Take It or Leave It: A New Approach to Intermittent Leave for Non-Traditional Family Caretaking Duties Under the Family and Medical Leave Act

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I. INTRODUCTION

American workers are among the most overworked in the entire world:[1] they "work longer hours, have shorter vacations, get less in unemployment, disability, and retirement benefits, and retire later, than people in comparably rich societies . . . ."[2] As a result, millions of those working Americans rely on the federal Family and Medical Leave Act[3] (FMLA or the Act) and its leave benefits to balance their lives as working employees with their numerous and ever-growing private obligations.[4] In turn, FMLA-leave related litigation has risen drastically in recent years as employees continue to assert their rights to FMLA leave time.[5]

Despite this, the FMLA is still relatively new,[6] and federal courts have not yet reached several leave-related issues within the Act's purview. One such issue pertains to employee-caregivers—those who are officially employed yet are often needed to care for an eligible family member.[7] There are millions of family caregivers in the United States: the most recent statistics from the Family

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[1] Even back in 2006, Americans were supposedly working more than "anyone else in the industrialized world." Dean Schabner, *Americans: Overworked, Overstressed*, ABC NEWS (Jan. 7, 2006), https://abcnews.go.com/US/story?id=93604&page=1 [https://perma.cc/WV6M-JG9F].

[2] Derek Thompson, *Workism is Making Americans Miserable*, ATLANTIC (Feb. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441/ [https://perma.cc/6GKJ-CQ85] (quoting SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 30 (2004)).

[3] Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601–54 (2012).

[4] *See* Sarah Jane Glynn, *The Family and Medical Leave Act at 20: Still Necessary, Still Not Enough*, ATLANTIC (Feb. 5, 2013), https://www.theatlantic.com/sexes/archive/2013/02/the-family-and-medical-leave-act-at-20-still-necessary-still-not-enough/272605/ [https://perma.cc/SJ7C-NE6S] ("The FMLA remains to this day the only piece of federal legislation specifically focused on helping workers manage their dual responsibilities in the workplace and in the home.").

[5] From 2012 to 2013, the number of FMLA-related cases being litigated in federal courts rose nearly 300%. *See* Joe Palazzolo, *More Workers File Family-Leave Lawsuits*, WALL ST. J. (Aug. 8, 2014), https://www.wsj.com/articles/more-workers-file-family-leave-lawsuits-1407515411 [https://perma.cc/H39L-SLND] ("Lawsuits filed under the statute jumped to 877 in 2013 from 291 a year earlier, according to the most-recent figures from the Administrative Office of the U.S. Courts."). From January through October of 2018, federal courts alone handled over 200 FMLA-related cases. *See 2019 Midwinter Meeting Report of 2018 Cases*, AM. BAR ASS'N (Feb. 2019), https://www.americanbar.org/content/dam/aba/events/labor_law/2019/MWM/flsl-papers/fmla-report.pdf [https://perma.cc/S7MS-26PF] (summarizing all FMLA-related federal court cases for a ten month period in 2018).

[6] After a tumultuous journey through Congress and several Presidents, the FMLA was signed into law in 1993. Glynn, *supra* note 4.

[7] *See* 29 C.F.R. § 825.124 (2019); Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 968 (2014) ("[T]he Family and Medical Leave Act . . . provide[s] only limited protection to workers who [have external family caregiving obligations].").

Caregiver Alliance put the number of family caregivers in the United States at around forty-four million, all of whom collectively provide thirty-seven *billion* hours of caregiving per year.[8] Many of these caregivers are formally employed and do not receive compensation for their caregiving activities.[9] These demographics and statistics raise one overarching question: how can these employee-caregivers use the FMLA to effectively balance their home lives and family obligations with their own needs to earn a living, if at all?

In its current form, the FMLA provides employees with, at best, moderate protections:[10] in general, it permits eligible employees to take up to twelve workweeks of unpaid leave time per year for a qualified reason.[11] One such qualified reason is when an employee is needed to "care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition."[12] The FMLA's accompanying regulations attempt to define what it means to "care for" such a family member, noting that care may encompass providing assistance with basic medical, nutritional, and

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[8] *Caregiving*, FAM. CAREGIVER ALLIANCE, https://www.caregiver.org/caregiving [https://perma.cc/BSD5-MG32]. It is important to note, however, that these statistics include caregivers of friends, which the FMLA does not cover. *See* 29 U.S.C. § 2612(a)(1)(C) (covering only care for a spouse, son, daughter, or parent). While these statistics are from 2013, these values have likely not decreased significantly. *See Caregiver Statistics: Demographics*, FAM. CAREGIVER ALLIANCE (Apr. 17, 2019), https://www.caregiver.org/caregiver-statistics-demographics [https://perma.cc/VU6S-WLUS] [hereinafter *Caregiver Statistics*] (citing 43.5 million caregivers in the United States in 2015, virtually unchanged from 2013).

[9] *See* NAT'L ALL. FOR CAREGIVING & AARP, 2020 REPORT: CAREGIVING IN THE U.S. 62 (May 2020), https://www.caregiving.org/wp-content/uploads/2020/05/Full-Report-Caregiving-in-the-United-States-2020.pdf [https://perma.cc/HP88-JQXD] (studying unpaid caregivers and citing 60% of those caregivers employed as working full-time, as of 2020). Perhaps unsurprisingly, family caregiving activities are disproportionately performed by women. *See Caregiver Statistics*, *supra* note 8 ("Upwards of 75% of all caregivers are female, and may spend as much as 50% more time providing care than males.").

[10] These protections are only moderate in part because the FMLA does not mandate paid leave. 29 U.S.C. § 2612(c). This is particularly unique in the parental leave sub-category of family leave, as the United States is the only country to offer *unpaid* parental leave—all other countries federally offering any parental leave mandate that employees be paid during their leave periods. Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RES. CTR. (Dec. 16, 2019), https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/ [https://perma.cc/7FLH-2KZ3]. Although the United States has made headway on this issue—including offering twelve weeks of paid parental leave for federal employees—the fact remains that many wage-earners remain unpaid for the duration of their family and parental leave time. Memorandum from Dale Cabaniss, Director, the U.S. Office of Pers. Mgmt., to Heads of Exec. Dep'ts & Agencies (Dec. 27, 2019), https://www.chcoc.gov/content/paid-parental-leave-federal-employees [https://perma.cc/VA9W-A38L].

[11] 29 U.S.C. § 2612(a)(1), (c). Note that "per year" does not necessarily mean per calendar year but rather per twelve-month period. *Id.*

[12] *Id.* § 2612(a)(1)(C).

hygienic needs as well as "psychological comfort and reassurance."[13] Employees may also use the permitted twelve workweeks of leave time in one of two ways—either in whole (i.e., for a consecutive twelve workweeks) or intermittently (i.e., for periods ranging from one hour to several consecutive weeks).[14]

Combining these provisions, one might expect that an otherwise-eligible employee may use intermittent FMLA leave time—a couple hours, at most—to run to the grocery store with her ailing child.[15] Or that a quick trip to the local park or library with her child would arguably be covered under the FMLA because of the psychological benefits such a trip could provide. Yet, as this Note will describe, these assumptions and expectations about how the FMLA *should* work often do not line up with how the FMLA *does* work under current judicial interpretations.

Unsurprisingly, the courts interpreting the statutory and regulatory language have historically differed on the activities the definition of "care" encompasses.[16] In the courts that have addressed the question of what it means to care for a loved one during a long-term, out-of-town trip—namely, the First, Fifth, Seventh, and Ninth Circuit Courts of Appeals[17]—massive variations in their interpretations and outcomes have created jurisdictions that are either employer-favorable or employee-favorable with little to no wiggle room. Without an overhaul of the current system, this could, in time, force employees within those employer-favorable jurisdictions to make tough decisions—either remain in a location that likely will not grant FMLA protection when needed or pick up their lives and move to a jurisdiction that will (which, of course, may be entirely impractical). The fact that only a few jurisdictions have addressed the problem creates another issue: employees in undecided jurisdictions are left wondering what level of involvement in their family members' ongoing medical care is required to obtain much-needed leave time. Employees in these jurisdictions have no single test or factor to look to for determining leave eligibility, forcing both to take their chances in an unpredictable—and often unforgiving—court system.

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[13] 29 C.F.R. § 825.124 (2019).

[14] *Id.* § 825.202.

[15] The family caregiver population is disproportionately comprised of women. *See* 29 U.S.C. § 2601(a)(5) ("[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men . . . ."); *Caregiver Statistics*, *supra* note 8. This Note will most often refer to employee-caregivers using the gender pronouns "she," "her," "hers," and "herself," while noting that all pronouns can be used for any gender.

[16] *See, e.g.*, Maegan Lindsey, Comment, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. TEX. L. REV. 559, 568 n.67 (2009) (presenting conflicting federal court outcomes in determining the level of employee involvement required in a family member's ongoing care to receive FMLA protection).

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

In short, the law in this area remains unsettled. This Note extrapolates federal courts' current split on employees taking long-term trips with their ailing family members under the protection of the FMLA to a narrower issue that remains wholly unaddressed in the federal arena: whether an employee may use intermittent FMLA leave for shorter, daytime trips—like those to the grocery store, park, or library—when accompanied by a family member with a serious health condition. Because current outcomes in related FMLA cases do not always align with general intuitions of fairness or Congress's intentions in crafting the FMLA, this Note advocates for a multi-factor judicial test for this intermittent leave issue that aligns with both.

