancy is not a disability under the ADA, pregnancy-related impairments may fall within the definition if they substantially limit a major life activity.¹¹⁸ Many impairments overlap, satisfying both the definitions of “serious health condition” under the FMLA regulations and “disability” under the ADA.¹¹⁹ The U.S. Senate Committee on Labor and Human Resources stated the following to justify the adult child provision:

¹⁰⁹ *Id.* at 2.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 4.

¹¹⁴ 29 C.F.R. § 825.122(c)(1) (2015); *see also* MAXWELL, *supra* note 3, at 2.

¹¹⁵ 29 C.F.R. § 825.122(c)(1); *see also* MAXWELL, *supra* note 3, at 5.

¹¹⁶ *See* MAXWELL, *supra* note 3, at 2.

¹¹⁷ 42 U.S.C. § 12102(4) (2014); 29 C.F.R. § 1630.1(c)(4); *see also* MAXWELL, *supra* note 3, at 4.

¹¹⁸ *See* MAXWELL, *supra* note 3, at 5.

¹¹⁹ *See id.* at 6.

The bill . . . recognizes that in special circumstances, where a child has a mental or physical disability, a child's need for parental care may not end when he or she reaches [18]. . . . An adult [child] who has a serious health condition and who is incapable of self-care because of a mental or physical disability presents the same compelling need for parental care as the child under [18] with a serious health condition.¹²⁰

As alluded to in the introduction, the DOL's webpage responding to frequently asked questions poses the following dilemma: "My adult daughter has a disability, epilepsy, which is controlled by medication. Can I take FMLA leave to care for her if she is admitted to a hospital overnight for observation due to a car accident?"¹²¹ The DOL's answer is a firm "no."¹²² According to its reasoning, the adult daughter, though having a disability, is *not* incapable of self-care due to that disability.¹²³ Even if the adult daughter is considered to have a serious health condition by receiving inpatient care, the parent would not be allowed to take FMLA leave because the adult daughter's ability to care for herself means that she is not considered a "daughter" for FMLA leave purposes.¹²⁴

2. "Care"

Despite having been signed into law for over 20 years, the FMLA still contains ambiguities that courts are trying to grapple with. For example, the FMLA's statutory language does not define what it means "to care for" a relative with a serious health condition under section 2612(a)(1)(C).¹²⁵ Thus, because of the absence of clarification in the statute, it is appropriate to look to the DOL's regulations for a definition.¹²⁶ However, section 2612(a)(1)(C) does not have a parallel regulation that defines "care" as applicable to that part of the statute. There is, however, a regulation pertaining to healthcare provider certifications under the FMLA that defines what is meant by "needed to care for."¹²⁷ The regulation explains what is necessary for a healthcare provider to certify that the employee is needed to care for a family member for leave under section 2612(a)(1)(C).¹²⁸ Regulation section 825.124(a)¹²⁹ broadly states that

¹²⁰ S. REP. NO. 103-3, at 22 (1993); *see also* MAXWELL, *supra* note 3, at 2.

¹²¹ *Questions and Answers*, *supra* note 1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 29 U.S.C. § 2612(a)(1)(C) (2014).

¹²⁶ Lindsey, *supra* note 8, at 567.

¹²⁷ 29 C.F.R. § 825.124(a) (2015).

¹²⁸ *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 841 (7th Cir. 2014); 29 C.F.R. § 825.124(a).

the FMLA encompasses care of both a physical and psychological nature.¹³⁰ The regulation then gives two examples of what it means to care for a family member with a serious health condition: (1) where “the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport his or herself to the doctor,” and (2) “providing psychological comfort and reassurance which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.”¹³¹

Courts have struggled with how to interpret the family-care provision of the FMLA, namely, what does it mean “to care for” a family member to qualify for leave? The Ninth Circuit in *Marchisheck v. San Mateo*¹³² and the First Circuit in *Tayag v. Lahey Clinic Hospital*¹³³ have held that “care” must include some sort of medical treatment to fall under the family-care provision of the Act.¹³⁴ In contrast, the Seventh Circuit in *Ballard v. Chicago Park District*¹³⁵ has ruled that the definition of “care” under the FMLA includes basic needs and is not restricted by geographic location.¹³⁶

i. Marchisheck v. San Mateo

A Ninth Circuit decision, *Marchisheck*, brings to light an above-stated ambiguity in the FMLA: what does it mean to care for a family member with a serious health condition? The court in *Marchisheck* determined that “care” of a family member with a serious health condition must involve ongoing medical treatment to be authorized under the FMLA.¹³⁷ In *Marchisheck*, the plaintiff-employee’s teenage son, who had a history of psychological issues, suffered a physical beating from his acquaintances.¹³⁸ The employee, fearing for her son’s safety, determined that it was necessary to move him to the Philippines to live

¹²⁹ The 2008 amendments to the FMLA regulations moved what was once 29 C.F.R. § 825.116 to what is now 29 C.F.R. § 825.124. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,953 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825). However, this move was made very little substantive change to the actual regulation. *Id.*

¹³⁰ 29 C.F.R. § 825.124(a).

¹³¹ *Id.*

¹³² 199 F.3d 1068, 1076 (9th Cir. 1999).

¹³³ 632 F.3d 788, 790 (1st Cir. 2011).

¹³⁴ *Id.* at 791 n.2 (“The inclusion of ‘psychological comfort and reassurance,’ 29 C.F.R. 825.116, in the definition of care cannot extend to accompaniment of an ill spouse on lengthy trips unrelated to medical care.”); *Marchisheck*, 199 F.3d at 1076 (“[C]aring for’ a child with a ‘serious health condition’ involves some level of participation in ongoing treatment of that condition.”).

¹³⁵ 741 F.3d 838, 839 (7th Cir. 2014).

¹³⁶ *Id.*

¹³⁷ *Marchisheck*, 199 F.3d at 1076.

¹³⁸ *Id.* at 1070–71.

with his uncle.¹³⁹ The employee requested leave from her supervisors to accompany her son abroad, but was denied her request due to a lack of employee coverage.¹⁴⁰ However, the employee had already bought her plane tickets and could not afford to buy new ones.¹⁴¹ She decided to take the trip, despite the denied request.¹⁴² Her employer thereafter terminated her for taking the unauthorized leave.¹⁴³

The Ninth Circuit concluded that the son's physical injuries and psychological issues did not qualify as a "serious health condition" under the FMLA.¹⁴⁴ Furthermore, the court declared that even if he did have a serious health condition, the plaintiff still would not have been entitled to FMLA leave.¹⁴⁵ This was because the employee's motivation for moving her son to the Philippines was not to seek any psychological or medical treatment.¹⁴⁶ The court concluded that the FMLA's corresponding regulations suggested that "caring for" a family member would have to involve "some level of participation in ongoing treatment" of the serious health condition.¹⁴⁷ Therefore, the employee's concern for her son's safety in moving him to the Philippines did not constitute "caring for" him under the statute.¹⁴⁸

ii. *Tayag v. Lahey Clinic Hospital*

Demonstrating the influential effect of case law, the First Circuit in *Tayag* relied upon *Marchishek*'s holding to determine whether an employee-plaintiff's FMLA claim had merit.¹⁴⁹ In *Tayag*, an employee's husband suffered from chronic liver, heart, and kidney problems.¹⁵⁰ The employee had to help him with his basic needs, including transportation, administering medication, preparing meals, and providing psychological support.¹⁵¹ The employee was accustomed to taking intermittent FMLA leave for the care of her husband,

¹³⁹ *Id.* at 1071.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1072.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1076.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* ("[The employee's] asserted purpose in moving [her son] to the Philippines was to keep him safe from further beatings. She was not moving [him] so that he could receive any superior—or any—medical or psychological treatment.").

