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TAKING CARE OF THE FMLA: TRAVELING WITH FAMILY MEMBERS UNDER THE FAMILY AND MEDICAL LEAVE ACT

I. INTRODUCTION

The Make-A-Wish Foundation helps children and adults fighting life-threatening medical conditions feel stronger, more energetic, and more willing to battle their illnesses.[1] Doctors, nurses, and other healthcare providers believe that "the wish experience works in concert with medicine to make their patients feel better emotionally and even physically."[2] That is why foundations such as Make-A-Wish or Fill Your Bucket List grant wishes.[3] Travel is involved in most wishes.[4] Out of the 14,000 wishes Make-A-Wish grants each year, many involve a trip.[5] Whereas the Make-A-Wish Foundation grants wishes to children, the Fill Your Bucket List Foundation provides wishes to adults over the age of eighteen; it recently helped Grant Lafoon, a twenty-six year old man from Raleigh, North Carolina, who was diagnosed with a brain tumor in early 2015.[6] The Fill Your Bucket List Foundation sent Grant and a guest to Super Bowl 50 to watch his favorite football team,

1. *Wishes*, MAKE-A-WISH FOUND., http://wish.org/wishes (last visited Apr. 13, 2017); *see Mission*, FILL YOUR BUCKET LIST FOUND., http://www.fillyourbucketlistfoundation.org/#!mission/clte (last visited Apr. 13, 2017).

2. *Wishes*, *supra* note 1. In fact, approximately every thirty-five minutes, the Make-A-Wish Foundation grants one of these such wishes to an individual facing a life-threatening ailment. *Id.*

3. *Id.* Make-A-Wish's mission is "to grant the wish of every child diagnosed with a life-threatening medical condition." *About Us*, MAKE-A-WISH FOUND., http://wish.org/about-us#sm.00001h3qc6n1hlfe8qhff0r2rrs84 (last visited Apr. 13, 2017). With a similar mission to the Make-A-Wish Foundation, Fill Your Bucket List's vision is "[t]o enrich and celebrate the lives of adults with cancer by granting wishes that allow them to create lasting memories with their family and friends." *Mission*, FILL YOUR BUCKET LIST FOUND., http://www.fillyourbucketlistfoundation.org/#!mission/clte (last visited Apr. 13, 2017).

4. *Top 10 Wish Destinations*, MAKE-A-WISH FOUND. http://wish.org/content/Top-10-Wish-Destinations (last visited Apr. 13, 2017).

5. *Id.* (the figures used are based on data from the 2013 fiscal year).

6. *About Us*, FILL YOUR BUCKET LIST FOUND., http://www.fillyourbucketlistfoundation.org/about_us (last visited Apr. 13, 2017); WNCN Staff, *Raleigh Man Who Survived Brain Tumor Gets Super Bowl Trip to See Panthers*, CBS N.C. (Jan. 27, 2016, 7:31 PM), http://wncn.com/2016/01/27/cary-man-who-survived-brain-tumor-gets-super-bowl-trip-to-see-panthers/.

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the Panthers, play against the Denver Broncos.[7] When Grant was diagnosed, his mother, Melinda Pupp, made the difficult decision to quit her job in order to tend to, and take care of her son's disease. As a thank you, he decided to bring her on his trip to the Super Bowl.[8] Grant explained that he asked his mother to accompany him "because she dropped everything when [he] was diagnosed. . . . She had a busy and full life, but stayed with [him] every step of [his] treatment."[9] Grant also explained that he and his mother "watched a lot of football together, whether it was live or on TV every Sunday" and "it was [a] really special time spent with [his mother]."[10] Grant expressed that having this experience with his mother was "really an unbelievable opportunity . . . to make memories that last a lifetime."[11]