This Note proceeds in the following Parts. Part II discusses the Act's legislative history and Congress's objectives and purposes in enacting the FMLA. This Part also discusses relevant portions of the FMLA's statutory and regulatory text and analyzes differing judicial approaches to related uses of the FMLA for long-term trips in an effort to illustrate how courts' traditional analyses fall short when it comes to promoting the FMLA's objectives. Part III then formulates a multi-factor test that both strikes an effective balance between employee and employer interests and accounts for the complexity of the FMLA, all while providing an efficient framework for courts to apply. Part IV offers a brief conclusion.

II. THE FAMILY AND MEDICAL LEAVE ACT: THE STATUTE, ITS REGULATIONS, AND COURTS' APPLICATIONS

This Part elucidates both the political background and purposes of the FMLA in an effort to illustrate the objectives that any interpretation and application of the FMLA should promote. It then presents varied judicial applications of the FMLA to the issue of long-term employee trips, each of which offers important guidelines in creating an equitable and workable solution to the issue of short-term employee trips.

A. *Congressional Origins*

The FMLA's journey to become the law of the land was neither quick nor easy, as it underwent significant revisions until its first bicameral passage in 1990.[18] The FMLA was first introduced in the House of Representatives in 1985 as the Parental and Disability Leave Act,[19] which originally mandated "eighteen weeks of unpaid, job-protected leave for new parents, as well as twenty-six weeks of leave to care for a sick child or the employee's own temporary disability."[20] After stalling in the House of Representatives in 1985, House

[18] Megan A. Sholar, *The History of Family Leave Policies in the United States*, ORG. AM. HISTORIANS, https://www.oah.org/tah/issues/2016/november/the-history-of-family-leave-policies-in-the-united-states/ [https://perma.cc/MQA8-EVXZ].

[19] *Id.*

[20] *Id.*

Democrats amended the bill to increase the size of covered employers[21] and adjust the total leave time available to thirty-six weeks over a two-year period.[22] This bill evolved to become the Family and Medical Leave Act in 1986 when lobby pressures again forced House sponsors to expand coverage for employees who required leave to care for a spouse or parent (as care for children was already covered).[23]

In response to President George H.W. Bush's subsequent veto,[24] congressional Democrats garnered more bipartisan support in the hopes of obtaining the President's signature.[25] While President H.W. Bush would go on to veto the bill again in 1992,[26] it would be his last, as President Bill Clinton—in his first act as President of the United States—would sign the bill into law in 1993[27] with the following statement: "Currently, the United States is virtually the only advanced industrialized country without a national family and medical leave policy. Now, with the signing of this bill, American workers in all [fifty] States will enjoy the same rights as workers in other nations."[28] Since then, the

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[21] Currently, a "covered employer" is "any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 C.F.R. § 825.104(a) (2019). By increasing the size (i.e., the number of employees employed) of covered employers, Congress reduced the number of businesses and employers subject to the FMLA. This was a response to pressure from pro-business House Republicans who felt that the Parental and Disability Leave Act covered too many employers. *See* Sholar, *supra* note 18.

[22] Sholar, *supra* note 18.

[23] *Id.*

[24] President H.W. Bush is said to have vetoed the bill in response to growing lobby pressures from pro-business organizations. *See* Steven A. Holmes, *House Backs Bush Veto of Family Leave Bill*, N.Y. TIMES, July 26, 1990, at A16 ("Business organizations, fearful that the bill would be a precursor of other mandated benefits, like compulsory health insurance, had bitterly fought the legislation and lobbied for Mr. Bush to veto it.").

[25] *See* Kelsey A. Jonas, *Fixing the FMLA's Flaws: A Fight for Care, Adult Children, and Tax Incentives*, 118 W. VA. L. REV. 1313, 1318 (2016) ("[S]upporters of the legislation began to win over Republicans by characterizing the leave bill in a pro-life manner. . . . With more bipartisan support, [a] subsequent version[] of the Act [was] passed by Congress in . . . 1992.").

[26] Michael Wines, *Bush Vetoes Bill Making Employers Give Family Leave*, N.Y. TIMES, Sept. 23, 1992, at A1.

[27] Glynn, *supra* note 4.

[28] William J. Clinton, *Statement on Signing the Family and Medical Leave Act of 1993*, 1 PUB. PAPERS 50, 51 (Feb. 5, 1993). Clinton's vision for the FMLA was certainly ambitious. *See id.* at 50 ("American workers will no longer have to choose between the job they need and the family they love."). He later remarked on the FMLA in his autobiography:

> I believed that family leave would be good for the economy. With most parents in the workforce, by choice or necessity, it is imperative that Americans be able to do well both on the job and at home. People who are worried about their infants or their sick parents are less productive than those who go to work knowing they've done right by their families.

FMLA has established minimum labor standards for employees requiring leave for a variety of family or medical reasons.[29]

B. *Purposes and Policies*

The common policy theory behind the FMLA is the idea of "work-life balance,"[30] but many disagree on whether the FMLA adequately accomplishes this balance for working families.[31] Initially, Congress's drafting and passing the FMLA was predicated on the simple fact that more parents were working in the 1980s and 1990s.[32] This increase brought Congress to consider the lack of job security for those working parents[33] as well as employers'

BILL CLINTON, MY LIFE 490 (2004).

[29] *See* S. REP. NO. 103–3, at 4 (1993) ("[The FMLA] accommodates the important societal interest in assisting families, by establishing a minimum labor standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.").

[30] Nearly four years before the FMLA's enactment, the original sponsor of the legislation that would evolve into the FMLA as we know it today—Democratic Congresswoman Patricia Schroeder—acknowledged the need for federal legislation that promoted work-life balance among working families. *See* Patricia Schroeder, *Is There a Role for the Federal Government in Work and the Family?*, 26 HARV. J. ON LEGIS. 299, 309 (1989) ("The changes in our country's demographics, family life, and economy make it imperative that our federal government provide leadership in family policy. A national family policy should have three basic goals: to acknowledge the rich diversity of American families; to protect the family's economic well-being; and to provide families with flexible ways to meet their economic and social needs.").

[31] *See* Andrew Keshner, *The Lack of Paid Family Leave Is "Breaking Families' Backs"—So What Are Democratic Presidential Candidates Going to Do About It?*, MARKETWATCH (Dec. 15, 2019), https://www.marketwatch.com/story/only-5-states-have-paid-family-leave-laws-allowing-parents-to-bond-with-their-newborn-2019-02-06 [https://perma.cc/Y4W9-STV6] (citing 2020 Democratic Presidential candidate Andrew Yang's proposal to offer parents paid family leave, which the FMLA currently does not mandate).

[32] 29 U.S.C. § 2601 (2012). Women contributed largely to the increase in the numbers of individuals joining the workforce. *See* Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1515 (2001) ("In 1990, seventy-four percent of women between the ages of twenty-five and forty-four were in the workforce, and, at that time, it was estimated that by 2005, half of the individuals entering the workforce would be women."). Congress noted that these demographic shifts required legislative policy changes. S. REP. NO. 103–3, at 7 ("The effect of [the increase in mothers joining the workforce] has been far reaching. With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill. When there is no one to provide such care, individuals can be permanently scarred as basic needs go unfulfilled. 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.").

[33] 29 U.S.C. § 2601.

unaccommodating leave policies.[34] At the time of the FMLA's passage, the only federal legislation in place related to family leave was the Pregnancy Discrimination Act of 1978,[35] which itself only provided mild protections for those few workers it covered.[36] In response to all these concerns, Congress devised the twelve-week unpaid leave scheme of the FMLA in an effort to promote the elusive work-life balance[37] while accommodating employers' interests in having active employees.[38]

The FMLA, however, has had little substantive change since 1993.[39] Many believe the FMLA needs serious changes, the main concern being that it does not mandate paid leave coverage.[40] As childcare costs rise drastically,[41] both parent-employees and politicians are advocating for a paid family leave scheme that better conforms to the work-life balance Congress sought to promote nearly thirty years ago when it created the FMLA.[42] Similar concerns have arisen

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[34] *See* S. REP. NO. 103–3, at 4 ("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. This failure continues to impose a heavy burden on families, employees, employers and the broader society.").

[35] The Pregnancy Discrimination Act of 1978 amended Title VII to prohibit sex discrimination on the basis of "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e-(k) (1976 & Supp. II 1978).

[36] Under the Pregnancy Discrimination Act, employers were only required to offer temporary disability benefits for pregnancy based on their own internal disability policies. *See Fact Sheet: Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (Jan. 15, 1997), https://www.eeoc.gov/eeoc/publications/fs-preg.cfm [https://perma.cc/MG8Z-EDCU] ("If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee; for example, by providing light duty, modified tasks, alternative assignments, disability leave, or leave without pay.").

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

[38] *See id.* § 2601(b)(3) ("It is the purpose of [the FMLA] . . . to accomplish the purposes described [in § 2601(b)(1)–(2)] in a manner that accommodates the legitimate interests of employers.").

[39] Tom Spiggle, *25 Years Later: Where Are We Going with the FMLA?*, TLNT (Mar. 1, 2018), https://www.tlnt.com/25-years-later-where-are-we-going-with-the-fmla/ [https://perma.cc/8R7K-UF5B]. The main substantive changes occurred in 2008 and 2010, and related mainly to families of military members. *See id.* (describing the changes with regards to military-related injuries and military "exigencies," like short-notice deployment and arrival ceremonies).

[40] *See* Keshner, *supra* note 31 (noting 2020 Presidential candidate proposals for paid family leave in response to a lack of federal legislation mandating for paid leave).

