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Do You Need a Doctor's Note? Lay Testimony Should Be Sufficient Evidence for FMLA Leave Unless Compelling Counter Conditions Exist

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NOTES

DO YOU NEED A DOCTOR'S NOTE? LAY TESTIMONY SHOULD BE SUFFICIENT EVIDENCE FOR FMLA LEAVE UNLESS COMPELLING COUNTER CONDITIONS EXIST

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INTRODUCTION

People often avoid dentists out of fear, sometimes with dire repercussions. For example, if a patient puts off a routine dental visit for too long, she may need a tooth extraction. Tooth extractions are common, and doctors—after giving the patient a prescription for an antibiotic and pain reliever "just in case"—will tell her that she will be fine in a day or two. Unfortunately, the patient's day or two of initial pain may extend to four or more days of excruciating, debilitating pain in the jaw, head, and ear. The patient may be unable to work, go to school, and even think because of the pain. If the patient's inability to work extends to four or more days, she may qualify for protection under the Family and Medical Leave Act ("FMLA") of 1993,[1] which enables an employee to "take job-protected, unpaid leave" for up to twelve weeks[2] when he is "unable to perform the functions of his or her job."[3]

The patient can treat the tooth pain with home remedies, or return to the dentist for treatment. For example, the patient's pain after a tooth extraction often is the result of a dry socket.[4] A

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[1] Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).

[2] 29 C.F.R. § 825.100(a) (2009).

[3] *Id.*

[4] C. Upadhyaya & M. Humagain, *Prevalence of Dry Socket Following Extraction of Permanent Teeth at Kathmandu University Teaching Hospital (KUTH), Dhulikhel,*

dry socket occurs when the blood clot that forms to help heal the wound dislodges and causes extreme pain that can last for days or even weeks.[5] Unfortunately, there is no "solution" to a dry socket; pain relievers can help, but the body simply needs time to heal.[6] Dentists can clean and medicate the dry socket area, but some patients have found that home remedies such as clove oil have helped more than return visits to the doctor.[7]

Home remedies for a dry socket may heal a patient, but a patient who uses home remedies could be risking her right to FMLA leave and even her job. Home remedy patients will not have a doctor's medical testimony that the dry socket caused them to be unable to work. Other patients, who choose to return to the dentist to apply the same clove oil that can be found over the counter, will have access to medical testimony that they were incapacitated due to the dry socket. Both home remedy and repeat visit patients have access to lay testimony—from themselves, their friends, and neighbors—that they were incapacitated. Nevertheless, the home remedy patients who are in jurisdictions that rely solely on medical testimony to prove whether FMLA leave is warranted will be unable to show that they are eligible for FMLA leave. Without the FMLA protection that requires an employer to reinstate an employee to the same or equivalent position after she returns from leave,[8] the patient could be fired.

A home remedy patient's risk of being denied FMLA leave depends on the patient's jurisdiction. Courts inconsistently interpret the FMLA: some courts rely solely on medical

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Kavre, Nepal: A Study, 8 KATHMANDU U. MED. J., no. 1, 2010 at 18, 21, *available at* http://www.nepjol.info/index.php/KUMJ/article/view/3216/2790 (indicating that two to four percent of tooth extractions lead to a dry socket).

[5] *An Overview of Dry Socket*, WEBMD, http://www.webmd.com/oral-health/dry-socket-symptoms-and-treatment (last visited Jan. 20, 2013).

[6] WMDS, Inc., *Dry Socket Treatments: Cures for Dry Sockets*, ANIMATED-TEETH.COM, http://www.animated-teeth.com/dry-sockets/a4-dry-sockets-treatments.htm (last visited Jan. 20, 2013) ("Treatment [of dry sockets] doesn't speed things up . . . . Instead, it simply helps to reduce the amount of discomfort that you experience while your (now prolonged) healing process takes place.").

[7] *Home Remedies for Dry Socket*, MY HOME REMEDIES, http://www.myhomeremedies.com/topic.cgi?topicid=301 (last visited Jan. 20, 2013).

[8] 29 C.F.R. § 825.214 (2009). "An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." *Id.* § 825.215(a).

testimony to prove that an individual was incapacitated,[9] others use a combination of medical and lay testimony,[10] and a third group allows lay testimony by itself to prove the incapacity.[11]

The inconsistent interpretation of the FMLA is caused by ambiguity in the Department of Labor ("DOL") regulations. Congress delegated responsibility to the DOL to "prescribe such regulations as are necessary to carry out" the requirements for FMLA leave.[12] The DOL regulations, although intended to make the regulations "accessible, understandable, and usable by a person not familiar with the FMLA,"[13] are ambiguous because they do not indicate if medical testimony is required. Because the DOL regulations lack clarity, the courts have inconsistently interpreted the FMLA. This inconsistency in the interpretation of the FMLA causes uncertainty for employees and employers and decreases stability and economic security, which the FMLA was intended to promote.[14]

This Note argues that the courts' inconsistency should be resolved by a revision to the DOL regulations that clearly indicates when medical testimony is required to qualify for protection under the FMLA. It proposes that the regulations should be changed as follows: Medical testimony is not required and a lay person's testimony is sufficient to create a genuine issue of material fact that a "serious health condition"[15] existed *unless* one or more of two trigger conditions are met. If one of the trigger conditions is met, medical testimony is required. In these trigger condition cases, lay testimony is allowed to supplement the medical testimony.

The conditions that will trigger a need for medical testimony are: (1) the employer has properly asserted its right under the FMLA to request medical certification of the "serious health

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[9] *See infra* Part II.A.

[10] *See infra* Part II.B.

[11] *See infra* Part II.C.

[12] 29 U.S.C. § 2654 (2006).

[13] Maegan Lindsey, Comment, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. TEX. L. REV. 559, 567 (2009) (quoting THE FAMILY AND MEDICAL LEAVE ACT 24 (Michael J. Ossip & Robert M. Hale eds., 2006)).

[14] 29 C.F.R. § 825.101 (2009) ("The Act is intended . . . to promote the stability and economic security of families, and to promote national interests in preserving family integrity.").

[15] The FMLA defines "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider." *Id.* § 825.113(a) (2009).

condition" from the employee or (2) the employee has exhibited a pattern of absences that are excessive, unexcused, or abut holidays or weekends. These trigger conditions will "balance the demands of the workplace with the needs of families"—one of the goals of the FMLA—while achieving previously elusive consistent results in the courts.[16] Additionally, this new standard will ensure that both employers and employees have clear notice of the testimonial requirements for the FMLA.

This Note discusses the Family and Medical Leave Act and different courts' interpretation of the testimonial requirements of the FMLA.[17] This Note also suggests changes to the corresponding DOL regulations to ensure a consistent and fair implementation of the FMLA that adheres to Congress's intent when passing the FMLA. Part I gives an overview of the FMLA. Part II discusses the different positions that courts have taken regarding what type of testimony will be allowed to prove a "serious health condition." Part III argues that the ambiguity of the DOL regulations has caused inconsistent court rulings. Part IV argues that the DOL regulations should be changed to clearly state what type of testimony is required to prove a "serious health condition" existed and suggests changes to make lay testimony sufficient to create a genuine issue of fact, subject to the exceptions outlined above.

I. FAMILY AND MEDICAL LEAVE ACT OF 1993

Congress enacted the FMLA to protect both employees and employers, intending to "balance the demands of the workplace with the needs of families, to promote the stability and economic

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[16] *Id.* § 825.101(a).