There are many people, like Grant's mother, who are placed in difficult positions and have to decide between working and taking care of an ill family member. While Grant's mother was able to leave her job, there are many who cannot afford to do so, and must continue working while caring for a sick loved one. Under the Family and Medical Leave Act (hereinafter "FMLA" or "the Act"), eligible employees are permitted to take up to twelve weeks of unpaid leave to take care of their own serious health condition, or to care for an immediate family member's qualifying serious health condition.[12] Currently, there is a dispute between the circuit courts on how to define "care for" under the FMLA.[13] Specifically, the concern is whether the FMLA is appropriate when an employee leaves to "care for" and travel with family members with "serious health conditions."[14]

In *Ballard v. Chicago Park District*, the Seventh Circuit held that leave was proper under the FMLA to protect an employee's trip to Las Vegas to care for her terminally ill mother.[15] The employee claimed she needed to travel to Las Vegas in order to provide physical and psychological care for her mother during the trip.[16] However, the First

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Wage & Hour Division, *Family and Medical Leave Act*, U.S. DEP'T. OF LAB., http://www.dol.gov/whd/fmla/ (last visited Apr. 13, 2017).
13. *See infra* Part III (discussing the circuit split over how to define "care for" under the FMLA).
14. *See* 29 C.F.R. § 825.113(a) (2013) (defining a serious health condition); *see also infra* Part III.
15. Ballard v. Chicago Park Dist., 741 F.3d 838, 839, 842-43 (7th Cir. 2014).
16. *Id.* at 839.

and Ninth Circuits emphasized that to "care for" a family member under the FMLA involves some level of involvement in on-going treatment when traveling.[17]

Under a plain reading of the statute, perhaps all of the employees in the cases were "caring for" their family members while they were traveling. However, the true issue becomes: When is it appropriate for an employee to take time off of work to travel for what may be considered a vacation? The potential problem with *Ballard* is that an employee may be able to take any ill family member on vacation, and claim that they are providing care that constitutes leave under the statute.[18]

A proposed solution to this circuit split is to follow the *Ballard* ruling,[19] and to follow the plain reading of the FMLA statute.[20] The rule of FMLA leave should be amended since it is already so limited in that the leave remains unpaid.[21] Without amending the rule, traveling with a family member with a serious health condition may not be considered appropriate leave, unless they traveled together for reasons related to the medical treatment of the sick family member.[22] For instance, traveling and "caring for" a loved one who is "terminally ill" or who has a life-threatening medical condition may not be considered appropriate leave under the FMLA,[23] even though it should be. If an employee is not able to care for a loved one who is terminally ill, this will go against the purpose of the FMLA.[24] This solution will continue to encourage the balance of workplace needs with the needs of the employee's families, while reducing litigation for both parties by decreasing ambiguities related to traveling.

Part II will discuss the history and structure of the FMLA, the

17. *See, e.g.*, Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788, 791 (1st Cir. 2011) (noting that "continuing treatment" under the statute is by a health care provider); Marchisheck v. San Mateo Cty., 199 F.3d 1068, 1076 (9th Cir. 1999).

18. *Ballard*, 741 F.3d at 843.

19. *See id.* at 839.

20. *See* Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2619 (1993).

21. *Id.* § 2612(b)(2)(c).

22. *See Ballard*, 741 F.3d at 842 (discussing First and Ninth Circuit cases and their interpretation of traveling with a family member as it relates to "caring for" a loved one).

23. *See, e.g.*, Marchisheck v. San Mateo Cty., 199 F.3d 1068, 1071, 1076 (9th Cir. 1999) (discussing the court's denial of protection under the FMLA because an employee took a leave from work to move her son to the Philippines in order to better "care for" her son, however, such leave was not to so he could receive medical "care").