[41] Lindsay Oncken, *Policy Recommendation: Paid Family Leave*, NEW AM., https://www.newamerica.org/in-depth/care-report/policy-recommendation-paid-family-leave/ [https://perma.cc/V629-EKVG] (citing an index that calculates average childcare costs by state, which found that "the average cost of center-based care for infants is more than the cost of in-state tuition at a four-year college in 33 states").

[42] As of January 2021, only nine states and the District of Columbia have legislation requiring employers to provide paid family leave benefits. NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE PAID FAMILY AND MEDICAL LEAVE INSURANCE LAWS 1 (Jan. 2021),

following the Department of Labor's (DOL) recent Opinion Letter,[43] which announced that employees who request both FMLA-related leave time and paid leave time pursuant to an employer's paid leave policy must use FMLA-designated leave time concurrently with any paid leave time.[44] This Opinion Letter ended the widespread employer practice of allowing employees to exhaust their paid leave time before granting FMLA leave.[45]

All this is to say that the FMLA's over-arching policy vision—though clear at its origin—has become exceptionally complicated by modern life. Congress and the DOL have left many stones unturned when it comes to promulgating FMLA legislation and guidelines, respectively, for employees and employers who find themselves facing new family leave time issues.

C. *Statutory and Regulatory Text and Applications*

The FMLA permits eligible employees to take up to twelve workweeks of unpaid leave time per year for a qualified reason.[46] One of these qualified reasons occurs when an employee is needed "to care for" a family member with a "serious health condition."[47]

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https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-leave/state-paid-family-leave-laws.pdf [https://perma.cc/9WDZ-UQYT]. In states without paid leave mandates, some companies have taken the step to create their own paid leave policies. *See, e.g.*, *Taft Announces Firm-Wide, Family-Friendly Benefits*, TAFT L. (July 24, 2019), https://www.taftlaw.com/news-events/news/taft-announces-firm-wide-family-friendly-benefits [https://perma.cc/X6UP-36TP] (describing a law firm's new policy that provides sixteen weeks of paid parental leave for all employees). *See generally* Jena McGregor, *The New Paid Family Leave*, WASH. POST (Dec. 30, 2019), https://www.washingtonpost.com/business/2019/12/30/new-paid-family-leave/?arc404=true [https://perma.cc/N8Y3-UFBD] (summarizing several stories of large employers offering paid leave to their employees).

[43] With regard to the FMLA, Opinion Letters are typically issued by the DOL's Wage and Hour Division and serve to provide the DOL's position on how the FMLA applies in certain fact-specific situations, which the general public may use as guidance. *Final Rulings and Opinion Letters*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/whd/opinion-letters/request/existing-guidance [https://perma.cc/4PB7-7XTS].

[44] Letter from Keith E. Sonderling, Acting Administrator, U.S. Dep't of Labor, to Anonymous (Mar. 14, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_03_14_02_FLSA.pdf [https://perma.cc/U42D-MEM6].

[45] *Id.* This Opinion Letter also contradicted the Ninth Circuit's holding in *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (2014). In *Escriba*, the Ninth Circuit held that an employee may decline to use FMLA leave time—and instead use vacation time or other leave time the employer may offer—"even if the underlying reason for seeking the leave would have invoked FMLA protection." *Id.* at 1244.

[46] 29 U.S.C. § 2612(a)(1) (2012).

[47] *Id.* § 2612(a)(1)(C).

1. *Family Member with a "Serious Health Condition"*

"Family member" means the employee's spouse, child,[48] or parent.[49] A "serious health condition," in turn, is defined as "an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care in a hospital, hospice, or residential medical care facility; or . . . continuing treatment by a health care provider."[50] The DOL's regulations mirror the FMLA itself,[51] effectively creating a bright-line test whereby fulfillment of either of the above conditions—inpatient care or continuing treatment—meets the serious health condition standard.[52] Under both prongs, the burden of proof is on the employee to establish that a serious health condition exists either in the employee herself or the family member she is caring for.[53]

The definition of continuing treatment is relatively straightforward. Continuing treatment encompasses five main types of serious health conditions: (a) a period of incapacity of more than three consecutive days that involves treatment by a health care provider;[54] (b) a period of incapacity due to pregnancy;[55] (c) treatment for a chronic serious health condition;[56] (d) permanent or long-term conditions that require continuing supervision of (but

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[48] The FMLA's text itself uses the terms "son" and "daughter" to refer to an employee's child. *Id.*

[49] *Id.* "Family member" is a shorthand term for purposes of this Note and should not be construed as an official statutory or regulatory term. Moreover, what constitutes a "family member" (i.e., a spouse, child, or parent) is beyond the scope of this Note. The solution provided in Part III thus assumes that any accompanied "family member" meets the proper FMLA standard.

[50] 29 U.S.C. § 2611(11) (2018).

[51] When enacting the statute, Congress gave full authority to the DOL to promulgate accompanying regulations. *See id.* § 2654.

[52] 29 C.F.R. § 825.113 (2019); *see also* Lindsey, *supra* note 16, at 565–66 (describing 29 C.F.R. § 825.113 as an "objective bright line test" for determining when a serious health condition exists in an employee's family member).

[53] *See* Bauer v. Varity Dayton-Walther Corp., 118 F.3d 1109, 1112 (6th Cir. 1997) ("[T]he plaintiff has the burden to establish the objective existence of a serious health condition . . . ."). The focus of this Note pertains to serious health conditions of employees' qualified family members, not those of employees themselves.

[54] 29 C.F.R. § 825.115(a) (2019). While this sub-section of the regulations goes into further detail on the exact circumstances required (e.g., the number of times the health care provider must treat the individual, applicable exceptions), those details are beyond the scope of this Note.

[55] *Id.* § 825.115(b).

[56] *Id.* § 825.115(c). A "chronic serious health condition" is one that either requires periodic visits for treatment, continues for some extended period of time, or causes "episodic rather than a continuing period of incapacity." *Id.* § 825.115(c)(1)–(3). The regulations present conditions like asthma and diabetes as examples that fall into this category. *Id.* § 825.115(c)(3). The conditions covered as chronic serious health conditions are a focus of the issue this Note explores.

not active treatment by) a health care provider;[57] and (e) conditions requiring multiple treatments.[58] Importantly, "incapacity" means "inability to work, attend school or perform other regular daily activities" because of the serious health condition or its required treatment.[59]

The definition of inpatient care and its application in courts, in comparison, is slightly more complicated:[60] it requires, at minimum, one overnight stay in some medical care facility.[61] While the DOL has not defined "overnight stay" in the regulations, federal courts have alluded that the patient must be in inpatient care—as defined in the regulations—from at least one calendar day to the next and for more than a few hours.[62] Thus, the FMLA covers employees who use leave time to care for a qualified family member who has had to stay overnight in a hospital.

2. *"To Care For"*

One of the larger issues within the FMLA is the question of what it means for an employee to care for a family member with a serious health condition.[63] The DOL has attempted to elaborate on what constitutes covered care under the Act: the DOL's regulations define "care" to encompass providing assistance with any basic medical, nutritional, and hygienic needs and providing "psychological comfort and reassurance."[64]

Despite this seemingly straightforward definition, this is a fundamental area where courts' interpretations of the Act and its regulations are the most disparate in the tests applied and the outcomes those tests give.[65] In the federal arena, what it means to care for a family member with a serious health condition has

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[57] *Id.* § 825.115(d). The conditions covered under this sub-section are those that require supervision but for which no active treatment exists or is effective. *Id.* The regulations present conditions like Alzheimer's or end-stage diseases as examples. *Id.*

[58] *Id.* § 825.115(e). The conditions covered under this sub-section include those requiring, for example, surgery, physical therapy, or chemotherapy. *Id.* § 825.115(e)(1)–(2).

[59] *Id.* § 825.113.

[60] While the inpatient care prong of the "serious health condition" requirement may be applicable in certain cases, this Note and the factual hypotheticals it poses will focus on those serious health conditions that require continuing treatment by a medical provider, like severe physical or mental disabilities or incapacities.

[61] *See* 29 C.F.R. § 825.114 (requiring an overnight stay in a "hospital, hospice, or residential medical care facility").

[62] *See, e.g.*, Bonkowski v. Oberg Indus., Inc., 787 F.3d 190, 192 (3d Cir. 2015) ("We conclude that 'an overnight stay' means a stay in a hospital, hospice, or residential medical care facility for a substantial period of time from one calendar day to the next calendar day as measured by the individual's time of admission and his or her time of discharge."); Isley v. Aker Phila. Shipyard, Inc., 275 F. Supp. 3d 620, 632–33 (E.D. Pa. 2017) (holding that a patient's three-and-a-half hour visit to the emergency room, although spanning two calendar days, was not an "overnight stay" for FMLA purposes).

[63] 29 U.S.C. § 2612(a)(1)(C) (2012).

[64] 29 C.F.R. § 825.124.

[65] *See infra* Part II.C.2.a–c.

come up in the context of employees who travel with ailing family members on long-term vacations and trips, but those jurisdictions that have addressed this issue have failed to reach a consensus.[66] As a result, federal courts have concocted three main approaches regarding long-term employee trips.[67]

a. *Incidental Consequence Approach*

Courts have regularly approached FMLA leave questions using some form of the "incidental consequence" test, whereby an employee's claimed leave is not covered by the FMLA "where physical or psychological care is merely an incidental consequence of an unprotected activity."[68] This approach was first elucidated in *Leakan v. Highland Companies*.[69] In *Leakan*, a Michigan employee initially took leave to give birth to her son, but soon after traveled to North Carolina with her newborn to "see his grandparents."[70] Upon her return to work and subsequent termination,[71] the employee claimed that the FMLA protected her out-of-state trip.[72] The court disagreed, holding instead that the employee did not require leave to care for her son within the meaning of the FMLA because the employee's caring for her son was "an incidental consequence of taking him with her on vacation in order to 'show' him to his grandparents."[73] The court reasoned that because the FMLA does not protect employees' long-term trips, any otherwise covered care an employee may provide during such a trip is secondary to the trip itself.