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* ("[The employee] could not 'care for' him under the FMLA by removing him to a place where he would receive *no* treatment for either condition and leaving him there.").

¹⁴⁹ *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788, 791 n.2 (1st Cir. 2011).

¹⁵⁰ *Id.* at 789.

¹⁵¹ *Id.*

which her employer had always approved.¹⁵² These brief periods of leave, often one to two days, allowed the employee to take her husband to doctor appointments or help him around the house.¹⁵³

In July of 2006, the employee requested leave for seven weeks to care for her husband after his surgery.¹⁵⁴ Unbeknownst to her employer, the employee's plan was to take a faith-based healing trip with her husband to various religious sites in the Philippines.¹⁵⁵ The employer required two certifications from healthcare providers that would verify that the employee's presence was necessary for leave.¹⁵⁶ Though the first was in the employee's favor, the second certification letter stated that the employee's presence was not necessary to care for her husband.¹⁵⁷ Thereafter, the employer denied the employee's FMLA request.¹⁵⁸ However, the employee was already on the trip when the second certification letter came.¹⁵⁹ She was terminated upon return.¹⁶⁰

The employee had indeed visited religious sites with her husband while in the Philippines, but the couple had also met with friends and family on the trip.¹⁶¹ Further, the husband had not received any "conventional" medical treatment while abroad.¹⁶² While on the trip, the employee continued to provide care for her husband that she normally would have given at home.¹⁶³ She gave him his medication, helped him walk, carried his luggage, and made sure that his illnesses did not further weaken him.¹⁶⁴

The district court ruled in favor of the employer, stating that the FMLA did not cover what was "effectively a vacation."¹⁶⁵ The First Circuit affirmed, determining that, despite having a serious health condition, the employee's presence on the trip did not qualify as "caring for" her husband.¹⁶⁶ This was largely because the trip's purpose was not to seek medical treatment, with the court going into a deep analysis regarding whether faith-based healing applied

¹⁵² *Id.* at 790.

¹⁵³ *Tayag v. Lahey Clinic Hosp., Inc.*, 677 F. Supp. 2d 446, 448 (D. Mass. 2010).

¹⁵⁴ *Tayag*, 632 F.3d at 790.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 790–91.

¹⁶⁶ *Id.* at 793.

under the definition.¹⁶⁷ The court cited *Marchishek* as guidance for determining the proper interpretation of the pertinent statutory section.¹⁶⁸ Ultimately, the court found that the faith-based healing trip did not constitute medical treatment under the FMLA, and therefore the employee did not qualify for leave under the Act's family-care provision.¹⁶⁹ Even if the employee's services qualified as "caring for" her husband, the second medical certification denying her necessity was enough to defeat the claim because the statute requires a third certification when there are two conflicting medical opinions.¹⁷⁰

iii. Ballard v. Chicago Park District

The Seventh Circuit, in *Ballard*, took a turn from the Ninth and First Circuits' views, arguing for a broader definition of "care" under the FMLA.¹⁷¹ In *Ballard*, the plaintiff-employee's mother had been diagnosed with end-stage congestive heart failure.¹⁷² The employee acted as her mother's primary caregiver by administering medication, draining fluids, bathing, and feeding her.¹⁷³ While discussing end-of-life goals with her hospice care worker, the mother mentioned that she wanted to take a family vacation to Las Vegas before she passed.¹⁷⁴ Hearing of this news, a charitable organization for terminally-ill adults granted the mother her wish by providing funds necessary for her and her daughter to take the trip.¹⁷⁵ The employer ultimately denied the employee's request for leave, though the employee's knowledge of this refusal was in dispute.¹⁷⁶ Regardless, the mother-daughter duo took the trip to Las Vegas, where the employee looked after her mother the way that she normally would have at home—by giving her medication and ensuring that her health was stable.¹⁷⁷ The trip's purpose was for the mother's enjoyment, and not to seek any type of professional medical treatment.¹⁷⁸ However, the employee did

¹⁶⁷ *Id.* at 791–92 (“Tayag properly does not claim that caring for her husband would itself be protected leave under the FMLA if the seven-week trip was for reasons unrelated to medical treatment of [her husband’s] illnesses.”).

¹⁶⁸ *Id.* at 791 n.2 (“The inclusion of ‘psychological comfort and reassurance,’ 29 C.F.R. [825.124], in the definition of care cannot extend to accompaniment of an ill spouse on lengthy trips unrelated to medical care.”).

¹⁶⁹ *Id.* at 791.

¹⁷⁰ 29 U.S.C. § 2613(d) (2014); *Tayag*, 632 F.3d at 793.

¹⁷¹ *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 839 (7th Cir. 2014).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 840.

¹⁷⁷ *Ballard v. Chi. Park Dist.*, 900 F. Supp. 2d 804, 807 (N.D. Ill. 2012).

¹⁷⁸ *Id.*

have to take her mother to a hospital in Las Vegas, when an unexpected fire broke out in the hotel and prevented access to her medication.¹⁷⁹ After the trip, the employee returned to work, where she was subsequently fired for the unexcused absences that had accumulated while in Las Vegas.¹⁸⁰

The employee then brought suit against the employer, alleging a violation of the FMLA.¹⁸¹ The Seventh Circuit found that the employee's leave was authorized under the FMLA because she was providing physical care for her mother during the trip.¹⁸² The court looked to the FMLA statute and corresponding regulations to determine the proper definition of "care."¹⁸³ Using the medical certification regulation, section 825.124, as analogous to section 2612(a)(1)(C) of the statute, the court defined "care" to include "basic medical, hygienic, or nutritional needs" for the family member with a serious health condition.¹⁸⁴ The court then used the statutory tool of *in pari materia*—presuming that words used in the same statute hold the same meaning throughout different sections—to apply the regulation to the issue at hand.¹⁸⁵ The court determined that the employee was traveling with her mother to provide the services listed in the regulation, and therefore her caregiving was within the meaning of the statute.¹⁸⁶ The court also stated that the FMLA was not restricted to a particular geographic location, so the fact that the care was in Las Vegas was of no consequence.¹⁸⁷

The court reviewed its sister circuits' decisions, which had restricted the definition of "care" to that involving medical treatment.¹⁸⁸ It determined not to adopt these views, however, because the FMLA did not speak in terms of "treatment."¹⁸⁹ Furthermore, the definition of "serious health condition" in the Act provided that active treatment was not required.¹⁹⁰ Therefore, it would not make sense to read "treatment" into the statute as being necessary.¹⁹¹ Finally, the sister circuits' analyses had not expressed why "care" would be any different on a trip as opposed to at home.¹⁹²

¹⁷⁹ *Ballard*, 741 F.3d at 840.

¹⁸⁰ *Ballard*, 900 F. Supp. 2d at 807.

¹⁸¹ *Ballard*, 741 F.3d at 840.

¹⁸² *Id.* at 842.

¹⁸³ *Id.* at 841.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 841–42.

¹⁸⁷ *Id.* at 840.

¹⁸⁸ *Id.* at 842.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

III. REMEDIES FOR THE MALADIES

As shown above, the FMLA is not a stagnant piece of legislation. Its provisions have had an influential effect on the workplace, in both positive and negative ways. Some believe that the Act has done too much, while others argue that it has done too little.¹⁹³ The overwhelming consensus, however, is that the FMLA is a confusing piece of legislation that spurs discontent from both sides. This Note recognizes the public's dissatisfaction and calls for several changes to the Act. These changes are meant to appease both employers and employees.