24. *See* 29 U.S.C. § 2601(b) (stating that the purpose of the FMLA is to allow employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons).

purposes and provisions of the Act, and what constitutes a "serious health condition" under the Act.[25] Part III will analyze cases addressing FMLA leave and what it means to "care for" ill family members when traveling.[26] Part IV will explain the potential impact of the *Ballard* ruling and will argue a solution to the circuit split which appropriates leave for travel under the FMLA.[27] Finally, Part V will analyze how this solution would impact the rulings of the other circuit cases and explain how employee abuse would be prevented.[28]

II. THE FAMILY AND MEDICAL LEAVE ACT

A. Overview

The FMLA was established "to help employees balance their work and family responsibilities by allowing them to take reasonable unpaid leave for certain family and medical reasons."[29] The FMLA was established based on the understanding that employees may be faced with certain circumstances where they must temporarily leave work in order to take care of themselves or their family members.[30] For instance, a new parent who has either given birth to a child or adopted a child will need to take leave from work in order to adjust to their new parental responsibilities.[31] Other examples include an employee leaving work for a necessary medical procedure with an extended recovery time, or caring for a sick child with a chronic illness.[32] The FMLA offers eligible employees the right to take up to twelve weeks of unpaid leave per year.[33] In addition, the FMLA indicates that an employee's job will be protected during that period of unpaid leave and that their health care benefits will be preserved during that same period.[34]

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See infra* Part V.

29. *Family and Medical Leave Act (FMLA)*, AM. CANCER SOC'Y (Nov. 21, 2014), http://www.cancer.org/treatment/findingandpayingfortreatment/understandingfinancialandlegalmatters/family-and-medical-leave-act [herinafter *Family and Medical Leave Act (FMLA)*].

30. *See id.*

31. Nancy J. King, *The Family Medical Leave Act: An Ethical Model for Human Resource Policies and Decisions*, 83 MARQ. L. REV. 321, 329 (1999).

32. *Id.*

33. *Family and Medical Leave Act (FMLA)*, *supra* note 29.

34. *Id.*

B. The History and Structure of the FMLA

Before Congress enacted the FMLA in 1993, there was an overwhelming amount of evidence and history of sex-based discrimination with respect to state specific leave benefits, which prompted its ratification.[35] After Congress passed the Pregnancy Discrimination amendments in 1978, feminist communities had become particularly aware that the current maternity leave policies in place were insufficient.[36] Prior to the FMLA, maternity leave programs were either state or employer specific.[37] Despite the progression of other nations, the United States was one of the industrialized nations that did not have a national policy that guaranteed new mothers their jobs after giving birth to newborn children.[38] Additionally, because leave programs were maternity leave specific, the feminist communities were concerned that programs like this would be a detriment to the principles of equality in the workplace.[39] Furthermore, these programs did not adequately confront the issue surrounding the need for family leave to extend beyond childbirth.[40]

In 1984, a national conversation regarding the establishment of a gender-neutral policy for family leave began "when a federal district court struck down [a] California maternity-leave law."[41] The court's reasoning was that the maternity leave law discriminated against men based on their sex.[42] The court's decision triggered the need for a meeting between certain California legislators and representatives from the organized women's movement.[43] At the meeting, a legislative proposal was outlined which became a basis for the FMLA.[44] The FMLA was designed to prevent women from losing their jobs after taking time off from work after a childbirth and was designed to protect both men and women equally who may encounter family situations or serious personal illnesses which causes them to need to take a leave from

35. Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003).

36. Donna R. Lenhoff & Lissa Bell, *Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES 3, http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf (last visited Apr. 13, 2017).

37. *Id.*

38. *Id.*

39. *Id.* at 3-4.

40. *Id.* at 4.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

their employment.[45] In addition, the FMLA intended to prevent employers from sex discriminatory hiring practices against women since the FMLA is a gender-neutral policy.[46]

By the time the FMLA was first drafted in 1984, Ronald Reagan was in office and Congress was split—a Senate under Republican control and the House of Representatives under Democratic control.[47] In order to pass the bill for the FMLA, proponents attempted to educate the public about the issue, in addition to informing the matter to members of Congress, particularly the House of Representatives.[48] Initially, members of Congress viewed the bill as a trivial "'girl' bill" and were not open to supporting it.[49] With time, public support for the FMLA increased and unions began to appreciate and endorse the FMLA efforts to help employees balance their work and family responsibilities.[50] By 1991, the FMLA became "one of the top . . . demands that the labor movement presented to Congress."[51]