Nearly fifteen years after the *Leakan* court devised the incidental consequence approach, the First Circuit followed suit by affirming a lower

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[66] *See infra* Part II.C.2.a–c.

[67] This Note refers to each approach by a given name (e.g., the Incidental Consequences Approach) for simplicity in identifying the factors that each jurisdiction considers.

[68] Lindsey, *supra* note 16, at 571.

[69] Leakan v. Highland Cos., No. 96-CV-75445-DT, 1997 WL 33812215 (E.D. Mich. Nov. 19, 1997).

[70] *Id.* at *1–2, *4.

[71] *Id.* at *2. It is worth noting the specific factual circumstances surrounding this employee, Angela Dye, and her claimed leave time. Dye initially requested several hours off a work day when she had to take her newborn to the doctor's office, a trip which the FMLA surely covers. *Id.* at *1. Dye ended up not taking her son to the doctor, and the two instead boarded their flight to North Carolina later that evening. *Id.* Although Dye's account differs from her employer's, Dye allegedly called in sick for the remainder of her vacation. *Id.* at *2. After her employer became aware of Dye's using sick time to travel on a "vacation," she was subsequently fired for falsifying time off from work in violation of her employer's internal policies. *Id.*

[72] *Id.* The employee presumably claimed leave under the theory that she was caring for her newborn pursuant to 29 U.S.C. § 2612(a)(1)(A), which permits employees to take leave "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter."

[73] *Id.* at *4.

court's application of the same test.[74] In *Tayag v. Lahey Clinic Hospital, Inc.*, an employee accompanied her severely ill husband on a "spiritual pilgrimage to the Philippines,"[75] which they took together due to their shared beliefs in "faith healing" and a local Filipino priest's "miraculous healing abilities."[76] During the trip, which lasted nearly two months,[77] the employee assisted her husband with his medications and other activities in which he required her help; however, the couple also made several social visits to friends, family, and local church members.[78] The employee was later fired after her employer received notice from her husband's doctor that the employee "did not need to take FMLA leave to care for her husband" on the faith healing trip to the Philippines.[79] Upon bringing an FMLA retaliation claim,[80] the district court found for the employer by invoking the rule from *Leakan* that "[t]he FMLA does not permit employees to take time off to take a vacation with a seriously ill spouse, even if caring for the spouse is an 'incidental consequence' of taking him on vacation."[81]

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[74] Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788 (1st Cir. 2011), *aff'g* 677 F. Supp. 2d 446, 452 (D. Mass. 2010).

[75] *Tayag*, 632 F.3d at 790. Here, the employee's husband undoubtedly suffered from several "serious health conditions" under 29 C.F.R. § 825.115, including "gout, chronic liver and heart disease, rheumatoid arthritis, and kidney problems that led to a transplant in 2000." *Id.* at 789. There is also no doubt that the employee was needed to provide her husband with daily assistance, as both the First Circuit and lower court found that the employee often "transport[ed] him to medical appointments, help[ed] him with household activities, prepar[ed] his food, aid[ed] him in moving around the house, provid[ed] medication, and g[ave] psychological comfort." *Id.*

[76] Tayag v. Lahey Clinic Hosp., Inc., 677 F. Supp. 2d 446, 449 (D. Mass. 2010) (internal quotations omitted).

[77] The couple's trip lasted from August 8 through September 22, 2006. *Id.*

[78] *See Tayag*, 632 F.3d at 790 ("In the Philippines, . . . the [couple] went to Mass, prayed, and spoke with the priest and other pilgrims at the Pilgrimage of Healing Ministry at St. Bartholomew's Parish. From September 8 to 22, the [couple] visited other churches and friends and family. While in the Philippines, [the employee's husband] received no conventional medical treatment and saw no doctors or health care providers. [The employee] assisted him by administering medications, helping him walk, carrying his luggage, and being present in case his illnesses incapacitated him.").

[79] *Tayag*, 677 F. Supp. 2d at 449.

[80] An FMLA retaliation claim occurs when an employee files a lawsuit against her employer for violating the FMLA's prohibition of "discriminating or retaliating against an employee . . . for having exercised or attempted to exercise FMLA rights." 29 C.F.R. § 825.220(c) (2019). These usually occur within the context of employees who claim they were fired for exercising their rights under the FMLA.

[81] *Tayag*, 677 F. Supp. 2d at 452. The court also noted that whether the FMLA protects faith healing trips (i.e., "trip[s] for non-medical religious purposes") is an undecided question under modern FMLA jurisprudence. *Id.* However, its holding noted that "[e]ven if caring for a sick spouse on a trip for faith-healing were protected because of its potential psychological benefits, it is undisputed that nearly half of the [couple's] trip was spent visiting friends, family, and local churches." *Id.* This was enough for the court to find that any medical care the employee may have provided during the trip was merely incidental to the trip itself. *Id.*

b. *Physical Proximity Approach*

A different yet related approach that similarly tends to favor employers is the physical proximity approach, whereby the issue of whether the employee was physically with or near her family member determines the question of care: if the employee is not physically present with her family member at the time she claims leave, she is not providing care.[82]

This test originated in the Ninth Circuit.[83] In *Tellis v. Alaska Airlines, Inc.*, a Seattle-based employee was initially granted FMLA leave by his employer to care for his wife, who was struggling with pregnancy complications.[84] During this time, the employee took an unplanned trip out of state to Atlanta to retrieve a car after his own car broke down.[85] The employee traveled to Atlanta without his wife but continued to talk with her daily over the phone.[86] The employee was later terminated for unauthorized and unexcused absences.[87] Under his FMLA retaliation claim, the employee claimed that the FMLA covered his out-of-state trip because he was remotely providing psychological reassurance to his pregnant wife the entire time.[88] The Ninth Circuit, however, held that a given activity constitutes care "only when the employee has been in *close and continuing proximity* to the ill family member."[89] Here, because the employee was physically thousands of miles away from his wife, the court determined that he could not have been providing his wife with any care.[90]

The Fifth Circuit affirmed a similar district court decision in *Baham v. McLane Foodservice, Inc*.[91] In *Baham*, the employee traveled to Florida to accompany his daughter during her stay at a hospital for a traumatic head injury, but later returned to their home state of Texas alone.[92] Similar to the employee

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Whether faith healing actually is an FMLA-protected activity, however, is beyond the scope of this Note.

[82] *See* Lindsey, *supra* note 16, at 570 (describing courts applying this test as holding that "care under the FMLA requires close physical proximity of the employee to his ill relative").

[83] Tellis v. Alaska Airlines, Inc., 414 F.3d 1045 (9th Cir. 2005).

[84] *Id.* at 1046. The employer presumably granted leave pursuant to 29 U.S.C. § 2612(c) and, in turn, 29 C.F.R. § 825.115(b), which permits the employee to care for a pregnant family member.

[85] *Tellis*, 414 F.3d at 1046.

[86] *Id.* at 1047.

[87] *Id.* at 1046.

[88] *Id.* at 1046–47.

[89] *Id.* at 1047 (emphasis added).

[90] *Id.* at 1048.

[91] Baham v. McLane Foodservice, Inc., 431 F. App'x 345 (5th Cir. 2011), *aff'g* No. 3:09-CV-914-O, 2010 WL 11538403 (N.D. Tex. Aug. 31, 2010).

[92] *Baham*, 431 F. App'x at 346. The employee claimed that he returned home to Texas because "he had received calls from the neighborhood association complaining of his untended yard." *Id.* His other reasons included a need to clean the house and "add padding to the sharp edges in the home to protect his daughter upon her return." *Id.*

in *Tellis*,[93] he claimed that he stayed in constant remote contact with his daughter during this time.[94] He was quickly terminated after claiming FMLA leave for all his time off—including his time spent in Texas, away from his injured daughter.[95] Finding *Tellis* instructive, the Fifth Circuit determined that the FMLA covers care for an ailing family member only where "the employee is in physical proximity to the cared-for person."[96] The mere fact that the employee was not physically near his daughter during the claimed leave period was dispositive.[97]

c. *Basic Needs Approach*

This approach is the most recently developed and the furthest departure from the more employer-friendly tests described above. Under this test, a court will find that an employee was providing care within the meaning of the FMLA so long as the employee attended to her family member's "basic medical, hygienic, or nutritional needs" during the claimed leave period.[98] The Seventh Circuit created this test in *Ballard v. Chicago Park District*, where an employee claimed FMLA leave when she accompanied her terminally ill mother on a non-profit-funded "end-of-life" trip to Las Vegas.[99] While on the trip, the employee continued to care for her mother while the pair participated in typical Las Vegas tourist activities.[100] Upon her return, the employee was terminated for unauthorized absences from work.[101]

On interlocutory appeal from the Northern District of Illinois, the Seventh Circuit refused to apply the same rules as the First and Ninth Circuits.[102] Instead, it created the most employee-friendly application of the FMLA to date by holding that "so long as the employee attends to a family member's basic medical, hygienic, or nutritional needs, that employee is caring for the family

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[93] *See Tellis*, 414 F.3d at 1047 (claiming that the plaintiff's phone calls to his wife constituted moral and psychological support within the meaning of the FMLA).

[94] *Id.*

[95] *Baham*, 431 F. App'x at 346–47.