[17] Although disability issues are often litigated with FMLA claims, this Note does not discuss the American with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101–12213 (2006 & Supp. II 2008), which "protects individuals against discrimination based on disability in . . . employment and public services." Michelle Kaemmerling, Note, Bragdon v. Abbott*: ADA Protection for Individuals with Asymptomatic HIV*, 77 N.C. L. REV. 1266, 1266 (1999). Although it is beyond the scope of this Note, *Bragdon v. Abbott*, 524 U.S. 624 (1998), and the issues it raises regarding per se qualification of disability under the ADA are worthy of consideration. *See* Kaemmerling, *supra*, at 1296–99. In *Bragdon*, a seminal case regarding the ADA disability status of individuals with asymptomatic HIV, the Supreme Court held that a dental patient was improperly denied treatment by a dentist because of her asymptomatic HIV status. 524 U.S. at 641. The Court found that her HIV status led to her choice not to reproduce, and the lack of reproduction qualified as a disability under the ADA. *Id.*

security of families, and to promote national interests in preserving family integrity."[18] Congress recognized that many American homes do not have a support system for emergencies because of the increase of single parent households and households where two parents work,[19] and observed that the "lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting."[20] Congress also recognized the "legitimate interests of employers."[21] It wanted to "protect employers from unforeseen costs associated with unexpected employee absences and employee abuse of leave provisions."[22] This Section discusses the continued need for the FMLA followed by an overview of the FMLA entitlements and requirements for both employees and employers.

A. The Need for FMLA Continues

The driving forces of the FMLA continue to plague both employees and employers. Employees still struggle with the lack of a support system, and the growing trend of caregivers working out of the home, which Congress recognized in its findings,[23] has continued upward.[24] Workers' need for leave is critical for both child and elderly care. Recent studies show the need for child care leave; several surveys found that: (1) seventy-one percent of mothers work, (2) seventy-six percent of unmarried mothers work,[25] and (3) both parents work in fifty-eight percent of two

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[18] 29 U.S.C. § 2601(b)(1) (2006).

[19] *Id.* § 2601(a)(1) ("[T]he number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly . . . .").

[20] *Id.* § 2601(a)(3).

[21] *Id.* § 2601(b)(3).

[22] Jessica Beckett-McWalter, Note, *The Definition of "Serious Health Condition" Under the Family Medical Leave Act*, 55 HASTINGS L.J. 451, 451 (2003) (citing S. REP. NO. 103–3, at 25 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 27).

[23] *See* 29 U.S.C. § 2601(a)(1).

[24] *See* HILDA L. SOLIS, U.S. DEP'T OF LABOR & KEITH HALL, U.S. BUREAU OF LABOR STATISTICS, REP. 1018, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2009) [hereinafter WOMEN IN THE LABOR FORCE], *available at* http://www.bls.gov/cps/wlf-databook-2009.pdf; Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 352 (2004) ("Between 1960 and 1999, the labor force participation rate for women with children under the age of six years grew from 20 percent to 64 percent.").

[25] WOMEN IN THE LABOR FORCE, *supra* note 24, at 13, 15.

parent households.[26] The need for elderly care leave is also clear: sixty-four percent of the twenty-two and a half million Americans who care for an elderly person work outside of the home.[27] Additionally, as the baby boomers age, the number of elderly parents who will need care is expected to increase from the already large twelve percent of the population to twenty percent of the population by 2030.[28] Forty percent of American laborers are expected to be taking care of an elderly relative by 2020.[29]

Similarly, the employer "demands of the workplace"[30] that Congress expressly noted in the FMLA also continue to require recognition and protection against undermining forces. Current studies show that employees who are given financial incentives, such as time off from work, exhibit false or exaggerated symptoms.[31] False claims for sick leave by employees are examples of "unforeseen costs" and "employee abuse[s] of leave" that Congress wanted the FMLA to protect employers against.[32] The continued and growing need for the protection that FMLA provides for both employees and employers indicates that the FMLA is critically important and efforts should be made to ensure that FMLA entitlements and requirements are consistently and accurately applied.

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[26] *Id.* at 76.

[27] *See* Smith, *supra* note 24, at 352–53.

[28] *Id.* at 352. In 1900, only four percent of the United States population was over sixty-five. *Id.*

[29] *Id.* at 353.

[30] 29 U.S.C. § 2601(b)(1) (2006).

[31] Gerald M. Aronoff et al., *Evaluating Malingering in Contested Injury or Illness*, 7 PAIN PRAC. 178, 180 (2007) (indicating that recent studies show the possibility of "30% to 40% incidence of malingering of pain, emotional, and/or cognitive symptoms secondary to pain in litigating and benefit-seeking claimants"). Malingering is "the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs." Kevin W. Greve et al., *Prevalence of Malingering in Patients with Chronic Pain Referred for Psychologic Evaluation in a Medico-Legal Context*, 90 ARCHIVES PHYSICAL MED. & REHABILITATION 1117, 1117 (2009) (quoting AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 739 (4th ed. 2000)). Results of a chronic pain study show that 20% to 40% of those with financial incentives show signs of malingering. *Id.* Although this study included individuals with stronger financial incentives than unpaid leave—89% were involved in workers compensation claims—it indicates the risk that employees will be dishonest for personal gain. *See id.* at 1118.

[32] *See* Beckett-McWalter, *supra* note 22.

B. *FMLA Entitlements and Requirements*

The FMLA defines requirements and entitlements for both employees and employers. The FMLA entitles employees who have worked for at least a year[33] for an employer that has over fifty employees[34] to take up to twelve weeks of unpaid leave[35] and get a position with equivalent salary, benefits, and responsibility when they return.[36] The FMLA requirements are as follows: an employee may take FMLA leave if he has a serious medical condition, or if he needs to take care of a family member who has a "serious health condition," or if he wishes to attend the birth or adoption of a child.[37] Intermittent leave, in which employees take shorter periods of time throughout the year instead of one straight twelve-week period, may be taken for absences where the "employee or family member is . . . unable to perform the essential functions of the position because of a chronic serious health condition."[38]

1. Serious Health Condition

Congress designed a "serious health condition" to be "broad and intended to cover various types of physical and mental conditions."[39] The DOL regulations define a "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider."[40] Inpatient care is defined as "an overnight stay in a hospital, hospice, or residential medical care facility."[41] Since medical testimony is readily available when a patient stays overnight in a facility, this Note does not focus on serious health conditions that require inpatient care. This Note discusses continuing treatment, which includes both individual instances of incapacity and chronic conditions.[42]

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[33] 29 C.F.R. § 825.110(a) (2009).

[34] *Id.* § 825.104(a).

[35] 29 U.S.C. § 2612(a) (2006 & Supp. III 2009); 29 C.F.R. § 825.200(a).

[36] 29 C.F.R. § 825.215(a).

[37] 29 U.S.C. § 2612(a); 29 C.F.R. § 825.112(a).

[38] 29 C.F.R. § 825.202(b)(2).

[39] Kelly Druten, Comment, *The Family and Medical Leave Act: What Is a Serious Health Condition?*, 46 U. KAN. L. REV. 183, 201 (1997) (quoting S. REP. NO. 103–3, at 28 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 30).

[40] 29 C.F.R. § 825.113(a).

[41] *Id.* § 825.114.

[42] *Id.* § 825.115.

An example of an individual instance of incapacity is when an employee has a heart attack and is unable to work for eight weeks. An example of a chronic condition is when reoccurring back pain makes it impossible for an employee to go to work once a month. For both individual instances and chronic conditions, an employee is incapacitated and, therefore, eligible for FMLA leave if she is unable "to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom."[43]

Incapacity for individual serious health conditions must last "more than three consecutive, full calendar days."[44] Additionally, the patient must be treated by a health care provider two or more times, or be treated as least once resulting in a plan "of continuing treatment under the supervision of the health care provider."[45] The plan could, for example, include a prescription for an antibiotic[46] or psychotherapy.[47]

Incapacity for chronic serious health conditions includes "recurring episodes of a single underlying condition" and requires periodic visits to a health care provider.[48] Absences due to chronic conditions "qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three . . . days."[49]

2. FMLA Notice and Documentation Requirements

The notice and documentation requirements for both employers and employees are specified in the DOL regulations.[50] An employee who wishes to invoke FMLA leave must give an employer notice at least thirty days in advance or, if that is not practical, as soon as possible.[51]

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[43] *Id.* § 825.113(b).
[44] *Id.* § 825.115(a).
[45] *Id.* § 825.115(a)(2).
[46] *See, e.g.*, Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156, 157, 159 n.4 (3d Cir. 2010).
[47] *See, e.g.*, Hyldahl v. AT&T, 642 F. Supp. 2d 707, 710, 715 (E.D. Mich. 2009).
[48] 29 C.F.R. § 825.115(c)(2).
[49] *Id.* § 825.115(f).
[50] *Id.* § 825.302.
[51] *Id.* § 825.302(a)–(b).