The National Partnership for Women & Families, the organization that wrote the first draft of the FMLA, was dedicated to securing equal employment opportunities for both men and women, by establishing workplace policies to create a better balance between work responsibilities and family life.[52] In order to endorse the FMLA, the Partnership arranged a "coalition" by becoming involved with certain communities, and media strategies, in order to increase public support of the FMLA.[53] In addition, major supporters such as the American Association for Retired Persons ("AARP") and the U.S. Catholic Conference helped promote the campaign and convinced significant members of Congress to promote the FMLA.[54]

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45. *Id.*

46. *Id.*; *see also* Family Medical Leave Act of 1993, 29 U.S.C. § 2601(b)(4) (2012) ("[T]o accomplish the purposes [of the Act] in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis.").

47. Lenhoff & Bell, *supra* note 36, at 4.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 5.

53. *Id.*

54. *Id.* The AARP had a great deal to benefit from the FMLA since it would help their own members take leave in order to recover from serious health conditions and would help their members' adult children take leave in order to care for them. *Id.* The Act was also framed in a way to obtain the unexpected support from groups such as the U.S. Catholic Conference, who were strongly pro-life while the National Partnership who drafted the Act was strongly pro-choice. *See*

FMLA proponents provided a "values-based message" to the problem and solution in order to gain FMLA support from the public.[55] FMLA proponents gathered public support through maternity leave alone, but since the Act provides leave to other family members as well, its proponents established a broader message.[56] For instance, the proponents created a slogan, asserting: "Employees shouldn't have to choose between the jobs they need and the families they love," in order to emphasize the needs of not just babies, but the needs of the employees to care for sick children and seniors.[57] The argument that the FMLA will prevent working people from losing their jobs after taking care of newborns, sick children, or ill parents proved to be highly convincing to the public.[58]

Though the advocates built support and awareness of the FMLA through their multi-year campaign, a number of compromises were made in order to strengthen the bill's "political viability."[59] For instance, in 1985, the law was introduced to the House of Representatives and applied to employers with five or more employees to provide "[eighteen] weeks over a two-year period [of] unpaid parental leave for the birth, adoption, or serious illness of a child, and [twenty-six] weeks of unpaid medical leave for the employee's own serious health condition."[60] However, to strengthen its political viability, there was an increase in the number of workers that employers had to have, and a decrease in the length of permitted leave.[61]

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id. The Act would support new mothers and would promote anti-abortion as an incentive for women not to abort. *Id.* For example, it would be difficult for anti-abortion activists to insist that women stay pregnant without an act like the FMLA if it would be possible for these new mothers to lose their jobs once they delivered their babies. *Id.*

55. Sally Steenland & Eleni Towns, *The Family and Medical Leave Act Is Synonymous with Family Values*, CTR. FOR AM. PROGRESS (Feb. 1, 2013, 2:30 PM), https://www.americanprogress.org/issues/labor/news/2013/02/01/51567/the-family-and-medical-leave-act-is-synonymous-with-family-values/ (Explaining that "[a] key theme in the partnership's campaign was the importance of motherhood and family—a values-based message that brought on board faith groups such as the National Council of Jewish Women and the U.S. Conference of Catholic Bishops. The partnership's values message also divided 'pro-family' religious-right opponents, many of whom objected to women in the workforce and fought policies that would make their working lives easier.").

56. Lenhoff & Bell, *supra* note 36, at 7.

57. *Id.*

58. *Id.*

59. *FMLA Federal Legislative History Highlights*, DIVERSITYDATAKIDS.ORG 1, www.diversitydatakids.org/files/Policy/FMLA/Logic/FMLA%20Legislative%20History%20Highlights.pdf (last visited Apr. 13, 2017) [hereinafter *FMLA Highlights*].