[96] Indeed, the *Baham* court expressly found the "Ninth Circuit case . . . instructive." *Id.* at 348.

[97] *Id.* at 348–49.

[98] Ballard v. Chi. Park Dist., 741 F.3d 838, 842 (7th Cir. 2014).

[99] *Id.* at 839. The employee's mother had been diagnosed with end-stage congestive heart failure at the time and was receiving hospice treatment. *Id.* During this time, the employee acted as her mother's primary caregiver; her typical duties included "cook[ing] her mother's meals, administer[ing] insulin and other medication, drain[ing] fluids from her heart, bath[ing] and dress[ing] her, and prepar[ing] her for bed." *Id.*

[100] *Id.* at 840.

[101] *Id.*

[102] *See supra* Part II.C.2.a–b. The Seventh Circuit decided it would "respectfully part ways with the First and Ninth Circuits," and expressly noted that its ruling would create a circuit split. *Ballard*, 741 F.3d at 842, 842 n.2.

member, even if that care is not part of ongoing treatment of the condition."[103] The court relied on the fact that neither the FMLA nor its regulations restrict an employee's provision of care to a particular geographic location.[104] Moreover, the court reasoned that ailing family members' basic physical needs do not necessarily change simply because they are away from home.[105] So long as the employee actually cares for those basic needs during the trip, the employee satisfies the FMLA's requirement that the employee provide care.[106]

3. *Intermittent Leave*

Although some employees requiring family or medical leave will take leave for a consecutive twelve weeks, the FMLA permits employees to take "intermittent leave"—leave for smaller blocks of time than the full consecutive twelve weeks.[107] This type of leave permits employees to take leave anywhere from several consecutive weeks to several consecutive hours in a single work day.[108] If intermittent leave is required at consistent intervals, such as on a certain day every week or at certain times of each work day, an employee may take "reduced-schedule leave," whereby the employee reduces the number of hours worked per week.[109] This changes the employee's work schedule, which is typically reduced from full-time to part-time, until the reason for leave has subsided or FMLA time has been used up.[110]

The DOL's precise purposes and policies behind allowing employees to take intermittent and reduced-schedule leave is unclear, but it seems these non-consecutive leave schedules were motivated in part by employees' general needs for flexibility in using leave time.[111] It is uncommon that a given

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[103] *Ballard*, 741 F.3d at 842.

[104] *Id.* at 841.

[105] *Id.*

[106] *Id.* at 842.

[107] 29 C.F.R. § 825.202 (2019). The Sixth Circuit has described intermittent leave as "a series of absences, separated by days during which the employee is at work, but all of which are taken for the same medical reason, subject to the same notice, and taken during the same twelve-month period." Davis v. Mich. Bell Tel. Co., 543 F.3d 345, 350–51 (6th Cir. 2008) (quoting Barron v. Runyon, 11 F. Supp. 2d 676, 681 (E.D. Va. 1998)).

[108] *See Intermittent Leave Under the FMLA—The Basics*, MINTZ (June 7, 2017), https://www.mintz.com/insights-center/viewpoints/2226/2017-06-intermittent-leave-under-fmla-basics [https://perma.cc/AZK9-9S6K] ("Intermittent leave might take the form of missing a few half-days in a week or missing an hour or two at a time to take a chronically sick child to medical appointments or to stay at home with the child when a medical condition prevents the child from attending school.").

[109] 29 C.F.R. § 825.202.

[110] *See id.* §§ 825.200–.202.

[111] *See* Crankshaw v. City of Elgin, No. 1:18-CV-75-RP, 2019 WL 3883565, *1, *7 (W.D. Tex. Jan. 14, 2019) ("The purpose of intermittent leave is for an employee to use FMLA leave as the need arises throughout the year, which suggests that an employee take such leave periodically, rather than consecutively. Otherwise, an employee who is required

employee will have a family or medical exigency requiring a full consecutive twelve-week leave period or even continuous leave beyond a few weeks.[112] Instead, many serious health conditions may only require leave time consisting of several hours in a day to, for instance, take a family member to medical appointments.[113] Thus, permitting intermittent leave may be the DOL's way of accounting for the reasonable and fact-specific needs of each employee who may rely on the FMLA's protections to balance their work and family lives.

III. THE BEST OF BOTH WORLDS: A HOLISTIC BALANCING TEST

The demographics of American family caregivers—as substantially made up of those who are formally employed and unpaid in their caregiving capacities[114]—forces the question of how these employee-caregivers are to effectively balance their family's medical needs with their own needs to earn a living wage. Even more, caregiving activities often go beyond those activities most people typically imagine—medication management and administration and transportation to and from medical appointments, for example—and will typically include more peripheral[115] activities like grocery shopping and assistance with beneficial exercise.[116]

This raises the question of whether an employee-caregiver who is responsible for caring for a family member with a serious health condition may use intermittent FMLA leave time to cover these peripheral trips and activities.

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to exhaust all 12 FMLA-leave weeks consecutively would have no FMLA leave remaining for the remaining 40 weeks of the year should a medical necessity arise.") (citation omitted).

[112] *See* Christian Schappel, *Wait . . . There Are How Many People on FMLA Leave?*, HRMORNING (Sept. 30, 2015), https://www.hrmorning.com/articles/wait-there-are-how-many-people-on-fmla-leave/ [https://perma.cc/TKE7-EAQH] (offering a statistic from an FMLASource study that found the average duration of FMLA leave in 2015 to be just over fourteen days).

[113] For example, a family member with severe arthritis requiring consistent physical therapy may only require the employee to transport the family member to and from physical therapy appointments, which may occur only occasionally. *See* 29 C.F.R. § 825.115(e)(2).

[114] *See supra* notes 8–9 and accompanying text.

[115] The term "peripheral" in this context is not meant to suggest that these activities are any less important than other caregiving activities; it is instead intended to differentiate between those duties most would perceive caregiving to include (i.e., traditional duties like medication administration, bandage dressing) and those that are perhaps less proximate but nonetheless just as critical (e.g., grocery shopping).

[116] *See* Linsey Knerl, *Top 11 Caregiver Duties to Know*, CARE.COM (Sept. 9, 2020), https://www.care.com/c/stories/12028/senior-caregiver-duties-definition/ [https://perma.cc/9RA3-ABT3] (describing "[a]ssisting with meals and nutrition," including grocery shopping and meal planning, as a top duty of most caregivers); *Caregivers: Ways to Engage Your Loved Ones in Fun Activities*, CHI. METHODIST SENIOR SERVICES (Nov. 25, 2015), https://www.cmsschicago.org/news-blog/caregivers-ways-to-engage-your-loved-ones-in-fun-activities/ [https://perma.cc/LP67-DABY] (recommending caregivers to "engage [their] loved one both mentally and physically by taking walks through museums, parks or gardens").

This would be an issue of first impression for the courts. On a related issue, the federal courts have failed to reach a consensus on what family-related leave activities warrant FMLA protection.[117] This suggests that, without a uniform test to apply, the courts will differ on the novel peripheral trip issue when they begin to encounter it. And—based on the sheer number of caregivers in the United States who are also formally employed[118]—the courts are likely to encounter it.

This Part formulates a test courts can use when they encounter this issue, a test which is mainly informed by issues with current judicial tests used in related contexts. It then applies the new test to familiar employee leave situations to demonstrate its workability and flexibility.

A. *One Size Does Not Fit All: The Issue with Current Tests*

Current judicial rationales for applying the more stringent, employer-friendly approaches—the incidental consequence and physical proximity approaches[119]—appear to center around abstractions from the language of the FMLA itself. The court in *Leakan* relied on one of the FMLA's explicit purposes—to provide employee protections "in a manner that accommodates the legitimate interests of employers"[120]—for its holding, noting that Congress specifically intended the FMLA to be applied according to notions of "reasonableness" and respect toward corporate efficiency.[121] Other courts have relied on these same premises to hold that the FMLA permits employers' interests to, at times, take precedence over employees' interests in work-life balance.[122] Legitimate fears of employee abuse may also rationalize these holdings,[123] particularly if one views court decisions as attempts to reign in

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[117] *See supra* Part II.C.2.

[118] *See Caregiver Statistics*, *supra* note 8.

[119] *See supra* Part II.C.2.a–b.

[120] 29 U.S.C. § 2601(b)(3) (2012).

[121] *See* Leakan v. Highland Cos., No. 96-CV-75445-DT, 1997 WL 33812215, at *4 (E.D. Mich. Nov. 19, 1997) ("[29 U.S.C. § 2601(b)] is significant in that it specifically invokes reasonableness, as well as the legitimate interests of employers. To allow [the employee] to retroactively claim her absence was for leave under the Act, in this situation, would not accommodate the legitimate interests of employers to manage their workplaces, and employees, in a fair, reasonable and efficient manner. Moreover, it simply is not reasonable.").

[122] *See, e.g.*, Kaylor v. Fannin Reg'l Hosp., Inc., 946 F. Supp. 988, 999 (N.D. Ga. 1996) ("The FMLA also does not give employees the unfettered right to take time off subject only to their own convenience without any consideration of its effect upon the employer.").