The employer "*may* require that a request for [FMLA] leave . . . be supported by a certification issued by the health care provider."[52] This request for certification should be given to the employee within five business days of when the employee informed the employer of the need for leave, or if the need for leave was unforeseen, within five business days of the start of the leave.[53] If the employer "has reason to question the appropriateness of the leave or its duration," the employer may request certification at a later date.[54] The health care provider certification must contain: (1) the date the condition started, (2) the probable duration of the condition, and (3) medical facts "sufficient to support the need for leave."[55] If the employer does not request the medical certification, then the employee is not required to provide medical certification.[56] If the employer requests medical certification, the employee must provide the certification "within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so."[57]

II. COURTS DISAGREE ON TESTIMONY REQUIRED TO PROVE A SERIOUS HEALTH CONDITION

Courts disagree on what type of evidence is required to prove a serious health condition to satisfy the Family Medical Leave Act. Courts' decisions on what type of testimony is required for a plaintiff to raise a "genuine dispute as to any material fact"[58] and survive summary judgment can be categorized into one of three different groups. The first group of courts relies solely on medical testimony for an FMLA plaintiff to survive summary judgment. The second group requires medical testimony but also uses lay testimony. The third group does not require medical testimony and holds that lay testimony alone is sufficient.

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[52] 29 U.S.C. § 2613(a) (2006 & Supp. III 2009) (emphasis added).

[53] 29 C.F.R. § 825.305(b).

[54] *Id.*

[55] *Id.* § 825.306(a).

[56] *See* Lubke v. City of Arlington, 455 F.3d 489, 496–98 (5th Cir. 2006).

[57] 29 C.F.R. § 825.305(b).

[58] FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

A. Seventh Circuit and Some District Courts Rely Solely on Medical Testimony

The first group of courts relies solely on medical testimony in order to determine whether an FMLA plaintiff can survive summary judgment. These courts have held that lay witness testimony—for instance, from the employee herself, a spouse, co-worker, or friend—cannot be used to prove that a serious medical condition exists.[59] For example, in *Gudenkauf v. Stauffer Communications, Inc.*,[60] the court held that the "plaintiff's . . . testimony . . . [was] insufficient evidence to base a finding that the plaintiff's [health] condition[] kept her from performing the functions of her job."[61] The plaintiff, a pregnant woman in her third trimester, testified that she requested part-time leave because she experienced back pain, nausea, headaches, and swelling due to her pregnancy and was unable to work full time.[62] The Kansas district court, however, found that she did not "present[] any *medical evidence* showing that . . . her pregnancy and pregnancy-related conditions kept her from performing the functions of her job."[63] Therefore, because the court interpreted the FMLA as requiring medical evidence to prove a serious medical condition, the court granted summary judgment for the pregnant woman's employers.[64]

Similarly, in *Haefling v. United Parcel Service, Inc.*,[65] the Seventh Circuit held that an employee's testimony regarding his chronic neck injury was inadequate to prove that a serious

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[59] *See* Divers v. Metro. Jewish Health Sys., No. 06-CV-6704, 2009 U.S. Dist. LEXIS 2312, at *63 (E.D.N.Y. Jan. 14, 2009) (holding that the plaintiff failed to establish a "genuine issue of material fact" because "aside from her own self-serving . . . testimony, . . . she submitted no medical evidence whatsoever"), *aff'd*, 383 F. App'x 34, 34 (2d Cir. 2010); McClure v. Comair, Inc., No. Civ.A. 04-107-DLB, 2005 WL 1705739, at *6 (E.D. Ky. July 20, 2005) (holding that the plaintiff's own representation regarding her serious health condition was insufficient to establish FMLA rights if unsubstantiated by a medical professional); Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028, 1037 (M.D. Tenn. 1995) (holding that doctor speculation that it was reasonable for someone to miss three or four days for her type of illness and employee's own testimony that she felt too sick to work was insufficient to support allegation of incapacitation).

[60] 922 F. Supp. 465 (D. Kan. 1996).

[61] *Id.* at 475.

[62] *See id.* at 469.

[63] *Id.* at 476 (emphasis added).

[64] *Id.*

[65] 169 F.3d 494 (7th Cir. 1999).

medical condition existed.[66] Although the plaintiff testified that he was treated with physical therapy and that his doctor prescribed a pain reliever, the court determined that his "own self-serving assertions regarding the severity of his medical condition and the treatment" were "insufficient to raise an issue of fact" in the absence of an affidavit from medical personnel.[67]

The decisions of these courts are characterized by sole reliance on medical testimony to determine if there was a serious medical condition. These courts believe that "a health care provider must instruct, recommend, or at least authorize an employee not to work,"[68] and that it is not enough that "in the employee's own judgment, he or she should not work."[69] These courts take a pro-employer stance, and categorically do not allow lay testimony to prove that a serious medical condition existed.

By relying only on medical testimony, these courts severely restrict an employee's ability to prove her incapacity. As a result, in these jurisdictions the FMLA does not protect employees who make the decision to care for a family member who is sick but for whom medical testimony is not available. For example, the tooth extraction patient who treats her dry socket with a home remedy would not be able to survive summary judgment in one of these courts and could lose her job. Even though she was incapacitated by the dry socket for four or more days, she would not be able to prove that she was entitled to FMLA protection because she does not have access to medical testimony.

This strict "medical testimony required" interpretation cuts against the goals of the FMLA. For example, this interpretation contributes to a lack of employee stability, which was one of the issues the FMLA was enacted to address.[70] This interpretation could also influence individuals, in order to retain their jobs, to not take care of family members, which is another issue Congress enacted the FMLA to prevent.[71] Although these pro-employer interpretations help prevent fraudulent abuse of the FMLA, they do so by causing some employees who have valid family and health issues to not be able to take FMLA leave. Since Congress

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[66] *Id.* at 500–01.

[67] *Id.* at 500.

[68] Bond v. Abbott Labs., 7 F. Supp. 2d 967, 974 (N.D. Ohio 1998), *aff'd per curiam*, 188 F.3d 506 (6th Cir. 1999).

[69] Olsen v. Ohio Edison Co., 979 F. Supp. 1159, 1166 (N.D. Ohio 1997).

[70] *See* 29 U.S.C. § 2601(b)(1)–(2) (2006).

[71] *Id.* § 2601(a)(1)–(3).

expressly stated in the FMLA that "it is important for the development of children and the family unit that fathers and mothers be able to participate in . . . the care of family members who have serious health conditions,"[72] these courts' interpretations do not support the main goals of the FMLA.

B. Third and Eighth Circuits Allow Lay Testimony To Supplement Required Medical Testimony

A second group of courts has held that medical evidence is required, but plaintiffs can use lay testimony to prove that a serious medical condition existed under the FMLA. These courts allow plaintiffs to survive summary judgment if a combination of medical professional testimony and lay testimony creates a genuine issue of fact that a serious health condition existed.[73] For example, the Third Circuit, in *Schaar v. Lehigh Valley Health Services, Inc.*,[74] held that plaintiff's lay testimony about her lower back pain, fever, and nausea that lasted for more than three days, in combination with her doctor's deposition that she had a urinary tract infection and was experiencing symptoms that should be gone "after a day or two,"[75] created a genuine issue of material fact. The *Schaar* court allowed lay testimony to prove the length of the plaintiff's illness,[76] but still additionally required medical testimony to prove that the incapacity was due to the serious medical condition.[77] Because the plaintiff's testimony that the actual length of her illness was four days,

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[72] *Id.* § 2601(a)(2).

[73] *See* Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148–49 (8th Cir. 2001) (holding plaintiff's affidavit that she was too sick to work, her testimony of her conversations with nurses about her condition, and her medical records were "sufficient to create a genuine issue of material fact regarding her incapacity"); Hyldahl v. AT & T, 642 F. Supp. 2d 707, 716 (E.D. Mich. 2009) (holding that "[p]laintiff's testimony in conjunction with [medical professional's] testimony . . . provides a plausible basis for the finder of fact to conclude" that her ability to do her job was impaired); Municipality of Anchorage v. Gregg, 101 P.3d 181, 188–89 (Alaska 2004) ("[T]here was substantial evidence in the record in addition to Dr. Dodge's testimony that corroborates the conclusion that Gregg was incapacitated.").