This Note argues below that the Seventh Circuit's interpretation of what constitutes "care" under the FMLA is more in line with congressional intent, public policy, and the recent trends of the nation. Part III.A encourages the DOL to define "care" in the regulations that pertain to the applicable section of the FMLA. This definition of care should mirror, but reword for clarification, the other section on medical certification, while ensuring that there is no ambiguity regarding travel or the requirement of ongoing medical treatment. Next, Part III.B advocates for the elimination of any distinction between children under the age of 18 and those over the age of 18 in regard to leave for family care. This Note's proposed legislation will not require an adult child to have a disability or be incapable of self-care to qualify as a "son or daughter" under the FMLA. Finally, Part III.C further advocates for the creation of FMLA tax credits for employers and employees to supplement the broad interpretation of "care" and the inclusivity of adult children, and also to combat any potential FMLA abuse.

A. The "Care" Regulation

The DOL should amend its regulations to include a definition of "care" that specifically pertains to section 2612(a)(1)(C)¹⁹⁴ of the Act, rather than making courts look toward the medical certification section to analogize what they believe was meant to apply to section 2612(a)(1)(C).¹⁹⁵ The lack of regulation creates uncertainty for employers, employees, and courts, when trying to decipher what is allowable under the FMLA. The consequences of this confusion are depicted throughout the case law that has surfaced on the issue of "care."¹⁹⁶ Neither employers nor employees can be expected to properly comply with the FMLA when the rules they must adhere to are a source of conflict for those who are far better equipped to interpret such rules than the lay businessman.

¹⁹³ See *supra* Part II.C.

¹⁹⁴ 29 U.S.C. § 2612(a)(1)(C) (2014).

¹⁹⁵ *Id.*

¹⁹⁶ See *Ballard*, 741 F.3d 838; *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788 (1st Cir. 2011); *Marchischeck v. San Mateo*, 199 F.3d 1068 (9th Cir. 1999).

The regulation that courts turn to, 29 C.F.R. § 825.124, is entitled: “Needed to care for a family member or covered service member.”¹⁹⁷ It broadly states that, for medical certifications, the definition of when an employee is “needed to care for” a family member includes both physical and psychological care.¹⁹⁸ The regulation then provides two situations where an employee would be needed to care for a family member.¹⁹⁹ The regulatory language states that “[i]t includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic . . . needs.”²⁰⁰ Section 825.124 is inadequate as written because it is unclear whether the examples of care are conclusive or open to further meaning. The language of “includes” and “for example” is too vague for courts and employers to properly determine what is allowable. If this was a conscious choice by regulatory drafters, the indecisive case law²⁰¹ stemming from the matter should alert them to a need for re-drafting.

1. Possible Drafting Solutions for the “Care” Issue

The legislative drafters could not have intended for employees to be able to take vacations with their ill family members while writing it off as FMLA leave. Despite this, the definition of “care” should be broad enough to include situations that do not contain medical treatment, while at the same time ensuring that employees are not effectively taking FMLA-vacations.

i. Internal Revenue Code Inspiration

One solution to ease the courts’ concerns regarding vacation leave would be to look toward the Internal Revenue Code for inspiration. In the itemized deduction section of the Internal Revenue Code, section 213 discusses the allowance of deductions for medical and dental expenses.²⁰² Section 213(d)(1) defines medical care, while section 213(d)(2) addresses deductions for “lodging away from home [to be] treated as paid for medical care.”²⁰³ Among other restrictions, section 213(d)(2) states that this type of lodging will be deductible only if there is “no significant amount of personal pleasure, recreation, or vacation in the travel away from home.”²⁰⁴ Using this language, the DOL could amend its regulations by keeping a broad definition of “care,”

¹⁹⁷ 29 C.F.R. § 825.124 (2015).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* § 825.124(a).

²⁰¹ *See supra* Part II.D.2.

²⁰² I.R.C. § 213 (2014).

²⁰³ *Id.* § 213(d)(1)–(2).

²⁰⁴ *Id.* § 213(d)(2)(B).

while adding that the FMLA leave, taken with the intent to travel away from home, shall not include a significant amount of recreation or vacation.

However, this type of remedy may cause issues due to its potential for allowing employers to block FMLA leave with a heavy hand, while prying into the personal lives of employees. Furthermore, modeling the FMLA regulations off of the Internal Revenue Code could create confusion for employers and employees. People often rely on accountants, attorneys, and tax computer programs to decipher the Internal Revenue Code each year during tax season. Writing this technical definition into the FMLA could end up unduly burdening employees who are trying to take leave. A broad interpretation of “care” will provide administrative simplicity both for employers and courts. To require anything more than a medical certification for FMLA leave could create tension in the workplace, with employers probing too far into the lives of their employees and loved ones’ health conditions. This was shown in *Tayag*, when the court had to examine every aspect of the employee’s trip, including socializing and religious beliefs.²⁰⁵

ii. A Clarified, Proposed Regulation

Another solution is to keep the FMLA’s “care” definition broad, while placing the burden on the least-cost avoider: the employer. Families should not be encouraged to take “vacations” on FMLA leave, but at the same time, a bright-line formula is needed to simplify courts’ and employers’ understanding of the Act. It should not make a difference whether an employee is at home or traveling with a family member. The amended regulation should specifically state that the definition of care is not changed by whether the employee’s leave will be spent at home or away from home. This fact should be disregarded entirely when courts or employers are deciding whether the leave is valid. The regulation should also state that there is no requirement of “ongoing medical treatment” when an employee is needed to care for a family member with a serious health condition. Any “treatment” necessities are handled by the requirement and definition of “serious health condition,” as well as the need for inpatient and home care under the psychological prong of the regulation.

A separate regulation for section 2612 should be drafted that explicitly lays out the two prongs of “care.” To draft this, section 825.124²⁰⁶ can be used, but reworded, to state the following:

“To care for,” under section 2612(a)(1)(C) means the following:

(a) Physical care: if the family member is unable to care for her own basic needs (such as medical, hygienic, nutritional, safety, or unable to transport herself to the doctor).

²⁰⁵ *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788, 791–92 (1st Cir. 2011).

²⁰⁶ 29 C.F.R. § 825.124 (2015).

(b) Psychological care: if psychological comfort and reassurance would be beneficial to the family member who is receiving inpatient or home care. If psychological care is accompanied by physical care (as defined in (a)), there is no need for the family member to be receiving inpatient or home care.

(c) Whether the leave includes traveling with a family member outside of one's home shall not be a factor in determining whether the employee is "caring for" the family member with a serious health condition.

(d) There is no requirement that the employee be participating in ongoing medical treatment of the family member to be eligible for leave to care for her.

2. Case Law Interpretations

After proposing the new regulation, this Note defends its expansive interpretation of care, in contrast to the narrower definition proposed by the Ninth and First Circuits.²⁰⁷ When deciding how to draft a new regulation, it is helpful to analyze the already existing case law on the issue. This Note argues that the Seventh Circuit's reading of the FMLA is more accurate than the Ninth and First Circuits' interpretations. The already restrictive nature of the Act ensures that the Seventh Circuit's holding would not adversely affect employers in any substantial way. The definition of "care" should not include "medical treatment," as is emphasized by *Marchisheck* and *Tayag*.²⁰⁸ It is understandable that these courts are wary of allowing for vacation time under the guise of FMLA leave. However, by adding unnecessary requirements to the "care" definition, *Marchisheck* and *Tayag* create the potential for more issues.

i. *Marchisheck v. San Mateo*

The court in *Marchisheck* determined that "care" of a family member with a serious health condition must involve "some level of participation in ongoing treatment of that condition" to be authorized under the FMLA.²⁰⁹ However, the Ninth Circuit did not have the requisite facts to make the meaning of "care" an issue,²¹⁰ and the faulty analysis of such has created bad precedent for lower courts and sister circuits to adopt. First, the court in its analysis relies on the DOL regulation pertaining to the medical certification section of the FMLA, rather than the section at issue.²¹¹ Neglecting to highlight

²⁰⁷ See *supra* Part II.D.2.