[123] *See Courts Crack Down on Abuse of FMLA Leave to Care for a Seriously Ill Relative*, GOLDBERG SEGALLA (July 6, 2012), https://www.goldbergsegalla.com/news-and-knowledge/news/courts-crack-down-on-abuse-of-fmla-leave-to-care-for-a-seriously-ill-relative [https://perma.cc/U5BC-4V5Q] (noting that "[o]ne area of the FMLA that has been prone to abuse is the right to leave to care for a seriously ill family member" and, as a result, that "courts are dismissing claims when there is no evidence that the plaintiff 'cared for' a relative in the manner set forth under the statute").

overly broad applications of the FMLA.[124] Yet any application of the FMLA that appears to wholly favor employers' interests over those of employees seems to violate Congress's command that respect for the exigencies of employees' home lives inform the FMLA-leave calculus.[125] Even more, it seems to violate general intuitions of fairness.[126]

Courts taking more employee-friendly approaches—the basic needs test[127]—similarly focus on the language of the FMLA but instead appear to home in on what the FMLA *does not* say. The Seventh Circuit in *Ballard* relied on the FMLA's lack of geographically limiting language to determine that employees can reasonably provide FMLA care from any location.[128] These more employee-friendly holdings similarly focus on different enumerated purposes, particularly those promoting work-life balance.[129] Courts may also be informed by equitable considerations, as it may feel wrong to allow employers to fire otherwise productive employees merely for caring for their ill family members. This is compounded by the stress of now-unemployed workers who must continue their caregiving while seeking new employment.[130] Yet this approach does not seem to get it quite right either: the dual nature of the FMLA

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[124] *See* Allen Smith, *Top 11 Employer FMLA Mistakes*, SHRM (Mar. 30, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/top-11-employer-fmla-mistakes.aspx [https://perma.cc/B2ZT-42TC] (describing potential drawbacks to "employers [who] provide FMLA leave in situations that are not truly FMLA-covered"); *7 FMLA Mistakes Employers Can't Afford to Make*, EMPLICITY (May 7, 2019), https://www.emplicity.com/7-fmla-mistakes-employers-cant-afford/ [https://perma.cc/XC7U-96X4] ("FMLA coverage is designed to provide coverage for an employee and a very limited definition of 'family members.' Sometimes employers provide FMLA leave in situations that should not be covered.").

[125] *See* 29 U.S.C. § 2601(b)(1)–(2) (describing several purposes behind the FMLA as the general need to help employees accommodate their family-related exigencies with their work demands).

[126] *See* JOAN C. WILLIAMS, ROBIN DEVAUX, PATRICIJA PETRAC & LYNN FEINBERG, AARP PUB. POLICY INST., INSIGHT ON THE ISSUES NO. 68, PROTECTING FAMILY CAREGIVERS FROM EMPLOYMENT DISCRIMINATION 8 (Aug. 2012), https://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/protecting-caregivers-employment-discrimination-insight-AARP-ppi-ltc.pdf [https://perma.cc/7K8U-HU42] ("American workers deserve public policies that protect them from . . . unfair treatment [like family responsibilities discrimination].").

[127] *See supra* Part II.C.2.c.

[128] Ballard v. Chi. Park Dist., 741 F.3d 838, 841 (7th Cir. 2014).

[129] Remember, the FMLA was originally passed in order to account for an employee's need to balance their work and home lives, and Congress expressly codified this purpose within the statute itself. *See* 29 U.S.C. § 2601(b)(1).

[130] *See* Lindsay Korn, Note, *Taking Care of the FMLA: Traveling with Family Members Under the Family and Medical Leave Act*, 34 HOFSTRA LAB. & EMP. L.J. 453, 487 (2017) ("Though 'some workplace stress is normal, excessive stress can interfere with your productivity and performance—and impact your physical and emotional health.' The FMLA is intended to alleviate that stress, and 'allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons.'") (citations omitted).

as a reasonable arbitrator between competing policies[131]—employees who need flexibility in balancing their work and home lives versus employers and their well-founded interests in having present and active employees[132]—requires more employer-centric consideration than this approach provides.

Thus, it appears that any one of the present tests for long-term care alone could not justly apply to the narrower intermittent leave and peripheral care issue. However, these approaches, at the very least, are instructive to formulating a solution that properly accounts both for courts' present concerns and Congress's enumerated objectives. That said, the variance in current judicial approaches demonstrates that caregiving can take on many forms, and any test that leaves no room to consider the exigencies of each case and instead nearly always gives a favorable outcome for one side is not much of a test at all. Any test must also clearly account for the complexity of the FMLA and its political background by effectively balancing competing policy interests.[133] Unfortunately, current judicial tests neither attempt nor effectively accomplish this balancing.

B. *The Multi-Factor Test: A Balancing Act*

The best response to the issue appears to be a judicial balancing test—an often-invoked type of judicial test that allows the judge to balance the litigants' competing interests in lieu of a rigid application of formal, bright-line rules.[134]

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[131] For a fuller discussion of the policy concerns that pressured Congress to create the FMLA—including the increase in working parents and women in the work force, as well as employers' lack of accommodating leave policies—see *supra* notes 30–38 and their accompanying text.

[132] As previously noted, the FMLA's employee protections are relatively modest: it grants only twelve weeks of leave per twelve-month period to *eligible* employees—those who have been employed by their employer for at least twelve months and have worked a minimum of 1,250 hours with their employer for the previous twelve months. 29 U.S.C. § 2611(2)(A) (2018). Even more, the employee's employer must be one of the FMLA's "covered" employers, which means that the employer must employ fifty or more employees within a seventy-five-mile radius of the employer's worksite. *Id.* § 2611(2)(B)(ii). This ensures that smaller employers are not required to grant family or medical leave to its employers, as allowing employees of these small business to take extended leave periods could strain the company's already limited workforce, as well as its health benefit costs and employee schedules. These eligibility requirements also ensure that those covered employers who are required to offer FMLA leave to their employees must only do so for those who have worked for the company for long enough period to provide the employer with enough "sweat equity" to warrant extended FMLA benefits.

[133] The solution this Note advocates for views the FMLA from an intentionalist perspective—it seeks to protect the purposes Congress delineated when it drafted the statute. *See* 29 U.S.C. § 2601(b)(1)–(3) (2012).

[134] Balancing tests often allow for deeper considerations of complex legal issues than bright-line tests can. *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 634 (1988) ("The balancing test gives judges the ability to consider all of the factors

Invoking a balancing test in this area of law—which is at least unsettled and at most unexplored—will certainly allow for an effective weighing of each side's legitimate interests.[135] At the same time, such a test will make way for new policy considerations as they arise—many of which the courts will likely have to balance until Congress addresses them with new federal legislation.[136]

Of course, balancing tests are not without critics: the main argument against balancing tests is that they may actually give inequitable outcomes because they do not ensure that like cases will be treated alike.[137] In this context, however, this issue is highly mitigated by the fact that existing judicial tests already give inequitable outcomes due to the widespread variation among federal courts.[138] Even more, the codified Congressional purposes behind the FMLA impliedly counsel a balancing of competing interests.[139] That said, with the present lack of definitive guidance on the issue, a judicial balancing test is the best option to uphold Congress's underlying FMLA policy considerations.

Under this test, a court holding that an employee-caregiver's peripheral activity or trip is covered as care within the ambit of the FMLA would require a holistic balancing of four factors: (1) the likelihood that care would have foreseeably been required on the trip, (2) the magnitude of the relationship between the trip and the employee's caregiving duties, (3) the employee's preparedness to care for the family member on the trip, and (4) the likelihood that the trip would confer some cognizable benefit on the family member. The overarching goal of this test is to determine whose interests—the employer's or the employee's—prevail given all the facts and circumstances of each individual case: a judicial determination that the factors weight against the employee is effectively a determination that the employer's interests in using its employees to maintain an efficient business enterprise outweigh those of the employee in

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potentially relevant to a decision. The test's simple structure permits a freedom in adding or subtracting factors on each side of the balance as the cases demand.").

[135] *Id.* Courts apply balancing tests in all sorts of legal contexts. *See, e.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 830–34 (2002) (Fourth Amendment searches); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (regulatory takings); Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 259 (5th Cir. 1980) (trademark infringement).

[136] In the context of the statute itself, Congress has done little since the FMLA's enactment to substantively revise or amend it, which suggests that low levels of judicial policymaking based on presently enumerated legislative policies may have to occur before Congress will feel compelled to make legislative amendments. *See supra* note 39 and accompanying text.

[137] *See* McFadden, *supra* note 134, at 642.

[138] *See supra* Part II.C.2.a–c.

[139] *See* 29 U.S.C. § 2601(b)(1)–(3) (2012).

using work hours to perform caregiving duties.[140] Each factor is discussed further below.[141]

1. *Likelihood That Care Would Have Foreseeably Been Required on the Trip*

The first factor would require the judge to analyze the likelihood that care would have reasonably and foreseeably been required on the trip. In other words, this factor will look at whether the employee could have reasonably needed to assist her family member with (1) "basic medical, hygienic, or nutritional needs"[142] and/or (2) psychological needs during the peripheral trip.[143]

In turn, this factor would significantly weight whether the family member with a serious health condition physically accompanied the employee,[144] as assistance with most physical and psychological needs reasonably requires a close physical proximity between the employee and her family member. This

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[140] Note that there is no explicit factor mandating a consideration of competing employer interests. Instead, a determination that a certain activity or trip did not constitute caring for an ailing family member functions as a determination that an employer's interests—like those interests in providing leave time for employees only when necessary—prevail. Considerations of competing interests may be built into each individual factor, and courts are free to experiment with the most efficient ways to do this.