[74] 598 F.3d 156 (3d Cir. 2010).

[75] *Id.* at 157.

[76] *Id.* at 161 (limiting the use of lay testimony to extend the length of the plaintiff's incapacity by two days). The *Schaar* court found "no support in the regulations to exclude categorically all lay testimony regarding the length of an employee's incapacitation." *Id.*

[77] *Id.*

which was longer than the doctor's testimony of expected incapacity of only two days, the plaintiff met the statutory requirements for a serious medical condition.[78] Therefore, the court's decision to allow lay testimony to supplement medical testimony was crucial to the *Schaar* plaintiff's ability to survive summary judgment.

The decisions of the second group of courts are characterized by the requirement of medical testimony in combination with the use of lay testimony to prove that a serious medical condition existed. These courts, which include the Third Circuit, the Eighth Circuit, some district courts, and some state supreme courts,[79] are defined by a compromise position which accommodates some of the concerns of both employees and employers. These courts do not "exclude categorically all lay testimony."[80] Yet they "do not find lay testimony, by itself, sufficient" to create a genuine issue of material fact that a serious health condition existed.[81] This second group instead allows lay testimony to supplement medical testimony to prove a serious medical condition under the FMLA.

These courts enable some employees to make a case for their incapacity who would not have been able to do so in the first group of courts' jurisdiction. For example, the hypothetical tooth extraction patient who chooses to use home remedies to alleviate the pain of her dry socket would be able to supplement the medical testimony from her dentist that she had a tooth extraction with her lay testimony that she had a dry socket that caused her to be unable to work for four or more days. In the second group of courts, unlike in the first group of courts, the home remedy patient would be able to survive summary judgment. This second group of courts, however, still restricts the ability of some employees to take FMLA leave. For example, if medical testimony were not available from the dentist about both the tooth extraction and the subsequent dry socket, the home remedy dry socket patient would not be able to prove that she had a "serious health condition."

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[78] *Id.*
[79] *See, e.g.*, *supra* notes 73–74 and accompanying text.
[80] *Schaar*, 598 F.3d at 161.
[81] *Id.*

C. Fifth and Ninth Circuits Do Not Require Medical Testimony

The third group of courts does not require medical testimony. These courts allow lay testimony—independent of medical testimony—to prove a serious health condition under the FMLA. They allow plaintiffs to survive summary judgment based solely on their version of the facts and leave it up to the jury as the trier of fact to determine the veracity of lay witness statements.[82] For example, the Ninth Circuit, in *Marchisheck v. San Mateo County*,[83] held that the psychological and physical problems of the plaintiff's son did not qualify as a serious health condition because he did not meet the requirement for the number of treatments by a health care professional.[84] The court, however, clearly indicated that the lay testimony of the boy that he "just did not and could not do anything for four or five days" was, by itself, enough to create a genuine issue of fact that the boy was incapacitated.[85] The court went even further to say that lay testimony allows a plaintiff to present his case to the jury even though medical testimony contradicts the lay testimony: "Notwithstanding the stronger evidence to the contrary, [the boy's] declaration creates a disputed issue of fact and precludes summary judgment on the issue of 'incapacity.' "[86]

Similarly, in *Lubke v. City of Arlington*, the Fifth Circuit held that the lay witness testimony, by itself, was sufficient to allow the plaintiff to survive summary judgment.[87] The *Lubke* plaintiff was a husband who stayed home from work to take care of his wife who had bronchitis, possible pneumonia, chronic back pain, and could not get out of bed.[88] Medical testimony from the wife's doctor was not admissible as expert medical testimony

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[82] *See* Ladner v. Hancock Med. Ctr., 299 F. App'x 380, 381 (5th Cir. 2008) (per curiam) (holding that an employee's testimony that her son was sick and wheezing due to an asthma attack, which usually required her to care for him for several days afterward, was sufficient evidence to show that hospital employee's son was incapacitated due to a serious health condition); Lubke v. City of Arlington, 455 F.3d 489, 494–95 (5th Cir. 2006) (holding that expert medical testimony is not "necessary to demonstrate [an] incapacity" existed and that evidence that included lay testimony from the plaintiff and his wife, coworkers, and supervisors was "legally sufficient for a jury to find a chronic condition" under the FMLA).

[83] 199 F.3d 1068 (9th Cir. 1999).

[84] *Id.* at 1074.

[85] *Id.*

[86] *Id.*

[87] *Lubke*, 455 F.3d at 494–95.

[88] *Id.* at 493.

because of discovery issues, so only lay witness testimony was available.[89] The plaintiff, his wife, a coworker, and his supervisor all submitted lay testimony regarding the wife's incapacity.[90] The Fifth Circuit interpreted the FMLA as not requiring medical testimony and determined that the lay witness testimony, by itself, created a genuine issue of fact.[91]

The decisions of the third group of courts are characterized by a lack of a requirement of medical testimony. These courts allow cases based solely on lay testimony to survive summary judgment and rely on the jury as a trier of fact to determine if there is a serious medical condition. These courts correctly apply "ordinary evidentiary rules to reach an ordinary, sensible conclusion regarding admissibility"[92] and do not cut short a plaintiff's right to present his case to the jury. For example, in these "lay testimony sufficient" courts, the tooth extraction patient who treats her dry socket with a home remedy instead of returning to the dentist would be able to testify that she was incapacitated for four or more days. Unlike in the "medical testimony only" first group of courts, her case would not be dismissed at the summary judgment phase for lack of medical testimony. Even if medical testimony was not available from the doctor for both the tooth extraction and the subsequent dry socket, she would still be able to survive summary judgment in this "lay testimony sufficient" group of courts with lay testimony from herself and other witnesses who had first-hand knowledge that she was sick.

These courts, however, introduce the risk that some employees will give false testimony and be able to present their case to a jury based solely on these fraudulent claims. Pro-employee holdings like this could force employers to give FMLA leave to employees who are unfairly taking advantage of the system. Additionally, these holdings could cause a flood of FMLA litigation. These concerns of fraudulent testimony, although

[89] *Id.* at 495.
[90] *Id.*
[91] *Id.* at 495–96.
[92] *Id.* at 495.

valid, exist in all judicial proceedings and are effectively handled by the trier of fact, whom our legal system entrusts to determine the credibility of the witnesses.[93]

III. AMBIGUOUS DOL REGULATIONS CAUSE INCONSISTENCY IN COURTS

The courts' inconsistent approaches to determining whether a "serious health condition" existed cause a lack of notice to both employers and employees as to their rights and obligations under the FMLA.[94] In particular, employers and employees lack notice of what types of testimony will be required or permitted to prove that a "serious health condition" exists. This inconsistency results in instability both in the form of unnecessary insecurity before judgment and unfair and disparate results after judgment. This inconsistency is particularly egregious because it flies in the face of the FMLA's goal of "promot[ing] the stability and economic security of families."[95]

Ambiguity in the DOL regulations, which are used by courts, employees, and employers to interpret the FMLA,[96] causes this inconsistency in the courts. Congress delegated responsibility to the DOL to "prescribe such regulations as are necessary to carry out" the requirements for FMLA leave.[97] The DOL regulations, although intended to "make the regulations 'accessible, understandable, and usable by a person not familiar with the FMLA,' "[98] have arguably failed in their goal to provide employees and employers with increased stability and reliability regarding the testimony required to prove that a serious health

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[93] GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 601.5 (2009) ("[T]he jury has the prerogative of weighing the credibility of all testimony.").

[94] *See supra* Part II.

[95] 29 C.F.R. § 825.101 (2009) (noting that the FMLA was enacted in 1993 "to promote the stability and economic security of families, and to promote national interests in preserving family integrity").

[96] *See* Lindsey, *supra* note 13, at 584 ("Employees, employers, and courts rely on the DOL regulations for guidance in determining whether leave is covered by the FMLA."); Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156, 159 (3d Cir. 2010).

[97] 29 U.S.C. § 2654 (2006).