60. *Id.*

61. *Id.*

Undoubtedly, the opposition's strong response influenced the FMLA's anticipated process.[62] For instance, lobby groups formed a coalition to prevent the enactment of the Act based on the idea that the FMLA was a government mandate.[63] Finally, the individual lawmakers' commitment to the FMLA also induced the FMLA process.[64] Several lawmakers, such as, Senator Dodd, Senator Bond, and Representative Roukema, were predominantly influential.[65] Though Senator Dodd was unmarried and did not have children, he understood the significance of raising children and families, and was committed to advocating for the FMLA.[66] Senator Dodd was responsible for obtaining Republican cosponsors to overcome President Bush's 1992 veto.[67] Senator Bond negotiated with Senator Dodd, and created a compromise bill that gained enough votes in the Senate necessary to override the expected presidential veto.[68] One of the reasons Senator Bond was interested in supporting the FMLA was to please an older constituency, including those represented by AARP.[69] In addition, as a prominent anti-abortion voice in Congress, Senator Bond viewed his support of the FMLA as a necessary means to secure his reelection through increased consideration of women's plights surrounding this hot topic issue.[70]

Unlike the other two lawmakers, Representative Roukema's main influence for the FMLA was her personal experience as a stay-at-home wife, caring for her ill mother-in-law.[71] Representative Roukema understood how much time and energy was needed in order to properly care for someone.[72] This personal experience helped her understand the dilemma working people faced when they needed to leave work in order to temporarily care for an ailing parent or other family member.[73] Representative Roukema's support of the FMLA was also significant

62. Lenhoff & Bell, *supra* note 36, at 9.
63. *Id.* at 9.
64. *Id.* at 10.
65. *Id.*
66. *Id.*
67. *Id.* (requiring at least a two-thirds majority).
68. *Id.*
69. Donna R. Lenhoff, Address at a Conference and Signature Study of the Hubert H. Humphrey Institute of Public Affairs conducted in collaboration with the School of Public Health, University of Minnesota: Family and Medical Leave in the United States: Historical and Political Reflections 3, 6 (Oct. 1, 2004), https://www.wou.edu/~mcgladm/climate%20change%20literature%20misc/FMLA%20History.pdf.
70. *See id.* at 6.
71. Lenhoff & Bell, *supra* note 36 at 10.
72. *Id.*
73. *Id.*

because she represented the Republicans on the Labor-Management Subcommittee, "which had jurisdiction over the main portions of the FMLA in the House."[74]

On February 5, 1993, President Bill Clinton signed the final version of the FMLA into law.[75] This version "allows for [twelve weeks] of unpaid parental and medical leave and applies to employers with at least [fifty] employees."[76] The Act permits employees to take leave in order to care for ill family members—specifically, spouses, children, or parents.[77]

Since 1993, there have been a few amendments to the Act.[78] In 2008, "President George W. Bush sign[ed] the National Defense Authorization Act for Fiscal Year 2008," amending the FMLA by incorporating two special military family leave provisions.[79] President Barack Obama also amended the FMLA when he signed the National Defense Authorization Act for Fiscal Year 2010 to include provisions pertaining to leaves for military caregivers.[80]

Though the original drafters of the FMLA were required to make compromises in order to attain political viability for the Act, the FMLA has slowly expanded through legislation and regulations since 1993.[81] An amendment to the FMLA broadened the Act's coverage not only to members of the military and veterans, but has also been able to offer job-protected leave to a great number of workers and families.[82] Though these amendments were great progress, other federal efforts to expand access to FMLA leave were unsuccessful.[83] For example, in 2008 President Obama wanted to extend FMLA coverage to workplaces with twenty-five or more employees, but it was not enacted.[84] In 2012,

74. *Id.*

75. Special To Peoplesworld.org, *Today in Labor History: The Family and Medical Leave Act of 1993*, PEOPLE'S WORLD (Feb. 5. 2015, 3:11 PM), http://peoplesworld.org/today-in-labor-history-the-family-and-medical-leave-act-of-199/.