[141] It is important to note that this test neither requires nor assumes that the family member with a serious health condition accompanied the employee on the trip. Certain factors do, however, take this into account, and whether or not the family member was actually with the employee may affect a judge's overall weighting of each factor within the test as a whole. Physical proximity is accounted for in several areas in this test because it has traditionally been important to courts in determining whether the employee actually "cared for" the family member or was merely abusing the FMLA's leave protections. *See* Baham v. McLane Foodservice, Inc., No. 3:09-CV-914-O, 2010 WL 11538403, at *5–6 (N.D. Tex. Aug. 31, 2010), *aff'd*, 431 F. App'x 345 (5th Cir. 2011) (holding that the lack of physical proximity between the employee and his injured daughter was enough to dispose of the suit on summary judgment); *see also* Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1048 (9th Cir. 2005) (holding that the employee's trip was not covered by the FMLA because he was physically too far away from his pregnant wife when he claimed to be providing her with remote psychological care). Physical proximity is, however, not a factor in itself because general intuitions of fairness and contemporary forms of caregiving counsel against requiring the employee to be physically with or accompanied by her family member. Accounting for physical proximity in certain areas of the test allows courts to balance how important an employee's physical proximity is based on the family member's serious health condition and the importance of close-quarters care versus remote care for that particular condition. Those factors that do substantially weight the family member's physical presence or proximity to the employee are noted.

[142] 29 C.F.R. § 825.124 (2019).

[143] *See id.* (noting that "care" can encompass the provision of psychological comfort and reassurance). Note that the definition of "care" under this factor conforms with the definition promulgated by the DOL. *Id.*

[144] *See supra* note 141.

factor may also turn on the category of the family member's serious health condition—either one requiring inpatient care or continuing medical treatment.[145] Inpatient care, by definition, means that the family member is temporarily housed in a medical care facility,[146] which necessarily implies that the family member receives treatment from employees of the medical care facility. In contrast, a family member who receives continuing medical treatment is not necessarily confined to a medical care facility.[147] Many serious health conditions requiring continuing medical treatment—like those described as chronic serious health conditions,[148] permanent or long-term conditions,[149] and conditions requiring multiple treatments[150]—require only periodic visits to a health care provider; thus, they may more likely require active treatment participation by the employee-caregiver outside of those visits.

As a result, this factor will most favor employees who (1) are caring for a family member with a serious health condition that requires continuing medical treatment and (2) are accompanied by their family member on their short trip to, for example, the grocery store, as both of these elements are strong indicators that the employee could reasonably have been required to provide medical, hygienic, nutritional, or psychological care during the trip. For example, an employee who, accompanied by her quadriplegic, wheelchair-bound child, runs to the grocery store to pick up items for their family meals could reasonably have been required to assist her child with using the bathroom—a valid hygienic need.

Of course, the employee will not automatically fail to meet this factor if she was not physically proximate to her family member. If the same employee described above instead has an extended phone call with her child while she grocery shops, the court may need to inquire into the psychological benefits that phone call may have provided and whether the provision of those psychological benefits was a foreseeable consequence of taking the trip without the child.[151] This affords the court sufficient flexibility to account for the specific facts of each employee's unique caretaking situation.

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[145] 29 C.F.R. § 825.113; *see also supra* Part II.C.1 (explaining in further detail the requirements of each category of serious health condition).

[146] *See* 29 C.F.R. § 825.114 ("Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility . . . .").

[147] *See supra* notes 54–58 and accompanying text.

[148] 29 C.F.R. § 825.115(c).

[149] *Id.* § 825.115(d).

[150] *Id.* § 825.115(e).

[151] The judicial bar for the "psychological comfort and reassurance" prong of "care" does, however, seem considerably harder to meet. *See* Katherine Stallings Bailey, Note, *The FMLA and Psychological Support: Courts Care About "Care" (and Employers Should, Too)*, 115 MICH. L. REV. 1213, 1227 (2017) (providing case illustrations of courts rejecting employees' claims that their trips were covered by the FMLA because of the psychological benefits provided to their family members).

2. *Magnitude of the Relationship Between the Trip and Caring for the Family Member*

The second factor would require the judge to analyze the magnitude of the relationship between the employee's short-term trip and caregiving duties. This factor essentially tests the "direct-ness" of this relationship—that is, the degree to which the trip is actually related to the employee's caregiving duties, as required by the family member's medical, hygienic, nutritional, or psychological needs.

This factor does not require an inquiry into the family member's physical proximity to the employee.[152] This is because several trips can have a direct relation to the employee's caregiving duties regardless of whether the employee is accompanied by her family member. For example, an employee responsible for caring for her elderly diabetic father could be responsible for ensuring he follows his prescribed diet,[153] which may naturally implicate meal planning, grocery shopping, and meal preparation duties, but it need not necessarily implicate him accompanying her to the grocery store.[154] But other family members—like those with severe cognitive disabilities or impairments—may require round-the-clock care and not be able to stay home alone.[155] This, in turn, suggests a second reason for excluding physical proximity under this factor: it is adequately accounted for under other factors in the proposed balancing test,[156] and its inclusion in this factor would effectively require physical proximity for an employee to prevail in the balancing of interests. This would make the test akin to the "physical proximity approach,"[157] which does not fairly account for

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[152] *See supra* note 141.

[153] Diabetics either cannot produce insulin or cannot use it effectively, often requiring a specialized diet. *See, e.g.*, Staff, *Diabetes Diet: Create Your Healthy-Eating Plan*, MAYO CLINIC (Feb. 19, 2019), https://www.mayoclinic.org/diseases-conditions/diabetes/in-depth/diabetes-diet/art-20044295 [https://perma.cc/RH5J-94N4] (describing the elements of a healthy diet for a Type II diabetic).

[154] Several elderly people with Type II diabetes may suffer from related conditions like diabetic neuropathy (i.e., nerve damage) that prevents long-range mobility but does not require hour-to-hour care. *See, e.g.*, Staff, *Diabetic Neuropathy*, MAYO CLINIC (Mar. 3, 2020), https://www.mayoclinic.org/diseases-conditions/diabetic-neuropathy/symptoms-causes/syc-20371580 [https://perma.cc/E9PQ-GGCQ] (overviewing diabetic neuropathy, its symptoms, and long-term medical consequences). For this reason, the employee in this example may be able to leave her father at home for an hour while she grocery shops for his meals.

[155] *See* Brian O. Burwell & Beth Jackson, *The Disabled Elderly and Their Use of Long-Term Care*, U.S. DEP'T HEALTH & HUM. SERVICES (July 1, 1994), https://aspe.hhs.gov/basic-report/disabled-elderly-and-their-use-long-term-care [https://perma.cc/K8Q3-23FN] ("[P]ersons with severe cognitive impairments usually require constant supervision and are more difficult to care for outside of a 24-hour supervised setting.").

[156] Physical proximity is accounted for under the first and third factor of the four-part balancing test. *See supra* Part III.B.1; *infra* Part III.B.3.

[157] *See, e.g.*, Baham v. McLane Foodservice, Inc., No. 3:09-CV-914-O, 2010 WL 11538403, at *5–6 (N.D. Tex. Aug. 31, 2010), *aff'd*, 431 F. App'x 345 (5th Cir. 2011)

the non-traditional and peripheral forms of care that many employees' family members now require.

In practice, this factor would most favor employees whose trip bears a clear and direct relation to their required caregiving duties—like trips to the grocery store to meet the family member's nutritional needs[158] or walks at the local park or around the neighborhood to meet family member's mobility and exercise needs.[159]

3. *Employee's Preparedness to Care*

The third factor is relatively straightforward and would require an inquiry into the employee's preparedness to care for the family member during the trip. This factor analyzes whether the short-term trip was one in which the employee was reasonably prepared to provide the forms of care required by the family member's serious health condition, such as those pertaining to the family member's medical, hygienic, and nutritional needs.[160]

This factor analyzes "preparedness to care" in terms of the family member's serious health condition. For example, if the family member's health condition requires regular doses of a certain medication, a court could reasonably expect the employee to have that medication on hand. Similarly, an employee with a newborn could reasonably be expected to have packed diapers. In general, this factor simply requires the court to analyze the degree to which the employee intended to provide care to her family member, if needed, in terms of what the family member's health condition would reasonably require.[161] This creates a *presumption* that employees with family members in inpatient care are not reasonably prepared to care for their family members because the nature of

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(requiring close physical proximity between employee and family member during the claimed leave period). General intuitions of fairness to employees and FMLA founding policy considerations counsel against closely hewing to this rule.

[158] *See* Knerl, *supra* note 116.

[159] *See* Staff, *Exercise and Chronic Disease: Get the Facts*, MAYO CLINIC (Nov. 11, 2020), https://www.mayoclinic.org/healthy-lifestyle/fitness/in-depth/exercise-and-chronic-disease/art-20046049 [https://perma.cc/7TUM-NU22] (providing an illustrative list of conditions for which regular exercise activities are recommended, including heart disease, diabetes, cancer, and dementia).

[160] The family member's psychological needs may also be relevant, but note that proving that the employee was in some way prepared to care for her family member's psychological needs could be more difficult than proving preparedness to care for physical needs. *See supra* note 151 and accompanying text.

[161] A similar factor has been suggested under a test for a related FMLA issue. *See* Margaret Wright, Comment, *A Caring Definition of "Care": Why Courts Should Interpret the FMLA to Cover Unconventional Treatment of Seriously Ill Family Members*, 32 T.M. COOLEY L. REV. 35, 60 (2015) (formulating a three-part test to the long-term travel issue using "[i]ntent to serve the medical need" of a family member as an element). The version suggested in this Note simply takes this a step further to look at the employee's objective intent, which is generally measured by the supplies she has on hand.

inpatient care implies that employees of the medical care facility are responsible for providing care.[162]

4. *Likelihood of Conferral of a Benefit on the Family Member*

The fourth factor would require a judge to analyze how likely the family member was to receive a benefit from the activity in which the employee claimed to have been providing care.[163] This factor serves the main purpose of accounting for less traditional forms of care that the FMLA should nonetheless cover: specifically, this factor is intended to account for those forms of care whose main objective is a psychological benefit to the family member. Unlike the other factors, satisfying this factor would be most important to employees claiming to have provided their family member with psychological benefits.