[98] *See* Lindsey, *supra* note 13, at 567 (quoting THE FAMILY AND MEDICAL LEAVE ACT 3, 14 (Michael J. Ossip & Robert M. Hale eds., 2006)).

condition existed.[99] This Section discusses two parts of the DOL regulations that are ambiguous: (1) the conflict between the lack of a medical testimony standard and the requirement of treatment and (2) the uncertainty caused because employers may elect medical certification but are not required to do so.

A. Conflict Between the Lack of a Medical Testimony Standard and the Requirement of Treatment

The DOL regulations are ambiguous because they do not clearly state if and when medical testimony is required to prove a serious medical condition. The regulations do not explicitly require a health care professional's testimony,[100] nor do they explicitly state that a health care professional's testimony is not required.[101]

The lack of an explicit medical testimony requirement indicates that testimony from a lay witness would be sufficient by itself to prove that the serious medical condition exists. The Federal Rules of Evidence state that "[e]very person is competent to be a witness"[102] and only require that the witness has "personal knowledge of the matter."[103] Since the Federal Rules do not require that a witness be an expert in order to testify, without specific requirements in the FMLA that an expert is needed, some courts have determined that lay witness testimony should be allowed, by itself, to prove that a serious medical condition exists.[104]

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[99] Unfortunately, the DOL recently updated FMLA regulations in 2008 and did not address the testimonial requirement issue. *See generally* The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934 (Nov. 17, 2008) (updating the FMLA, but not addressing if medical testimony is required to prove that a serious health condition existed).

[100] *See generally* 29 C.F.R. § 825.100–800 (not addressing whether medical testimony is required to prove the existence of a serious medical condition).

[101] *Id.*

[102] FED. R. EVID. 601.

[103] FED. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.").

[104] *See supra* Part II.C.

Other courts, however, have interpreted a DOL medical *treatment* requirement as a medical *testimony* requirement.[105] The DOL regulations require that a health care professional treat the employee at least once in order for a "serious medical condition" to have existed.[106] These courts hold that this medical *treatment* requirement indicates that medical *testimony* is required. The tension between the aforementioned provisions—(1) lack of an explicit medical testimony requirement and (2) treatment requirement—causes ambiguity in the DOL regulations and results in the FMLA being inconsistently interpreted by the courts, employees, and employers.

B. Medical Certification May Be Elected but Is Not Required

DOL regulation §825.305, which allows the employer to elect that medical certification by a doctor is required, creates further ambiguity about whether medical testimony is required.[107] Since employers have the option to require medical certification, and many employers do require certification, some courts view medical certification as "de facto mandatory."[108] Not all employers, however, elect medical certification.[109] Employees, therefore, are not categorically required to provide medical certification.

Because all employers do not statutorily elect medical certification, courts should not treat medical certification as "de facto mandatory"[110] and require medical testimony. In cases where the employers elect medical certification, the employers have invoked a statutory right to medical documentation; therefore, medical testimony should be required to prove that a serious medical condition existed. In cases where employers do

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[105] *See* Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156, 161 (3d Cir. 2010).

[106] 29 C.F.R. § 825.115(a)(2).

[107] 29 C.F.R. § 825.305(b).

[108] Konrad Lee, *The Employees' Quest for Medical Record Privacy Under the Family and Medical Leave Act*, 41 SUFFOLK U. L. REV. 49, 54 (2007) (noting that the medical certification form, DOL Form WH-380, "[w]hile envisioned as a voluntary form, because the employer will not grant the FMLA leave request without the form, the medical disclosure certification, or some version thereof, is de facto mandatory").

[109] *See, e.g.*, Lubke v. City of Arlington, 455 F.3d 489, 496 (5th Cir. 2006). If the employer does not elect medical certification in a timely manner, the employer is not entitled to medical certification unless it has a reason to question the validity of the request for leave. 29 C.F.R. § 825.305(b).

[110] Lee, *supra* note 108.

not elect medical certification, the employer has failed to act to reserve his statutory right to medical documentation. In these cases, the employee should not be required to provide medical testimony that a "serious medical condition" existed.[111]

IV. AMBIGUOUS DOL REGULATIONS SHOULD BE CLARIFIED TO ALLOW LAY TESTIMONY

The ambiguity of the DOL regulations should be resolved to ensure notice and stability regarding medical leave for employees and employers. The expected rise in the need for FMLA leave because of the aging U.S. population[112] and growing number of households where all of the caregivers work outside of the home[113] puts further pressure on the need for a clear definition of what type of testimony is required for leave under the FMLA. The DOL regulations should be revised to expressly state when medical testimony is required to prove that a serious medical condition exists.

This Note proposes changes, which in accordance with the purpose of the FMLA,[114] balance the needs of both the employee and the employer. The proposed changes account for the employee's needs by uniformly allowing courts to consider lay testimony when determining if a serious health condition existed. The proposed changes account for the employer's needs by requiring that medical testimony be provided in cases where the employee's prior actions call into question the validity of the leave request. The proposed changes also adhere to the spirit of the current provisions in requiring medical testimony where medical certification was properly requested.

This Note specifically proposes that the DOL regulations should be updated to provide that lay testimony is sufficient to prove that a "serious health condition" existed *unless* one of the following trigger conditions exists: (1) medical certification was properly requested or (2) the employee has exhibited a pattern of

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[111] If the employer does not elect to require medical certification, the employee will, however, still need to prove that a "serious health condition" existed. Murphy v. FedEx Nat'l LTL, Inc., 618 F.3d 893, 902 (8th Cir. 2010). An employer's choice not to request medical certification is not an "absolute waiver of the right to challenge the existence of an FMLA-qualifying condition." *Id.*

[112] *See supra* notes 27–29 and accompanying text.

[113] *See supra* notes 24–26 and accompanying text.

[114] 29 U.S.C. § 2601(b)(1) (2006) ("It is the purpose of [the FMLA] . . . to balance the demands of the workplace with the needs of families.").

absences that were excessive, unexcused, or abutted weekends or holidays. If one of the trigger conditions is met, medical testimony will be required. Additionally, if one or more of the trigger conditions existed, lay testimony will be allowed to support or contradict the medical testimony.

A. Lay Testimony Alone Is Sufficient Unless Compelling Counter Conditions Exist

The DOL regulations should be changed to include the default rule that lay testimony is sufficient to prove that a "serious health condition" existed. Support for this rule includes: (1) the interpretation of the current FMLA and DOL regulations, which do not require medical testimony; (2) the tradition of the United States legal system, which favors allowing relevant testimony to be heard and assessed by the trier of fact; and (3) the practical reality that medical testimony is not always accurate or available. As the Sixth Circuit held in a 2001 FMLA case, the "plaintiff's burden in establishing a prima facie case is not intended to be an onerous one."[115] Without explicit Congressional intent that indicates otherwise, in an FMLA case, all courts should follow the default rules of the United States legal system, which allow lay testimony.[116]

1. Interpretation of the FMLA and DOL Regulations

Interpretation of the FMLA and DOL regulations indicates that lay testimony alone is sufficient to prove that a "serious health condition" existed. The current FMLA statute and corresponding DOL regulations do not require medical testimony to prove that a serious health condition existed.[117] On the contrary, the DOL regulations indicate that medical proof is not required in all situations: (1) medical certification *may* be required by the employer[118] and (2) a health care provider visit is not required for flare-ups of a chronic injury.[119] In both of these situations, medical testimony is explicitly not required; this indicates that lay testimony should be sufficient to prove that a serious medical condition existed.