²⁰⁸ See *supra* Part II.D.2.

²⁰⁹ *Marchisheck v. San Mateo*, 199 F.3d 1068, 1076 (9th Cir. 1999).

²¹⁰ *Id.*

²¹¹ *Id.*; 29 C.F.R. § 825.124(a).

this distinction, the court continues its analysis without a proper explanation,²¹² leaving a lay reader to place more weight on the definition than should be given.

Despite its shortcomings, the Ninth Circuit's emphasis on a necessity of "treatment" is not without merit.²¹³ In fact, it is reasonable to view the second prong of the "care" definition as requiring some sort of treatment to allow leave.²¹⁴ This is because the second example relates to psychological comfort, as opposed to basic care.²¹⁵ There indeed would be potential for abuse if employees could take leave for the sole purpose of psychologically comforting their ailing family member when that family member has not gone through any sort of event that would require such comfort. Therefore, "some level of participation in ongoing treatment"²¹⁶ would be a necessary safeguard in this part of the definition to ensure that psychological comfort is not a free pass for FMLA leave. However, the regulations already address this problem by stating the necessity of inpatient or home care when referring to psychological comfort, which does not accompany the physical care example.²¹⁷ This ensures that leave for psychological care will only be allowable when the family member is, essentially, being treated.

That being said, the treatment requirement was written too broadly into *Marchisheck's* opinion, especially because both the majority of the son's ailments and the mother's support were psychologically-based.²¹⁸ The son did not need medications administered nor his food prepared; he was capable of providing his own basic care.²¹⁹ Thus, the court should have tailored its analysis to the psychological prong of the regulation. It is unclear where the *Marchisheck* court finds support for its view that ongoing treatment is a requisite step to "caring for" a family member.²²⁰ As is stated in *Ballard*, section 2612(a)(1)(C) does not speak in terms of "treatment."²²¹ *Marchisheck's* analysis is, therefore, too tenuous to be regarded as a proper interpretation of the FMLA. If Congress or the DOL meant to impose such a requirement, they would have written it more expressly into the Act.

Under this Note's proposed regulation, *Marchisheck's* result would

²¹² *Marchisheck*, 199 F.3d at 1076.

²¹³ *Id.*

²¹⁴ 29 C.F.R. § 825.124(a).

²¹⁵ *Id.*

²¹⁶ *Marchisheck*, 199 F.3d at 1076.

²¹⁷ 29 C.F.R. § 825.124(a) ("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.").

²¹⁸ *Marchisheck*, 199 F.3d at 1075.

²¹⁹ *Id.* at 1071.

²²⁰ *Id.* at 1076.

²²¹ *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 840 (7th Cir. 2014).

have likely been the same, assuming that the son had a serious health condition.²²² Looking at whether the employee was needed to care for her son, the “physical care” prong is not met because the son was capable of meeting his own basic needs. There is a possibility that the son qualifies as not being able to meet his own “safety” needs, as is used in the regulation. However, it is unlikely that being assaulted by one’s peers²²³ is what the legislature meant by unable to meet one’s own “safety” needs. The “psychological care” prong is also unsatisfied because the employee’s leave was not to provide comfort in conjunction with the son’s inpatient or home care. There was no inpatient or home care involved, and therefore, the employee would not have been needed to care for her son under the FMLA. Whether or not the employee was traveling to the Philippines²²⁴ would be irrelevant.

ii. Tayag v. Lahey Clinic Hospital

The First Circuit in *Tayag* relied upon the Ninth Circuit’s *Marchisheck* opinion,²²⁵ though *Tayag*’s opinion contained very different facts. In actuality, *Tayag*’s facts are more akin to *Ballard*’s, with a situation where the ailing family member could not provide for his basic needs without help from the employee.²²⁶ *Tayag* creates a confusing precedent because the facts given would lend to an analysis regarding physical care. However, *Tayag* analyzed the situation as if the only care given to the employee’s husband was in the form of psychological reassurance and comfort.²²⁷ The court therefore determined that, to care for her husband, the purpose of the trip would have to be to seek medical treatment.²²⁸ The question then became whether the faith-based healing, along with socializing, constituted medical care for purposes of the statute.²²⁹ This analysis was unnecessary. The court should not have ignored the “physical care”²³⁰ aspects of the trip. Whether the faith-based healing trip was congruent to medical care was not the issue.²³¹

Under this Note’s proposed regulation, *Tayag* would likely have ended differently, assuming that there was no medical certification issue.²³² Here, the first prong of the “care” inquiry would have been at issue: that is, physical care.

²²² *Marchisheck*, 199 F.3d at 1076.

²²³ *Id.* at 1070–71.

²²⁴ *Id.* at 1076.

²²⁵ *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788, 791 n.2 (1st Cir. 2011).

²²⁶ *Id.* at 789.

²²⁷ *Id.* at 793.

²²⁸ *Id.* at 791.

²²⁹ *Id.*

²³⁰ 29 C.F.R. § 825.124 (2015).

²³¹ *Tayag*, 632 F.3d at 791–92.

²³² *Id.* at 793.

Because the prong regards physical care and not psychological care, there is no need for the family member to be in inpatient or home care. Thus, because the wife assisted her husband with his basic and medical needs,²³³ the physical care prong of the regulation would be satisfied. Administering the husband's medications, helping him walk, and carrying his luggage²³⁴ are all situations that satisfy the "basic needs"²³⁵ of a family member. Where they were traveling, what they were doing while traveling, and whether "faith-based healing" qualified as medical treatment, would not be questioned.

3. Alleviating Employers' Fears

Since its passage, employers have opposed expansion of the FMLA.²³⁶ However, employers should not fear a broad interpretation of "care" under section 2612.²³⁷ Opponents may believe that broadening "care" will lead to more cases decided in the employees' favor. However, from the cited court opinions, it is shown that there are other safeguards besides "care" that allow employers to win FMLA cases. The analyses above isolate "care" as being the only issue when determining *Tayag* and *Marchisheck*'s outcome. In truth, the courts would have likely held for the employers regardless of what constituted "care." In *Tayag*, the claim would have been defeated by the second medical certification denying the necessity of the wife's presence.²³⁸ In *Marchisheck*, the son's lack of a "serious health condition" was enough to disallow the employee's leave to care for him.²³⁹ Both of these opinions demonstrate that the already technical and restrictive nature²⁴⁰ of the FMLA ensures that employers will not walk away empty-handed from every FMLA violation claim.

Furthermore, employers may be worried that broadening the definition of "care" will lead to an onslaught of FMLA requests by employees who now believe that they qualify for leave. Though a valid concern, this expanded definition will not reach the majority of leave-takers. This is because the issue of "care" arises solely through the family-care provision of the FMLA, which is utilized by less than a fifth of leave-taking employees.²⁴¹ Even if the numbers increase, the self-care leave-takers will likely still outnumber the family-care leave-takers. Finally, the miniscule number of employees who do abuse the

²³³ *Id.* at 790.

²³⁴ *Id.*

²³⁵ 29 C.F.R. § 825.124.

²³⁶ *See supra* Part II.C.

²³⁷ 29 U.S.C. § 2612 (2014).

²³⁸ *Tayag*, 632 F.3d at 793.

²³⁹ *Marchisheck v. San Mateo*, 199 F.3d 1068, 1076 (9th Cir. 1999).

²⁴⁰ *See supra* Part II.B.

²⁴¹ ABT TECHNICAL REPORT, *supra* note 84, at ii.

FMLA²⁴² should not negatively affect the vast majority of employees who truly need the Act to safeguard their salaries, while being able to tend to their family members' needs.