76. *FMLA Highlights*, *supra* note 59, at 2.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*; Wage & Hour Div., *Fact Sheet #28M(b): Military Caregiver Leave for a Veteran under the Family and Medical Leave Act*, U.S. DEP'T OF LAB. (Feb. 2013), http://www.dol.gov/whd/regs/compliance/whdfs28mb.pdf ("The Family and Medical Leave Act (FMLA) entitles eligible employees who work for covered employers to take unpaid, job-protected leave to care for a family member who is a covered veteran with a 'serious injury or illness.' FMLA leave for this purpose is called 'military caregiver leave.'").

83. *FMLA Highlights*, *supra* note 59, at 2.

84. *Id.*

President Obama proposed a budget of about $23 million in order to "provide grants to assist additional states to establish[] paid leave programs," but this was rejected from the final budget.[85] Other types of legislation, such as the Family Leave Insurance Act of 2011, were proposed to mandate paid leave plans, but these Acts have yet to be enacted.[86] Because FMLA leave continues to be unpaid, many families are unable to afford to take the necessary leave.[87] Some states including California, Rhode Island, and New Jersey, have addressed this issue by offering "level partial wage replacement."[88]

More recently, during the November 2016 election campaign, two major-party candidates proposed *paid* family leave policies.[89] In September, now President Donald Trump announced a plan for paid maternity leave to cover women, as new mothers, after childbirth, who were not guaranteed paid maternity leave by their employers.[90] President Trump's plan for paid leave "would be administered through the Unemployment Insurance program and funded by [the] savings [earned] from eliminating fraud in that insurance program."[91] Trump's proposal was announced after Democratic nominee Hillary Clinton's plan, which also supported paid leave, was proposed.[92] Clinton's plan "calls for equal coverage for women and men, whether they become parents through pregnancy, surrogacy or adoption."[93]

C. The Purpose and the Provisions of the FMLA

The purpose of the FMLA is to improve the work-life balance for employees while improving business productivity for employers since

85. *Id.* at 2-3.
86. *Id.* at 3.
87. *Id.*
88. *Id.*; *see* The Heller Sch. for Soc. Policy & Mgmt., *State Variation in Family and Medical Leave Policies*, DIVERSITYDATAKIDS.ORG 1, 4, http://www.diversitydatakids.org/files/Policy/FMLA/Capacity/State%20variation%20in%20family%20and%20medical%20leave%20policies.pdf (last visited Apr. 13, 2017) [hereinafter *State Variation*].
89. Megan A. Sholar, *Donald Trump and Hillary Clinton Both Support Paid Family Leave. That's a Breakthrough*, (Sept. 22, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/22/donald-trump-and-hillary-clinton-both-support-paid-family-leave-thats-a-breakthrough/?utm_term=.08631284be56 ("mark[ing] the first time in U.S. history that both major-party candidates have put forward paid family leave policies").
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

employees are encouraged to return to their employers after their leave.[94] The FMLA does this by allowing employees to take "reasonable unpaid leave for medical reasons, for the birth or adoption of a child, or for the care of a child, spouse, or parent who has a serious health condition."[95] Aside from helping employees balance the demands of the workplace with the needs of families, the FMLA promotes the stability and economic security of families, and promotes the national interests of preserving family integrity.[96] The Act also seeks to consider the employers interest "in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment [by] minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women."[97]

The "needs of the American workforce, and the development of high-performance organizations" were two concerns that prompted the legislation.[98] The FMLA also indicates that "workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home."[99] In addition, the Act considers the benefits to not only the employees but also to the employers.[100] For example, findings show that there is "[a] direct correlation [] between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations."[101]

1. Basic Coverage Standard

The FMLA provides up to twelve weeks of unpaid leave per year to eligible employees, and requires "group health benefits to be maintained during the leave as if employees continued to work instead of taking leave."[102] At the end of their FMLA leave, "[e]mployees are also

94. *State Variation*, *supra* note 88, at 1-2; Wage & Hour Div. (WHD), *The Family and Medical Leave Act, Fact Sheet*, U.S. DEPT. OF LAB., http://www.dol.gov/whd/regs/compliance/1421.htm (last visited Apr. 13, 2017) [hereinafter *The Family and Medical Leave Act, Fact Sheet*] .