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[115] Skrjanc v. Great Lakes Power Serv. Co., 272 F.3d 309, 315 (6th Cir. 2001).
[116] *See* FED. R. EVID. 601.
[117] *See generally* 29 U.S.C. §§ 2601–2654; 29 C.F.R. § 825.100–800 (2009).
[118] 29 C.F.R. § 825.305(a).
[119] 29 C.F.R. § 825.115(f).

a. Medical Certification Not Required

Current DOL regulations do not require medical certification. The regulations explicitly say that "[a]n employer *may* require that . . . leave . . . for . . . a serious health condition . . . be supported by a certification issued by the health care provider."[120] Since an employer only *may* request medical certification, the regulations clearly contemplate that there will be times that an employer will not request medical certification. If the employer does not request the medical certification, then the employee "[is] not required to provide medical certification."[121] Because employees are not always required to provide medical certification, it would be inconsistent with the DOL regulations to *require* medical testimony.[122] If medical testimony is not used, lay testimony is the only type of testimony possible. Therefore, the DOL regulations should be updated to unambiguously state that medical testimony is not required and that lay testimony is sufficient to prove that a serious medical condition existed.

b. Health Care Provider Visit Is Not Required for Flare-ups of a Chronic Injury

Another example in the current DOL regulations where medical testimony is explicitly not required is flare-ups of chronic serious health conditions.[123] The DOL regulations state that "[a]bsences attributable to incapacity [for chronic conditions] qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence."[124] For chronic conditions, the injured person is not even required to visit with a health care provider during the incapacity, so in many cases there will be no

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[120] 29 C.F.R. § 825.305(a) (emphasis added).

[121] Lubke v. City of Arlington, 455 F.3d 489, 496–98 (5th Cir. 2006).

[122] The fact that most employers do request medical certification, which employees are then required to provide, is potentially one reason why some courts have held that medical testimony is required to prove a serious health condition existed. *See* Lee, *supra* note 108 ("While envisioned as a voluntary form, because the employer will not grant the FMLA leave request without the [medical certification] form, the medical disclosure certification, or some version thereof, is de facto mandatory.").

[123] 29 C.F.R. § 825.115(c) & (f).

[124] *Id.* § 825.115(f).

medical testimony relating to the incapacity.[125] If the patient does not visit a health care provider during the flare-up of an ongoing chronic condition, as is her statutory right, the only evidence available for her to prove the incapacity is lay testimony. Lay testimony, therefore, must be sufficient to prove that a "serious health condition" existed. The current DOL regulations, as shown in the previous two examples, support the change to the regulations to not require medical testimony and to allow lay testimony to be sufficient to prove that a "serious health condition" existed.

2. Federal Rules of Evidence Allow Lay Witness Testimony

The tradition of the United States judicial system and the Federal Rules of Evidence indicate that lay testimony alone is sufficient to prove that a "serious health condition" existed.

The Federal Rules of Evidence state that "every person is competent to be a witness,"[126] and requires only that the witness has "personal knowledge of the matter."[127] Since the Federal Rules do not require that a witness be an expert in order to testify, without specific intent by Congress to require expert testimony, lay witness testimony should be allowed to prove that a serious health condition existed.

Further, the jury's power to determine the credibility of the witnesses and weigh the evidence is usurped when a defendant is granted summary judgment because only lay witness evidence is available. The importance of the jury's role in assessing credibility of witnesses under the FMLA was emphasized by the Fifth Circuit in *Ladner v. Hancock Medical Center*.[128] In *Ladner*, the court held that a mother's testimony that her son's chronic asthma was flaring up was sufficient evidence to prove that a serious health condition existed and that "it was the jury's province to evaluate the credibility of witnesses and weigh the evidence."[129] The jury mitigates the risk of allowing potentially self-serving lay testimony because the jury would need to believe

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[125] *See, e.g.*, McCoy v. Port Liberte Condo. Ass'n #1, No. Civ.A. 2:02-1313, 2003 WL 23330682, at *7 n.8 (D.N.J. Sept. 12, 2003) (stating that treatment for the plaintiff's chronic condition during the specific time frame of her alleged incapacity is not required by the DOL regulations).

[126] FED. R. EVID. 601.

[127] FED. R. EVID. 602.

[128] 299 Fed. App'x. 380 (5th Cir. 2008) (per curium).

[129] *Id.* at 381.

that the testimony—as well as the plaintiff's reason for not having a doctor's note—was credible. For the reasons listed above, the rules and traditions of the United States judicial system support allowing lay witness testimony to be sufficient to prove that a serious health condition existed under the FMLA.

3. Medical Testimony May Not Be Available

The non-availability of medical testimony in some cases indicates that lay testimony should be sufficient to prove that a serious health condition existed. Medical testimony may not be available to prove that a serious health condition existed for many reasons including: (1) medical certification was not contemporaneously required by the employer,[130] (2) expert medical testimony was not allowed at court because of discovery violations,[131] or (3) the employee would prefer not to disclose his medical records to his employer for privacy reasons.[132] For those individuals who are concerned about privacy issues, allowing lay testimony to be sufficient to prove that a serious health condition existed would enable an employee to choose to testify himself instead of opening up lines of communication between his employer and the health care provider about personal issues.

Because medical testimony is not always available, it would be unfair to the employee to categorically prohibit her from using non-medical testimony to prove that a serious medical condition existed. When medical testimony is not available, it is risky for

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[130] *See* Municipality of Anchorage v. Gregg, 101 P.3d 181, 188 (Alaska 2004).

[131] *See* Lubke v. City of Arlington, 455 F.3d 489, 495 (5th Cir. 2006).

[132] In *The Employees' Quest for Medical Record Privacy Under the Family and Medical Leave Act*, *supra* note 108, Konrad Lee raises the tangential issue that medical certifications that discuss personal medical issues of the employee, which are given to the employer, put the employee at risk of being discriminated against because of his or her medical issues. *See* Lee, *supra* note 108, at 50–51. He points out that fifteen percent of individuals have gone to great lengths to avoid their medical records being made known to others. *Id.* at 49–50. Lee argues that details of medical issues are not relevant to whether or not an employee is eligible for FMLA, and, therefore, FMLA medical certifications should not be required to divulge personal medical details, and instead, only be required to state that in the health care provider's opinion, a "serious health condition" existed. *See id.* at 51. The changes to the FMLA DOL regulations that this Note proposes would give some individuals who are concerned about their privacy an alternative to medical information disclosure. Allowing lay testimony to be sufficient to prove that a serious health condition existed would enable an employee to choose to testify about his incapacity himself instead of providing medical testimony and opening up lines of communication between his employer and the health care provider.

the employee to proceed with only lay testimony—because the jury may not believe his potentially self-serving testimony. When medical testimony is not available, however, the employee should be given an opportunity to make her case. This allows for the balance between employees and employers that Congress intended when creating the FMLA.[133]

B. Trigger Conditions That Require Medical Testimony

The proposed standard allows lay testimony to be sufficient to prove that a serious health condition existed *unless* one of two trigger conditions occurs. These trigger conditions are: (1) the employer properly requested medical certification and (2) the employee has a pattern of prior absences that are excessive, unexcused, or abut weekends or holidays. If one of these trigger conditions occurs, medical testimony will be required to prove that a serious health condition existed. These conditions, which are favorable to employers, mitigate the risk of self-serving fraudulent claims by employees.

1. Employer Properly Requested Medical Certification

If an employer properly requests medical certification, the proposed changes to the DOL regulations require medical testimony in order to prove that a serious health condition existed. This trigger condition parallels the current DOL regulations' medical certification provision[134] and makes it clear that if an employer would like medical testimony to be required, then the employer should adhere to the DOL regulations' provisions regarding when and how to request medical certification.[135] In cases where the employers elect medical certification, the employers have invoked a statutory right to medical documentation, and, therefore, medical testimony should

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[133] 29 U.S.C. § 2601(b) (2006).

[134] "An employer *may* require that . . . leave . . . be supported by a certification issued by the health care provider." 29 C.F.R § 825.305(a) (2009) (emphasis added).

[135]

> [T]he employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

Id. § 825.305(b).

be required to prove that a serious medical condition existed. In cases where employers do not elect medical certification, the employer has failed to act to reserve his statutory right to medical documentation. In these cases, the employee should not be required to provide medical testimony that a serious medical condition existed.