4. Why a Broad Interpretation Is Needed

As a remedial statute,²⁴³ the FMLA should be construed broadly. Specifically, the family-care provision should be read broadly to effectuate the purposes of the FMLA: that is, being a pro-family piece of legislation.²⁴⁴ Women continue to be considered “caregivers” in 2016 and are more likely to request FMLA leave than their male colleagues.²⁴⁵ Consequently, a restrictive definition of “care” would disproportionately affect women in a negative way.²⁴⁶ As the legislation was intended to ensure that women were treated fairly in the workplace,²⁴⁷ an over-denial of leave requests would circumvent the Act's purpose. If women are continually denied leave requests, while continually having to request leave to care for ailing family members, this can either lead to termination for unauthorized leave or resignation due to a lack of alternative means of care.²⁴⁸ This effectively forces women to “choose between the job they need and the family they love,”²⁴⁹ which is exactly what the Act was designed to prevent. Furthermore, the United States' rapidly aging population²⁵⁰ may lead to more family members who require care from their

²⁴² WAGE & HOUR DIV., U.S. DEP'T OF LAB., FMLA IS WORKING (2013), http://www.dol.gov/whd/fmla/survey/FMLA_Survey_factsheet.pdf (stating that two percent of covered worksites reported confirmed misuse of the FMLA, while three percent reported suspicion of FMLA misuse).

²⁴³ Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 734 (2003).

²⁴⁴ H.R. REP. NO. 103-8, pt. 1, at 24 (1993); H.R. REP. NO. 101-28, pt. 1, at 82 (1990); *Hearing on H.R. 1, supra* note 74 (statement of Hon. Matthew G. Martinez, Rep. from California) (“Our ‘family values’ are something right about America. But there is something wrong with America if we support family values, but fail to support the family.”).

²⁴⁵ ABT TECHNICAL REPORT, *supra* note 84, at 60.

²⁴⁶ Lisa M. Keels, *Family and Medical Leave Act*, 7 GEO. J. GENDER & L. 1043, 1051 (2006) (“As long as women are faced with the dual responsibilities of career and family, they cannot compete in a market system where unwavering dedication is required for success.”).

²⁴⁷ 29 U.S.C. § 2601 (2014).

²⁴⁸ Debra H. Kroll, *To Care or Not to Care: The Ultimate Decision for Adult Caregivers in a Rapidly Aging Society*, 21 TEMP. POL. & CIV. RTS. L. REV. 403, 407 (2012) (“Many adult children caregivers end up quitting work entirely in order to become full-time caregivers for elderly parents because the juggling act is unsustainable.”).

²⁴⁹ Grossman, *supra* note 4, at 45.

²⁵⁰ JENNIFER M. ORTMAN ET AL., U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 1 (2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

younger, working relatives.²⁵¹ This will likely result in a rise of FMLA requests, as employees deal with their loved ones' illnesses. Now, more than ever, a broad definition of "care" is needed.

The FMLA had a promising beginning in Congress,²⁵² but became more and more restrictive as it worked its way through the legislative process. Company size requirements,²⁵³ hours that an employee must work each year,²⁵⁴ and length of allowable leave²⁵⁵ slowly became less agreeable for employees. The enacted FMLA certainly was created with employers in mind,²⁵⁶ as it sets a high bar for employees to be eligible for leave.

Despite a constrictive beginning, recent activity shows that the nation is moving toward an FMLA expansion. Further amendments would be consistent with this country's actions. Recent regulatory amendments show that the DOL is embracing a broad view of the FMLA, as opposed to narrowing the Act's language. For example, the expansion to military caregivers,²⁵⁷ same-sex spouses,²⁵⁸ and airline flight attendants²⁵⁹ increases the number of eligible employees. Furthermore, the nation as a whole is pushing for greater rights under the FMLA, with states passing paid family leave laws²⁶⁰ and members of Congress proposing a paid family leave bill at the federal level.²⁶¹ President Obama's recent memorandum should also be considered, which directs agency heads to regulate the FMLA in the most expansive way allowable.²⁶² Finally, the Supreme Court's recent decision in *Hibbs* validates the FMLA's original

²⁵¹ Yang & Gimm, *supra* note 77, at 502 ("[T]he number of seniors expected to be living with long-term illnesses requiring high levels of care, particularly dementia, is expected to grow substantially in the coming decades, possibly doubling by the year 2030.").

²⁵² Grossman, *supra* note 4, at 36.

²⁵³ The company size requirement for FMLA-compliance increased from no requirement to the modern day requirement of at least 50 employees. LEVINE, *supra* note 72, at 2; WISENSALE, *supra* note 20, at 139.

²⁵⁴ The hours of service eligibility requirement increased from 500 hours to 1,250 hours in a given year. WISENSALE, *supra* note 20, at 143; Grossman, *supra* note 4, at 19–20.

²⁵⁵ The duration of allowable leave decreased from 18 weeks of parental leave every two years and 26 of weeks medical leave each year, to 12 weeks of all leave per year. 29 U.S.C. § 2612(a)(1) (2014); Grossman, *supra* note 4, at 36.

²⁵⁶ H.R. REP. NO. 103-8, pt. 1, at 22, 29 (1993).

²⁵⁷ *Military and Airline Protections*, *supra* note 102.

²⁵⁸ *Fact Sheet #28F*, *supra* note 106.

²⁵⁹ *Military and Airline Protections*, *supra* note 102.

²⁶⁰ *See Pine*, *supra* note 80.

²⁶¹ S. 786, 114th Cong (2015); FACT SHEET: THE FAMILY AND MEDICAL INSURANCE LEAVE ACT (THE FAMILY ACT) (2015), <http://www.nationalpartnership.org/research-library/work-family/paid-leave/family-act-fact-sheet.pdf> (describing a paid family leave bill sponsored by Representative Rosa DeLauro (D-Conn.) and Senator Kirsten Gillibrand (D-N.Y.)).

²⁶² *See Enhancing Workplace Flexibilities and Work-Life Programs*, 79 Fed. Reg. 36,625, 36,623–26 (June 23, 2014), www.gpo.gov/fdsys/pkg/FR-2014-06-27/html/2014-15334.htm.

purposes, and extends its reach to include more employers.²⁶³ Each branch of government—the legislative, executive, and judicial—has, through words and actions, been advocating and allowing for the FMLA’s expansion. Therefore, the broad definition of “care” proposed by this Note should be implemented.

B. Adult Children Under the FMLA

Closely connected with the above-mentioned “care” issue²⁶⁴ is *who* employees can take leave to care for under the FMLA. The statute states that an employee can take leave to care for “the spouse, or a son, daughter, or parent, of the employee” with a serious health condition.²⁶⁵ Thus, the next issue that needs to be examined is what constitutes a “son or daughter” for care-taking purposes.

For an employee to be eligible to take FMLA leave regarding the care of a child over the age of 18, the adult child must have a serious health condition and a disability for which they are incapable of self-care.²⁶⁶ The DOL recently issued an interpretation in 2013, clarifying that “disability” should be defined under the ADA’s broad definition.²⁶⁷ Though employers are questioning whether there will be an increase of FMLA requests to care for adult children,²⁶⁸ their fears are trumped by public policy and the realities of today’s society. This Note argues against the requirement of any “disability” in regard to the eligibility of adult children as qualifying family members under the FMLA. The DOL and Congress should amend the Act and its regulations to eliminate the extra requirements for adult children²⁶⁹ and allow for children of any age to qualify as a “son or daughter” under the FMLA.

1. An Unexplained Age Limit

First, there is no parallel requisite for other listed relationships that an employee may request leave to care for. Children under 18, parents, and spouses are only required to have a serious health condition and a need for the employee’s care.²⁷⁰ Why would adult children have two separate requirements

²⁶³ Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 733 (2003).