The main reason for formulating a factor that accounts for non-traditional provisions of care is the plain intent within the FMLA's regulations that care encompass "both physical and psychological care."[164] Neither the regulations nor the statute itself limit care to the more traditional caretaking activities—like caring for medical, hygienic, and nutritional needs—and courts therefore should not require it. For this reason, this factor also does not weight physical proximity, as psychological care does not necessarily require a close physical proximity.

Importantly, the phrasing of this factor as "likelihood of conferral of a benefit on the family member"—without mentioning the *type* of benefit required—is still flexible enough so that the traditional caretaking activities described above and physical benefits they produce readily satisfy this element. Courts have the leeway under this part of the test to recognize the physical and psychological benefits it views as both cognizable and acceptable given the relevant policy considerations, but only those benefits which are truly too far-fetched or incidental should be excluded from consideration.

C. *Balanced Outcomes: Applying the Multi-Factor Test*

The four factors courts should consider in determining whether an employee-caregiver's activity or trip constitutes caring for an ailing family member are (1) the likelihood that care would have foreseeably been required

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[162] Whether duties like patient advocacy—"support[ing] a vulnerable or disadvantaged person and ensur[ing] that their rights are being upheld in a healthcare context"—constitute caring for a family member in inpatient care is beyond the scope of this Note. *What Is an Advocate in Health and Social Care?*, ENA CARE GROUP (Oct. 30, 2018), https://ena.co.uk/news/what-is-an-advocate-in-health-and-social-care/ [https://perma.cc/Q2KE-2PCA].

[163] This factor of the balancing test borrows from another student-written piece. *See* Wright, *supra* note 161, at 60 (formulating a three-part test to the long-term travel issue using "likely conferral of a benefit" to the ailing family member as an element).

[164] 29 C.F.R. § 825.124 (2019).

on the trip, (2) the magnitude of the relationship between the trip and the employee's caregiving duties, (3) the employee's preparedness to care for the family member on the trip, and (4) the likelihood that the trip would confer some cognizable benefit on the family member.[165] This test is intended to be flexible and its application will look different in each situation.

For example, imagine that the employee in *Leakan* instead resided in the same North Carolina town as her family.[166] If the employee took her newborn on her visit with family for a few hours, she would likely have readily satisfied[167] the first factor because she was both accompanied by her newborn and she would have reasonably been required to assist with his basic needs like feeding and changing.[168] Furthermore, she likely had the necessary supplies on hand—diapers, formula, baby food, and the like—to assist with these needs, so she would have satisfied the third factor as well.[169] The nature of newborns similarly suggests that the employee's child would have benefitted from any physical care the employee provided, and research further suggests that newborn contact with family is crucial for early psychological and neurological development.[170] However, the second factor could weigh against this employee, as she could have difficulty proving that a visit with extended family was directly related to her caregiving duties as a new mother.[171] Despite this, a court could reasonably determine that the employee was caring for her newborn in the context of the FMLA during this short visit based on the likelihood that care would have foreseeably been required on the trip, the employee's preparedness to care, and the likely benefits that care conferred on her newborn.[172]

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[165] *See supra* Part III.B.

[166] Leakan v. Highland Cos., No. 96-CV-75445-DT, 1997 WL 33812215 (E.D. Mich. Nov. 19, 1997). The employee actually resided in Michigan while her parents resided in North Carolina. *Id.* at *1–2, *4. However, these facts are adjusted for the purposes of illustrating the balancing test's application to different factual circumstances.

[167] Using this phrasing in this section is simply shorthand and should not suggest that employees can either satisfy or not satisfy a given factor; instead, the nature of the balancing test is such that a court should determine in what directions and with what magnitude each factor points to make the overall determination of whether the employee provided care that the FMLA should cover.

[168] *See* Sanjeev Jain, *How Often and How Much Should Your Baby Eat?*, AM. ACAD. PEDIATRICS, https://www.healthychildren.org/English/ages-stages/baby/feeding-nutrition/Pages/How-Often-and-How-Much-Should-Your-Baby-Eat.aspx [https://perma.cc/4XUT-QHJ3] (last updated Oct. 29, 2020) ("Most newborns eat every 2 to 3 hours . . . .").

[169] Of course, a court would need to inquire into what supplies the employee actually carried, but this example assumes that she had all necessary supplies on hand.

[170] *See generally* Robert Winston & Rebecca Chicot, *The Importance of Early Bonding on the Long-Term Mental Health and Resilience of Children*, 8 LONDON J. PRIMARY CARE 12 (2016) (discussing infancy as a "crucial time for brain development" and suggesting that social bonding is an effective means of promoting brain development).

[171] *See supra* Part III.B.2.

[172] This does not suggest that a court *must* find that the employee was providing care based on the fact that she readily satisfied at least three of the four factors of the balancing test—after all, the test is holistic, and courts are free to determine which factors are most

Yet this test will not always give employee-favorable outcomes, and may instead track the reasoning of previous judicial approaches. For instance, the employee's trip in *Tellis* would still likely not have been covered by the FMLA even if it was a short trip to the local car dealership.[173] Under the first factor, the employee's calls to his wife likely provided some psychological comfort during her pregnancy and childbirth,[174] but she did not physically accompany him.[175] It may also be difficult to prove that his trip to retrieve a new family vehicle directly related to his wife's needs as a pregnant woman, and in fact likely ran counter to those needs because he was not present to help her with any pregnancy-related medical issues. This also indicates that he may not have been reasonably prepared to care for her needs during this time if the only way he could provide any care—physical or psychological—was over the phone. Thus, the first, second, and third factors could all suggest that the employee was not caring for his wife during the claimed leave period—at least, not in a way that the FMLA should or was intended to cover. While his wife likely felt psychologically reassured knowing that they would soon have a replacement family vehicle—particularly given that their family would be growing—the fact that her husband's trip was likely psychologically beneficial for her would not require a court to find that the FMLA should cover that trip, particularly given the significance of the other factors.

All in all, the above analyses illustrate the flexible nature of the balancing test. The test has the potential to give either employee-favorable or employer-favorable outcomes, furthering Congress's objective that the FMLA promote employee work-life balance while accounting for the legitimate needs of employers to efficiently maintain their business enterprises.[176] While it grants courts a considerable amount of discretion in determining which factors are most compelling in each given case, it at the very least forces courts to examine those things that prior judicial decisions have deemed most critical to the FMLA

compelling in each case. If other facts suggested that the primary purpose of the employee's trip was not to provide care for her child, a court could reasonably determine her trip was not covered by the FMLA.

[173] *See* Tellis v. Alaska Airlines, Inc., 414 F.3d 1045 (9th Cir. 2005). The *Tellis* employee actually took a trip thousands of miles away to retrieve a new car. *Id.* at 1046.

[174] *Id.* at 1046–47.

[175] *Id.* at 1048.

[176] *See* 29 U.S.C. § 2601(b)(1)–(3) (2012).

care analysis—nexus,[177] physical proximity,[178] and the physical[179] and psychological needs[180] of the ailing individual.

IV. CONCLUSION

For now, employee-caregivers are left with two undesirable options when it comes to taking short-term care-related trips: rely on their employers to provide progressive leave policies or take their chances in an unpredictable court system after they are terminated for "unauthorized" time off. Absent a test that goes beyond a single static factor—like physical proximity or daily needs—employees will be unable to effectively balance their work lives with their personal lives as caregivers, and many will be forced to choose between the two. Yet the purpose of the FMLA was to mitigate the circumstances that would force employees to choose between their work and personal lives, a purpose which current applications of the law and attitudes toward non-traditional caretaking hardly effectuate.

Employees deserve more from their federal leave protections. By promulgating a consistent yet adaptable test—one where all factors are balanced holistically given the unique facts of each case—federal courts can ease the burden on the masses of American workers who care for their loved ones.

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[177] Nexus—that is, the magnitude of the relationship between the trip and the family member's direct physical needs—appears to be the most critical factor to several courts. *See* Tayag v. Lahey Clinic Hosp., Inc., 677 F. Supp. 2d 446, 452 (D. Mass. 2010), *aff'd*, 632 F.3d 788 (1st Cir. 2011); Leakan v. Highland Cos., No. 96-CV-75445-DT, 1997 WL 33812215, at *4 (E.D. Mich. Nov. 19, 1997).

[178] Physical proximity of the ailing individual to the employee is the critical inquiry for the Fifth and Ninth Circuits. *See* Baham v. McLane Foodservice, Inc., No. 3:09-CV-914-O, 2010 WL 11538403, at *5–6 (N.D. Tex. Aug. 31, 2010), *aff'd*, 431 F. App'x 345 (5th Cir. 2011); Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1047 (9th Cir. 2005).

[179] The touchstone for the Seventh Circuit is the daily physical needs of the ailing individual. *See* Ballard v. Chi. Park Dist., 741 F.3d 838, 841 (7th Cir. 2014).

[180] 29 C.F.R. § 825.124 notes the importance of whether the ailing individual received any psychological comfort or reassurance from the employee's care, and the First Circuit also appears to see this as an important factor in the FMLA-care calculus. *See* Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788, 789 (1st Cir. 2011) (noting that the employee provided "psychological comfort" to her ill husband when she cared for him).