The medical certification provision of the FMLA—and this parallel trigger condition—was "designed as a check against employee abuse of leave."[136] Congress designed the FMLA to include the needs of both the employers and the employees.[137] This trigger condition, when combined with the default rule that lay testimony is sufficient to prove that a serious health condition existed, adheres to Congress's goal of "balanc[ing] the demands of the workplace with the needs of families."[138]

2. Employee Pattern of Prior Absences That Are Excessive, Unexcused, or Abut Weekends or Holidays

If an employee has a pattern of prior absences that are excessive, unexcused, or abut weekends or holidays, the proposed changes to the DOL regulations require medical testimony to prove that a serious health condition existed. This second trigger condition is similar to and supported by current DOL regulation § 825.305(b), which allows an employer to request medical certification at any time if she has "reason to question" the validity of the employee's leave claim.[139] Both the new standard and § 825.305(b) allow the employer to give notice to the employee that medical testimony is required well after the incapacity started. The new trigger condition, however, unlike the vague standard of § 825.305(b), is objective. The new "pattern of prior absences" trigger condition requires a repeated pattern of actions by the employee that relate directly to the request for leave: a pattern of prior absences that are excessive, unexcused, or abut weekends or holidays.

The "pattern of prior absences" trigger condition mitigates the potential for fraudulent claims by employees. False claims by employees are a significant issue: Recent studies show the possibility of "30% to 40% incidence of malingering of pain,

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[136] S. REP. NO. 103–3, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 27–28.
[137] 29 U.S.C. § 2601(b).
[138] *See id.* § 2601(b)(1).
[139] 29 C.F.R § 825.305(b).

emotional, and/or cognitive symptoms . . . in litigating and benefit-seeking claimants."[140] Malingering is "the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs."[141] Results of a chronic pain study show that twenty to fifty percent of those with incentives of money or time off show signs of malingering.[142] Although this study included individuals with stronger financial incentives than unpaid leave—eighty-nine percent were involved in workers compensation claims[143]—it indicates that there is a risk that employees will be dishonest for personal gain in work-related claims.

A pattern of questionable absences is evident in many cases when an employee sues her employer for improper termination under the protection of the FMLA.[144] For example, in *Brown v. Seven Seventeen HB Philadelphia Corporation Number Two*,[145] the court held that the plaintiff did not provide sufficient medical evidence to prove that a serious medical condition existed.[146] In *Brown*, the "[p]laintiff had previously accumulated a high number of points for other unrelated absences."[147] Using the proposed changes to the DOL regulations on the facts of *Brown*, a court would allow lay testimony by default, but the plaintiff's large number of other absences would trigger a need for medical testimony, causing the court to rule against the plaintiff—in accordance with the *Brown* court's ruling. Similarly, in In re *Board of Education of Community Consolidated School District Number 180*,[148] an arbitrator upheld the school board's reprimand of a teacher and its withholding of one day's pay when the teacher did not provide medical proof of her Friday

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[140] *See* Aronoff et al., *supra* note 31.

[141] *See* Greve et al., *supra* note 31 (quoting AMERICAN PSYCHIATRIC ASS'N, *supra* note 31, at 739).

[142] *Id.*

[143] *Id.* at 1118.

[144] *See, e.g.*, Haefling v. United Parcel Serv., Inc., 169 F.3d 494, 496–97 (7th Cir. 1999) (holding that a plaintiff, who had been absent eighteen times in the prior two hundred days was not entitled to FMLA protection).

[145] No. 01-1741, 2002 WL 31421924 (E.D. Pa. Aug. 8, 2002).

[146] *Id.* at *5.

[147] *Id.* at *1.

[148] 93 Lab. Arb. Rep. (BNA) 1218 (Nov. 27, 1989).

absence.[149] There, the teacher had seventeen previous sick leave absences on Mondays, Fridays, or days before or after a holiday.[150] This case, like *Brown,* shows the need for a trigger condition to require medical testimony when employees' previous actions give the employer and the courts reason to question the validity of their current leave.

The prevalence of questionable absences by plaintiffs indicates that this trigger condition is necessary to uphold the FMLA's goal[151] of properly balancing the needs of employers with those of employees.[152] The requirement of medical testimony when an employee has questionable absences does not limit the employee's ability to make a successful claim under the FMLA. It offers a reasonable safeguard against fraudulent claims when employees have taken specific actions which reasonably call their credibility into question. In these cases, the proposed trigger condition reasonably requires additional proof beyond lay testimony—medical testimony—in order to prove that a "serious health condition" existed.

C. If Trigger Conditions Exist, Lay Testimony Should Be Allowed To Supplement Medical Testimony

In the proposed changes to the DOL regulations, if a trigger condition occurs that causes medical testimony to be required, lay testimony should be allowed—in addition to the medical testimony—to support or contradict the medical testimony for three reasons. This Note argues that first, two sections of the current DOL regulations contemplate that medical testimony may not be sufficient by itself. These sections are the definition of "serious health condition" and the requirements for the content of the medical certification.[153] Second, medical diagnoses are not

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[149] *Id.* at 1221–24.

[150] *Id.*

[151] 29 U.S.C. § 2601(b) (2006).

[152] In *The Definition of "Serious Health Condition" Under the Family Medical Leave Act*, *supra* note 22, Jessica Beckett-McWalter argues for a new standard for the FMLA definition of "serious health condition" that includes "evidence of prior unexplained absences" on the theory that this more flexible balancing standard will help mitigate abuse of the FMLA while allowing honest employees who deserve FMLA protection to receive it. *See* Beckett-McWalter, *supra* note 22, at 471–75.

[153] *See supra* Part I.B.

always accurate. Finally, as per the Federal Rules of Evidence, both lay and medical testimony should be allowed to be assessed by the trier of fact who will weigh credibility.[154]

1. Current DOL Regulations Contemplate That Lay Testimony Will Be Needed To Supplement Medical Testimony

Two sections of the current DOL regulations support allowing lay testimony to supplement medical testimony because they contemplate that medical testimony may not be sufficient by itself. These sections are (1) the definition of "serious health condition" and (2) the contents of the FMLA medical certification.

a. "Serious Health Condition" Definition Supports Use of Lay Testimony To Supplement Medical Testimony

The DOL regulations' definition of a serious health condition supports allowing lay and medical testimony to prove a serious health condition. DOL regulations define a serious health condition to include both (1) incapacity and (2) treatment.[155] The regulations define incapacity as "[a] period of incapacity of more than three consecutive, full calendar days."[156] This definition of incapacity *does not* mention a health care provider. The definition of treatment, however, does explicitly say that it must be "[t]reatment by a health care provider."[157]

This divergent treatment of mentioning the health care provider in discussion of the treatment requirement but not in the incapacity requirement has caused some courts to hold that lay testimony should be allowed to prove that the incapacity lasted the required number of days, but medical testimony is required to prove the treatment.[158] For example, in *Schaar v. Lehigh Valley Health Services*, the court allowed the plaintiff's lay testimony that she was incapacitated for more than three full calendar days to supplement medical testimony of treatment of the incapacity.[159] The court found "no support in the regulations to exclude categorically all lay testimony regarding the length of

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[154] *See* FED. R. EVID. 601; WEISSENBERGER & DUANE, *supra* note 93, § 601.5.

[155] 29 C.F.R. § 825.115(a) (2009); *see supra* Part I.B.

[156] 29 C.F.R. § 825.115(a).

[157] *Id.*

[158] *See, e.g.*, Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156, 161 (3d Cir. 2010).

[159] *Id.*

an employee's incapacitation."[160] The court pointed to the Supreme Court's holding in *Jama v. ICE*,[161] which said that when interpreting statutes, courts should not assume Congress omitted textual requirements that it showed later in the statute that it was capable of using.[162] In summary, because only part of the definition of a "serious health condition" discusses a health care provider, this definition can be interpreted to indicate that medical testimony is only required for the treatment part of the definition, and plaintiffs will be allowed to use lay testimony to prove incapacity.

b. Medical Certification Contents Support the Use of Lay Testimony To Supplement Medical Testimony

The contents of the FMLA medical certification support the use of lay testimony to supplement medical testimony to prove that a serious health condition existed. Both the FMLA statute and the DOL regulations contemplate that the doctor may not know how long the employee's incapacity will last; they require the medical certification to only include the "probable duration" of the incapacity.[163] Since the medical certification required by the FMLA may not contain the length of the incapacity—which is one of the required elements to prove a "serious health condition"[164]—the only way to prove the incapacity in some cases would be with lay testimony. Therefore, the FMLA clearly supports the use of lay testimony in conjunction with medical testimony to prove that a serious health condition existed.