²⁶⁴ See *supra* Part III.A.

²⁶⁵ 29 U.S.C. § 2612(a)(1)(C) (2014).

²⁶⁶ *Id.* § 2611(12); MAXWELL, *supra* note 3.

²⁶⁷ MAXWELL, *supra* note 3.

²⁶⁸ Allen Smith, *DOL Guidance May Increase FMLA Requests for Care of Adult Children*, SOC’Y FOR HUM. RESOURCE MGMT. (Jan. 17, 2013), www.shrm.org/legalissues/federalresources/pages/adult-child-care-fmla.aspx (“[E]mployers can expect more requests from employees seeking protection under the act to care for adult children unable to care for themselves.”).

²⁶⁹ MAXWELL, *supra* note 3.

²⁷⁰ 29 U.S.C. § 2612.

of an ADA-defined disability and being incapable of self-care due to that disability? It does not make sense that the DOL so broadly defines “son or daughter” to include foster children, stepchildren, and “in loco parentis,”²⁷¹ but the moment a child turns 18, he or she is not considered a “son or daughter” under the FMLA without meeting these separate disability requirements. The drafters may have found it necessary to draw a line as to when a child ceases to require parental care. Because 18 is the age of legal adulthood,²⁷² it is understandable why Congress and the DOL would choose it as the cut-off. However, given the reasons behind enacting the FMLA, as well as adult children’s social standings in 2016,²⁷³ there should be no line drawn at all. The legislative history of the FMLA states the following:

Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one other than the child’s parents to care for the child. The same is often true for adults caring for a seriously ill parent or spouse.²⁷⁴

This sentiment applies equally to seriously ill children who are over the age of 18. A child’s 18th birthday does not alter the fact that he or she is still the parent’s child,²⁷⁵ nor does it change the parent’s emotional investment in assuring that her child is cared for.²⁷⁶ The importance of maintaining a work-family balance is congruent with allowing for parent-employees to care for their adult children without having to overcome the burdensome obstacles of disability requirements. Though the FMLA’s legislative history includes a disability requirement,²⁷⁷ the Act was implemented so that employees would not have to choose between their work and family.²⁷⁸ Thus, the elimination of

²⁷¹ 29 C.F.R. § 825.122(d) (2015).

²⁷² Sally F. Goldfarb, *Who Pays for the “Boomerang Generation”?: A Legal Perspective on Financial Support for Young Adults*, 37 HARV. J.L. & GENDER 45, 70–71 (2014) (stating that most states’ age of majority is 18 for most purposes).

²⁷³ See *id.* at 48.

²⁷⁴ H.R. REP. NO. 103-8, pt. 1, at 36 (1993).

²⁷⁵ TERRI APTER, *THE MYTH OF MATURITY: WHAT TEENAGERS NEED FROM PARENTS TO BECOME ADULTS* 35 (2002) (“Parents have to take a new look at their realities and revise their expectations of when parenting ends. Children are forever, and, as one father in my study reflected, ‘forever is longer than it was for my parents.’”); Goldfarb, *supra* note 272, at 64 (“[Y]oung adults are emotionally closer and in more frequent contact with their parents (especially their mothers) than in earlier eras.”).

²⁷⁶ APTER, *supra* note 275, at 38 (“A young adult continues to be dependent on his parents’ love, admiration, and approval to define and stabilize his sense of self.”); Goldfarb, *supra* note 272, at 47 (“Longer life expectancies, smaller nuclear families, and marital instability have the potential to make parent-child relationships the most significant and enduring family bonds in contemporary American society.”).

²⁷⁷ H.R. REP. NO. 103-8, pt. 1, at 34.

²⁷⁸ Grossman, *supra* note 4, at 45.

the “son or daughter” age-distinction would adhere to the reasons behind the FMLA’s enactment.

Perhaps the rationale behind the age-distinction is that children over the age of 18 are capable of self-care, or else have spouses who can provide care for them. However, this argument fails because it is often untrue. The moment that a child turns 18, she does not automatically become married²⁷⁹ or financially independent.²⁸⁰ In fact, many children continue to be financially supported by their parents through college, as well as into their early twenties.²⁸¹ Drawing the line at 18 does not take into account the realities of today’s familial structure, with more young adults continuing to be dependent on their parents.²⁸² This strong familial bond of supporting one’s child into early adulthood,²⁸³ ensuring that she becomes a functioning member of society,²⁸⁴ should not be weakened by the fact that if the adult child develops a serious health condition, not constituting a disability, the parents will not be able to take time off to care for their child.

²⁷⁹ Richard Fry, *A Rising Share of Young Adults Live in Their Parents’ Home*, PEW RES. CTR. SOC. & DEMOGRAPHIC TRENDS (Aug. 1, 2013), <http://www.pewsocialtrends.org/2013/08/01/a-rising-share-of-young-adults-live-in-their-parents-home/> (“In 2012 just 25% of Millennials were married, down from the 30% of 18- to 31-year-olds who were married in 2007. Today’s unmarried Millennials are much more likely than married Millennials to be living with their parents (47% versus 3%).”).

²⁸⁰ Shelley Clark & Catherine Kenney, *Is the United States Experiencing a “Matrilineal Tilt?”: Gender, Family Structures and Financial Transfers to Adult Children*, 88 SOC. FORCES 1753, 1753 (2009) (“[C]hildren often expect and receive considerable financial assistance from their parents well into their 20s and 30s to help pay for college and other educational or vocational training, weddings, and new houses.”).

²⁸¹ Goldfarb, *supra* note 272, at 54 (“In a 2007 study, almost three-quarters of people between the ages of eighteen and twenty-five reported that they received financial assistance from their parents in the preceding twelve months.”); Debra H. Kroll, *To Care or Not to Care: The Ultimate Decision for Adult Caregivers in a Rapidly Aging Society*, 21 TEMP. POL’Y & CIV. RTS. L. REV. 403, 407–08 (2012) (“[O]ne survey of 2006 college graduates [stated that] forty-two percent of the graduates reported that they were still living at home.”); Charles R. Pierret, *The “Sandwich Generation”: Women Caring for Parents and Children*, 129 MONTHLY LAB. REV. 3, 3 (2006).

²⁸² See Goldfarb, *supra* note 272, at 55 (“Between the ages of eighteen and thirty-four, adults receive an average of almost 200 hours of service from their parents and parents-in-law each year.”); Samantha Raphelson, *Some Millennials—And Their Parents—Are Slow to Cut the Cord*, NPR (Oct. 21, 2014), www.npr.org/2014/10/21/35695140/some-millennials-and-their-parents-are-slow-to-cut-the-cord (“[A] majority of today’s emerging adults . . . receive financial support from their parents . . .”).

²⁸³ Joe J. Gallo & Eileen Gallo, *Adult Children and Money*, 18 PROB. & PROP. 29, 30 (2004) (“Although reducing or even eliminating financial support may be appropriate, it is vital that the parents continue to provide their young adult with emotional support.”).

²⁸⁴ Goldfarb, *supra* note 272, at 45 (“Parental support is often crucial to enable young adults to achieve long-term financial security.”).

2. An Emphasis on Spousal Relations

The FMLA's allowance for care in spousal relationships, but not for adult children, no longer makes sense in 2016 when more people are waiting until their late twenties to marry,²⁸⁵ divorcing soon after, or never marrying at all.²⁸⁶ If the argument were that the family-care provision should only be for young children or elderly parents because adult children are usually capable of self-care, it could make sense why adult children should be excluded. However, the allowance of spousal care in the family-care provision completely negates such an argument because spouses can be of any age and are not part of a vulnerable class. Therefore, by accommodating spousal relations, while neglecting the parent-child relationship past the age of 18, the Act creates a gap in coverage. In particular, it leaves unmarried adults floundering somewhere in between, with no one legally allowed to take unburdened FMLA leave to care for them. Although federal law currently rewards married couples with tax breaks, inheritance rights, and disability benefits, the rationale behind those benefits does not apply to the FMLA. The former benefits are all financially based. However, when it comes to caring for a loved one's health in the face of serious illness, the law should not be focused on incentivizing legal relationships.