95. 29 C.F.R. § 825.101(a) (2013).

96. *Id.*

97. *Id.*

98. *Id.* § 825.101(b).

99. *Id.*

100. See *id.* § 825.101(b)-(c).

101. 29 C.F.R. § 825.101(c).

102. *FMLA Frequently Asked Questions*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/fmla/fmla-faqs.htm#1, (last visited Apr. 14, 2017).

entitled to return to their same or an equivalent job."[103] The Act is applicable to all public agencies, state and federal employees, schools, and private sector companies with "[fifty] or more employees for at least [twenty] workweeks in the current or preceding calendar year."[104] A "public agency," as used herein to clarify the Act's scope, includes the federal, state, and local employers, and thereby, their employees.[105] Employees who work in public agencies are covered by the FMLA despite the number of employees working there.[106] In order to be qualified for FMLA leave, employees must also meet the employer's eligibility requirements of the Act.[107]

2. Eligibility of Employees for Leave

Eligible (public) employees under the FMLA must work for a covered employer at a location where the employer has fifty or more employees within seventy-five miles of that location.[108] Further, to be eligible, an employee is required to have worked for that employer for at least twelve months in addition to working a minimum of 1,250 hours in the twelve months preceding the start of FMLA leave.[109]

3. Types of Leave

Employees who are FMLA eligible are permitted to take

> up to [twelve] weeks of unpaid leave each year for any of the following reasons: [F]or the birth and care of the newborn child of an employee; for placement with the employee of a child for adoption or foster care; to care for an immediate family member (spouse, child, or parent) with a serious health condition; or to take medical leave when the employee is unable to work because of a serious health condition.[110]

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103. *Id.*
104. *Id.*
105. *See id.*
106. Gerald Mayer, CONG. RESEARCH SERV., R42758, THE FAMILY AND MEDICAL LEAVE ACT (FMLA): AN OVERVIEW 4, (Sept. 28, 2012), https://www.fas.org/sgp/crs/misc/R42758.pdf.
107. *Id.*
108. *Id.*
109. *Id.*
110. *FMLA (Family & Medical Leave)*, U.S. DEP'T OF LAB., http://www.dol.gov/dol/topic/benefits-leave/fmla.htm (last visited Apr. 14, 2017).

By its own definition, other members of one's extended family would not be covered by the Act; i.e. siblings, grandparents, and in-laws.[111] For the purposes of this Note, the focus will be on caring for an immediate family member with a serious health condition.

The FMLA explains that the phrase "needed to care for" a family member encompasses physical and psychological care, it includes:

> [S]ituations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.[112]

4. Serious Health Condition

A "serious health condition" has been defined as "an illness, injury, or physical or mental condition that involves— (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider."[113] "Inpatient care" has been defined as at least one "overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity . . . or any subsequent treatment" related to the inpatient care.[114] In cases where FMLA is applicable, the patient receiving care for a serious health condition must be able to present sufficient proof of incapacitation and continuing treatment.[115] Incapacity has been defined as "the inability to work, attend school or perform regular daily activities due to the serious health condition, treatment or recovery therefrom."[116]

In addition, continuing treatment has been defined as at least three consecutive days of incapacity that involves either treatment by a doctor or health care provider, two times within the first thirty days following

111. *See id.*
112. 29 C.F.R. § 825.116(a) (2009).
113. 29 U.S.C. § 2611-(11) (2009).
114. 29 C.F.R. § 825.114 (2013).
115. *See* 29 C.F.R. §§ 825.113(b)-(c), 825.115(a).
116. *Id.* § 825.113(b).