2. Medical Diagnoses Are Not Always Accurate

The inaccuracy of medical diagnoses supports allowing lay testimony to supplement medical testimony. The following two research initiatives highlight the inaccuracy of medical diagnoses: (1) a survey of 1,500 individuals' experiences and (2) a comparison of ante-mortem and postmortem diagnoses. The first initiative, a telephone survey of the experiences of over 1,500 people completed by the American Medical Association ("AMA"),

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[160] *Id.*

[161] 543 U.S. 335 (2005).

[162] *Id.* at 341.

[163] *See* 29 U.S.C. § 2613(b)(2) (2006 & Supp. III 2009); 29 C.F.R. § 825.306 (2009).

[164] 29 C.F.R. § 825.115(a).

indicated that over forty-two percent of individuals "have been involved, either personally or through a friend or relative, in a situation where a medical mistake was made."[165] Similarly, the second initiative, which analyzed the differences between what individuals were diagnosed with, and what they actually died of, showed that the medical diagnosis was incorrect approximately forty percent of the time."[166]

Recent FMLA cases also show that medical diagnosis is a central issue for FMLA leave. For example, in *Municipality of Anchorage v. Gregg*,[167] the court held—using a combination of lay and medical testimony—that the plaintiff suffered from post-traumatic stress disorder even though health professionals at the time of the plaintiff's injury released her to go back to work.[168] The *Gregg* court correctly used lay testimony to allow the plaintiff to prove that a serious health condition existed.[169] As shown in *Gregg*, the prevalence of medical misdiagnosis indicates that lay testimony should be allowed to support or contradict medical testimony. Without the ability to augment or contradict the medical professional's testimony, employees would unfairly be stripped of the protection of the FMLA.

The prevalence of medical misdiagnosis and other doctor-patient interaction data indicates that lay witness testimony is potentially more trustworthy and relevant[170] than a treating health professional's view of whether the employee—or his or her family member—was unable to "work, attend school or perform other regular daily activities."[171] Lay witnesses, such as the employee herself, her spouse, or her friend may spend many hours with the injured party. Doctors, however, spend on average less than twenty-two minutes with each patient.[172]

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[165] LOUIS HARRIS & ASSOCS., NAT'L PATIENT SAFETY FOUND. AT THE AM. MED. ASS'N, PUBLIC OPINION OF PATIENT SAFETY ISSUES RESEARCH FINDINGS 5 (1997).

[166] George D. Lundberg, *Low-Tech Autopsies in the Era of High-Tech Medicine: Continued Value for Quality Assurance and Patient Safety*, 280 JAMA 1273, 1273 (1998), *available at* http://jama.jamanetwork.com/article.aspx?articleid=188042.

[167] 101 P.3d 181 (Alaska 2004).

[168] *Id.* at 184–85, 188–89.

[169] *Id.* at 191.

[170] The Federal Rules of Evidence state that "[a]ll relevant evidence is admissible [in a trial] . . . . Evidence which is not relevant is not admissible." FED. R. EVID. 402.

[171] 29 C.F.R § 825.113(b) (2009).

[172] David Mechanic et al., *Are Patients' Office Visits with Physicians Getting Shorter?*, 344 N. ENG. J. MED. 198, 200 fig.1 (2001), *available at*

Tellingly, in other research, thirty-two percent of doctors surveyed in large metropolitan areas across the United States felt that they were unable to spend sufficient time with patients.[173] The telephone survey of patients' experiences completed by the AMA also supports the doctors' view that they are unable to spend enough time with their patients: respondents believe that carelessness, negligence, overwork, hurriedness, and stress are the main reasons for medical misdiagnosis.[174] Further, unless the doctors commit malpractice, there is no penalty for making mistakes.[175] Although doctors have good intentions, "they have little economic incentive to spend time double-checking their instincts."[176] All of these doctor-patient factors contribute to a high prevalence of medical misdiagnosis. They also indicate that lay witness testimony from someone who has intricate, consistent, in-depth observance of the symptoms has potentially more reliable testimony than an un-incentivized, overworked doctor who only sees a patient once for twenty-two minutes. Of course, doctors are well-trained to be able to determine the health of a patient in a short amount of time, but in the potentially forty percent of cases that are misdiagnosed, it is imperative that lay testimony be permitted to augment or contradict the medical testimony from the treating health care provider.

CONCLUSION

Congress took a strong step in the right direction with the Family and Medical Leave Act of 1993 when it supported American workers in their need for medical leave for themselves and for the medical care of their family members. Congress's affirmation of family integrity as a "national interest" through the FMLA has provided "stability and economic security" for

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http://www.nejm.org/doi/pdf/10.1056/NEJM200101183440307 (stating that 1998 surveys from the American Medical Association and the National Center for Health Statistics indicate that the average doctor's visit is less than twenty-two minutes).

[173] *Id.* at 198 (stating that in a 1997 survey of "young physicians in the 75 largest metropolitan areas in the United States, . . . only 32 percent [of the respondents] reported that they could spend sufficient time with patients").

[174] LOUIS HARRIS & ASSOC., *supra* note 165, at 30.

[175] David Leonhardt, *Why Doctors So Often Get It Wrong*, N.Y. TIMES, Feb. 22, 2006, at C1.

[176] *Id.*

many families over the past seventeen years.[177] During that time, however, inconsistent court rulings on what type of testimony is allowed under the FMLA has caused instability and lessened the positive impact of the FMLA. The need for the FMLA has continued to grow since 1993 and is expected to grow even more in the future[178]; this creates a strong imperative to change the ambiguous FMLA-related DOL regulations.

Both employees and employers need and are entitled to the protection of the FMLA.[179] Employees, like the tooth extraction patient who chose to use home remedies to treat her dry socket instead of returning to the dentist to apply the pain reliever, are being unfairly denied FMLA protection. An employee's belief in herbal pain relievers or her choice to medicate her pain over the weekend when her dentist is not available, should not lead to the loss of her FMLA rights and her job. An honest employee who has a valid claim should be able to prove her FMLA claim with lay testimony and present her case to a jury. The United States judicial system has put their faith in juries to decipher the truth, and unless there are extenuating circumstances that show a need for medical testimony, the jury should play its traditional role as determiner of the truth in FMLA cases.

On the other side of the spectrum, some courts' implementation of the FMLA is egregiously unfair to employers. For example, employers are disadvantaged when courts allow fraudulent health-related claims to pass summary judgment based on lay testimony from untrustworthy employees who have repeatedly abused company attendance policies. These malingering employees' absences and lawsuits are a financial drain on employers and result in less efficient and less profitable businesses. Employers should have a way to protect themselves from such deceitful actions of employees. This is particularly so when employees have shown a continued pattern of unexcused absences. Both the follow-up home remedy treatment patient and the malingering employee are examples of unfair applications of the current FMLA regulations and are not what Congress had in mind when it designed the FMLA.

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[177] 29 U.S.C. § 2601(b)(1) (2006).

[178] *See supra* notes 24–29 and accompanying text.

[179] *See* 29 U.S.C. § 2601(b).

The DOL regulations should be clarified to clearly indicate when medical testimony is required to prove that a serious medical condition existed. The changes should follow the standard rules of the Federal Rules of Evidence, which allow lay testimony, by itself, to prove that a condition existed. This will further the goal of allowing honest employees the opportunity to make their cases to juries. Because of the valid concerns of employers, however, the FMLA should be changed to require medical testimony if an employer is pro-active and properly requests medical certification, or when an employee's prior actions have raised a red flag that validates the need for a heightened testimonial requirement. These trigger conditions correctly take into account both the employee and the employer's needs and properly "balance the demands of the workplace with the needs of families."[180] Even when these trigger conditions exist, lay testimony should still be allowed to supplement the medical testimony.

The proposed changes will allow the FMLA, as "intended and expected to benefit employers as well as their employees."[181] The changes accommodate the employees' practical reality that medical testimony may not be available to prove all of the elements of their incapacity, while giving employers an opportunity to ensure that they are not taken advantage of by malingering employees.

[180] 29 U.S.C. § 2601(a)(1) (2009).
[181] 29 C.F.R. § 825.101(c).