The fact that many of the ADAAA disabilities and the FMLA's serious health conditions will overlap, satisfying both requirements,²⁸⁷ does not expunge the alarmingly disparate treatment of the two classes of children: under 18 and over 18. Because pregnancy is not considered a disability under the ADAAA,²⁸⁸ parents of pregnant, adult children cannot take FMLA leave to care for them unless they have other complications.²⁸⁹ Additionally, scholars have noted that the overlap of the ADAAA and the FMLA is confusing to the public. Therefore, legislative drafters should seek a "son or daughter" definition that does not require the interplay of two statutes. The elimination of any "disability" requirement would allow for a simpler, less confusing FMLA. This

²⁸⁵ *Id.* at 51 ("Americans' average age at first marriage is higher than it has been at any time since 1890."); Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. SOC. & DEMOGRAPHIC TRENDS (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/> (stating that the median age at first marriage for women is 27, while for men it is 29).

²⁸⁶ Richard Fry, *No Reversal in Decline of Marriage*, PEW RES. SOC. & DEMOGRAPHIC TRENDS (Nov. 20, 2012), <http://www.pewsocialtrends.org/2012/11/20/no-reversal-in-decline-of-marriage/> ("Marriage increasingly is being replaced by cohabitation, single-person households and other adult living arrangements."); Wang & Parker, *supra* note 285 ("In 2012, one-in-five adults ages 25 and older (about 42 million people) had never been married.").

²⁸⁷ MAXWELL, *supra* note 3.

²⁸⁸ *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited Feb. 21, 2016).

²⁸⁹ Smith, *supra* note 268.

is necessary when the FMLA's primary users are employees and employers, with likely no training in the field of legislative interpretation.

3. The Affordable Care Act and Proposed Legislation

Supporting this Note's argument is recent legislation that addresses the financial dependence of millennials. President Barack Obama recently implemented the Affordable Care Act, which, though many of its provisions have been a source of public controversy,²⁹⁰ does contain notable changes to existing healthcare law. One of these changes extends insurance policies to include dependent coverage for children under their parents' healthcare until the child reaches age 26.²⁹¹ The legislation applies regardless of whether the child is married, living with parents, attending school, or financially dependent on their parents.²⁹² Even if Congress decides not to eliminate the age distinction entirely, an alternative solution would be to move the age of "son or daughter" without a disability to 26.²⁹³ Over the age of 26, the disability requirement can be reinstated. This would at least provide some type of care safety net for unmarried adult children.²⁹⁴

Members of Congress are not entirely blind to this issue. Proposed legislation has included the addition of adult children, grandchildren, in-laws, and other relations to the definition of "family member."²⁹⁵ However, the inclusion of other relations waters down the importance of adult children, as well as the likelihood that the bill will be passed. This Note's amendment should be considered because the addition of all adult children to the FMLA would not impose unbearable hardships on employers. This is because adult children with serious health conditions may have two relationships to fall on for

²⁹⁰ J. Angelo DeSantis & Gabriel Ravel, *The Consequences of Repealing Health Care Reform in Early 2013*, 60 CLEV. ST. L. REV. 365, 367–68 (2012) (quoting 2012 Republican candidates harshly criticizing the legislation).

²⁹¹ *People Under 30: How to Get or Stay on a Parent's Plan*, HEALTHCARE.GOV, www.healthcare.gov/young-adults/children-under-26/ (last visited Feb. 21, 2016).

²⁹² *Id.*

²⁹³ See Gallo & Gallo, *supra* note 283, at 30 ("A study released by the University of Chicago's National Opinion Research Center in 2003 found that most Americans currently believe that adulthood does not begin until age 26."); Goldfarb, *supra* note 272, at 62 (discussing how research has shown that the part of the brain responsible for impulse control continues to mature until at least 25 years old).

²⁹⁴ See Goldfarb, *supra* note 272, at 48 ("[W]ith few exceptions (such as the . . . Affordable Care Act, which mandates that adults up to age twenty-six must be permitted to remain on their parents' health insurance policy), legal rules have not been revised to take account of the growing financial burden borne by parents of adult children.").

²⁹⁵ See, e.g., Family and Medical Leave Enhancement Act of 2014, H.R. 3999, 113th Cong. (grandchildren); Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. (grandparents and siblings); H.R. 2287, 107th Cong. (2001) (domestic partners, parent-in-laws, adult children, siblings, and grandparents); H.R. 2104, 106th Cong. (2000) (same).

care: spouses and parents. For adult children who are married, it is more likely that they will rely upon their spouses to care for them in times of illness. This result is no different than the FMLA of today, with spouses being able to take leave to care for each other.²⁹⁶ The remaining adult children, presumably unmarried, can now be taken care of by their parents. Furthermore, because of the overlap in “disability” and serious health condition, parents were already sometimes able to take leave to care for their adult children. The additional leave taken is unlikely to substantially increase the existing numbers.

C. Tax Incentives to Supplement the FMLA

The legislative history of the FMLA explicitly states that it was implemented with employers’ needs in mind.²⁹⁷ Despite strongly advocating for employee-friendly changes to the FMLA,²⁹⁸ it would be negligent and unrealistic to overlook the many concerns of employers regarding the Act.²⁹⁹ Because the FMLA imposes heavy mandates upon employers for the benefit of society, it only makes sense that the federal government should give something to employers that will help alleviate these economically-burdensome requirements.³⁰⁰ President Bush had the right idea to request tax credits for employers;³⁰¹ however, the credits should not be in lieu of the statute itself.³⁰² Rather, tax credits should supplement the FMLA to ensure that employers are not being economically disadvantaged³⁰³ by FMLA-vacation-taking employees.³⁰⁴ Federal mandates and financial incentives are not mutually exclusive, and the two can work in tandem to ensure that each side is satisfied. Having optional tax credits puts control back in the hands of employers and employees, who may be quick to terminate or call off of work. This Note

²⁹⁶ 29 U.S.C. § 2612(a)(1)(C) (2014).

²⁹⁷ H.R. REP. NO. 103-8, pt. 1, at 22 (1993).

²⁹⁸ See *supra* Part III.A, III.B.

²⁹⁹ Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL’Y 193, 193 (2004) (“[Employers argue] that the notice requirements placed on employees are insufficient, that the FMLA’s interaction with company sick-leave policies is unsatisfactory, that leave is taken in too small of increments, and that courts are too permissive in deciding what illnesses qualify under the Act.”).

³⁰⁰ See Lukas, *supra* note 85, at 6 (“[An] increase in mandated benefits raises the costs associated with hiring an employee. . . . If the cost of hiring a worker increases, businesses will have an incentive to hire fewer workers or to outsource jobs to [other] countries[.]”).

³⁰¹ Porette & Gunn, *supra* note 27, at 593.

³⁰² See *id.*

³⁰³ Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 18 (2010) (“Employers are reluctant to take on the additional costs that FMLA expansion would impose on them, largely because they believe that the existing cost of FMLA compliance is excessive.”).

³⁰⁴ See *supra* Part III.A.1.

proposes three types of tax credits for Congress's consideration: (1) a tax credit for employers with excessive FMLA leave-takers, (2) a tax credit for employers in lieu of terminating FMLA violators, and (3) a tax credit for FMLA-eligible employees who do not take leave.

1. Tax Credit for Employers with Excessive FMLA Leave-Takers

This Note's first proposed tax credit is aimed toward employers who have employees taking long blocks of FMLA leave. For employees that take greater than a certain amount³⁰⁵ of FMLA leave each year, employers shall receive a specified amount as a tax credit to help offset the loss of labor. This tax credit should apply to all types of FMLA leave, not merely to family care. This is a win-win situation because it allows employees to take the time off that they need, while incentivizing employers to approve leave. However, as only 59% of employers and employees are eligible for FMLA leave to begin with,³⁰⁶ this will not likely significantly cut into the federal government's ability to collect revenue.

Further, a tax credit implemented immediately will give employers a cushion if new legislation advances regarding paid leave.³⁰⁷ Certain states have already implemented paid leave policies,³⁰⁸ and employers are wary of the effects on business costs. Though many proposed paid leave policies do not require employer contributions to sustain themselves,³⁰⁹ paid leave may increase the percentage of employees who apply for and take FMLA leave³¹⁰ since they will no longer have to bear the financial burden of unpaid leave.³¹¹ With a potential increase of FMLA-taking employees, of perhaps longer durations of leave, employers need something from the federal government to offset these changes. For a broad, proposed definition of "care," inclusivity for adult children, and new paid leave legislation, a tax credit will incentivize

³⁰⁵ A good choice would be the median number of FMLA-leave days that an employee takes per year. The median number should be chosen because the mean may be skewed by lengthy leave-taking outliers.

³⁰⁶ ABT TECHNICAL REPORT, *supra* note 84, at i.

³⁰⁷ See Pine, *supra* note 80.

³⁰⁸ *Id.*

³⁰⁹ Malone, *supra* note 13, at 1316 ("California funds its [paid leave] program through its State Disability Insurance Program, which is financed entirely by employee contributions; employers are under no obligation to contribute to the fund.").

³¹⁰ Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 432 (2007) (arguing that paid leave could increase the Act's usage by men and lower-income employees).

³¹¹ ABT TECHNICAL REPORT, *supra* note 84, at ii-iii (stating that a reason employees returned to work after leave-taking was because they could no longer afford unpaid leave).

employers to approve such FMLA alterations.³¹² Plus, having the financial cushion could reduce employers' hesitation in regard to employees taking FMLA leave, which would potentially lead to less instances of termination and, therefore, fewer claims brought to court and a reduction in costs for unemployment benefits.³¹³

2. Tax Credit for Employers in Lieu of Terminating FMLA-Violators

A second type of credit that Congress should consider would allow employers to take a tax credit in lieu of terminating an employee who takes unauthorized FMLA leave. The employer can write up the employee for a FMLA violation, choosing to keep the worker employed, and receive a tax credit for doing so. FMLA claims often arise from an employer's termination of an employee for unauthorized absences.³¹⁴ However, allowing for a tax credit that rewards employers for holding onto their employees will keep unemployment low—reducing the financial burden on government-funded welfare programs and maintaining a stable economy. Like the first proposed credit, fewer instances of termination will potentially decrease the amount of FMLA claims brought against employers. This saves employers from the financial burdens of attorneys' fees, payouts of damages, and a diminished reputation.

3. Tax Credit for FMLA-Eligible Employees Who Do Not Take Leave

Despite the broad purposes of the FMLA, there are still undeniable issues regarding leave-taking, such as intermittent leave. Intermittent leave can negatively affect both employers and employees by creating administrative difficulties for employers, while shifting the absentee's work burden to other employees.³¹⁵ This work-shifting can have the effect of decreasing employee

³¹² 'FMLA Is Working,' *Employers Tell DOL*, FAM. & MED. LEAVE HANDBOOK NEWSL., Apr. 2013, at 2 ("[A] series of paid leave bills introduced during Obama's first term failed.").

³¹³ See GUERIN & ENGLAND, *supra* note 49, at 9 ("In 2013, the number of FMLA court cases reached almost 900, three times the number filed in the previous year."); Anne Wells, *Paid Family Leave: Striking a Balance Between the Needs of Employees and Employers*, 77 S. CAL. L. REV. 1067, 1069 (2004) ("[A]pproximately one-fourth of employees stated that they did not take leave because they thought their job might be lost, and approximately 26% of employees thought that taking leave might diminish their prospects for job advancement.").

³¹⁴ *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 840 (7th Cir. 2014) ("[T]he [employer] terminated Ballard for unauthorized absences accumulated during her trip."); *Marchisheck v. San Mateo*, 199 F.3d 1068, 1072 (9th Cir. 1999) ("[The employer] sent Plaintiff a letter expressing Defendant's intent to terminate Plaintiff on September 20, for insubordination and absence without leave.").

³¹⁵ *Improvements*, *supra* note 86; Lukas, *supra* note 85, at 3 ("[E]mployers report 'job disruptions' and 'adverse effects on the workforce' resulting 'when employees take frequent,

morale.³¹⁶ An employer-based tax credit would certainly contribute to the employer's satisfaction, but what about the morale of existing employees?

One way to satisfy both employers and co-workers of FMLA-eligible employees would be to create a tax incentive for leave-eligible employees to reduce the amount of leave taken. Employees can receive a tax credit for opting not to take eligible leave, or taking less than a certain amount, during the taxable year. Alternatively, the credit could specifically focus on employees who do not take intermittent leave. Either way, this would dissuade employees from abusing the FMLA and make employers more likely to believe that employees are justifiably taking leave. Employees could use the financial assistance to help pay for outside care for their family members. Furthermore, this credit could reduce absenteeism due to FMLA leave, which would alleviate the labor-burden placed on other co-workers, as well as improve their views of the Act. Taxpayer-employees would have to establish to the IRS that they meet the requirements for FMLA leave, such as working for an FMLA-eligible company. Next, the taxpayer-employee would have to substantiate that she did not choose to take any, or a certain amount of, FMLA leave during the taxable year. This is akin to any type of credit in which substantiation is required.

IV. CONCLUSION

Though an important step in the fight toward workplace equality, the FMLA was merely a minimum standard,³¹⁷ open to further additions and amendments. The originally drafted legislation fought its way through Congress, slowly withering to a shell of its former self by limitations, restrictions, and compromises.³¹⁸ Slightly bolstered throughout the years,³¹⁹ the FMLA is still aching for expansion. This Note argues for a new line of FMLA amendments to include a broader definition of "care,"³²⁰ an elimination of age distinctions in the definition of "son or daughter,"³²¹ and the creation of various tax credits to supplement such changes.³²²

The broader definition of care and elimination of age distinctions will ensure that those who need to take leave to care for family members are able to take it. A clearer "care" regulation takes uncertainty out of the courts' and employers' hands. It provides a degree of consistency and predictability for the

unscheduled, intermittent leave from work with little or no advance notice to the employer."); Smith, *supra* note 85.

³¹⁶ *Employee Absences*, *supra* note 86.

³¹⁷ LEVINE, *supra* note 72, at 1.

³¹⁸ *See supra* Part II.A.

³¹⁹ *Military and Airline Protections*, *supra* note 102.

³²⁰ *See supra* Part III.A.

³²¹ *See supra* Part III.B.

³²² *See supra* Part III.C.

workplace. The elimination of an age distinction for the definition of “son or daughter” allows unmarried adult children to be cared for in their time of need. The confusing overlap of ADAAA’s “disability” definition with the FMLA will no longer be an issue. Finally, to curtail employers’ concerns that have been in place since the 1985 family leave proposal, tax incentives should be created to address businesses’ financial issues regarding the FMLA. These changes are ideally a moderate solution to a polarizing piece of legislation, with the ability to realistically meet the needs of the American people.

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