the period of "incapacitation," or one treatment by a doctor or health care provider, and which "results in a regimen of continuing treatment under the supervision of the health care provider."[117] Continuing treatment may also relate to a pregnancy or prenatal care, permanent or long-term conditions that lack effective treatments, and chronic serious health conditions.[118] In order to certify that a person has a chronic serious health condition, a patient must have "periodic visits for treatment" which "continue[] over an extended period of time" and "may cause episodic rather than a continuing period of incapacity."[119] Alzheimer's is an example of a permanent or long-term condition with a lack of effective treatments, as compared to asthma which is an example of a chronic serious health condition.[120]

Finally, a continuing treatment may also relate to receiving "multiple treatments" for "restorative surgery after an accident or other injury; or [a] condition that would likely result in a period of incapacity of more than three consecutive, full calendar days" if not treated.[121] Examples of what has been considered "serious health conditions" include a heart, chest, or respiratory condition, digestive problems, and psychological difficulties.[122]

Employers have had issues with the broad regulatory definition of a serious health condition.[123] For instance, "the University of Minnesota stated [t]he current definition of 'serious health condition' is broad enough to cover minor illnesses that were not intended to be covered by the Act . . . . Specifically, the test set forth in section 825.114(a)(2)(i) (period of incapacity lasting more than three days) is broad enough to cover minor illnesses," such as common colds and upset stomachs.[124] The University of Minnesota continued to explain that since "physician certifications seldom use terms like 'common cold,' 'upset stomach,' 'ear ache,' etc., the University does not feel it can deny the requests, even when the University is convinced the illness is minor. . . . As []

117. *Id.* § 825.115(a)(1)-(2).

118. *Id.* § 825.115(b)-(d).

119. *Id.* § 825.115(c)(1)-(3).

120. *Id.* § 825.115(c)-(d).

121. *Id.* § 825.115(e)(1)-(2).

122. *See, e.g.*, Brief for Sec'y of Labor as Amici Curiae Supporting Appellant at 374-81, Thorson v. Gemini, Inc., 205 F.3d 370 (8th Cir. 2000) (Nos. 99-1656, 99-1708, 99-2059); Barrilleaux v. Thayer Lodging Grp, Inc., No. CIV. A. 97-3252, 1999 WL 155939, at *1 (E.D. La. Mar. 19, 1999); Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028, 1035 (M.D. Tenn. 1995).

123. *See Thorson*, 305 F.3d at 375-76.

124. U.S. Dept. Of Lab., *Family and Medical Leave Act Regulations, III: Serious Health Condition* 21, https://www.dol.gov/whd/FMLA2007Report/Chapter3.pdf (last visited Apr. 13, 2017) [hereinafter *Serious Health Conditions*].

such minor illnesses were not intended to be covered by the Act."[125]

5. Requirement of Pay with Leave, Restoration Rights, and Protections From Discipline or Discrimination

Though the FMLA does not require paid leave, employees still continue their employer-provided health care insurance coverage at the same cost to the employee as if the employee continued working.[126] An employee is also allowed to substitute accrued paid leave for FMLA leave.[127] However, an employer reserves the right to require an employee to substitute accrued paid leave for unpaid leave.[128]

Further, under the FMLA, an employee has "restoration rights" where an employer is required to secure the same or equal paid position upon the employee's return from leave.[129] In other words, when an employee goes on FMLA leave, a substitute employee cannot permanently replace that employee's job unless the employer offers the returning employee an "equivalent" position.[130] The FMLA also protects employees from discipline or discrimination for taking leave.[131] For instance, the Act protects employees from "no-fault absenteeism policies" or "bonus programs that reward good attendance" so that employers disregard absences for FMLA leave.[132] The FMLA also protects employees from employer retaliation through "unfavorable job assignments" when returning from work.[133]

6. Medical Certification and Recertification of Serious Health Conditions for the Employee's Family Member

When an employee is caring for his own or an immediate family member's "serious health condition," an employer may require that an employee obtain certification from a health care provider.[134] The

125. *Id.*

126. *See* Mayer, *supra* note 106, at 2.

127. *Id.*

128. *Id.*

129. *The Family and Medical Leave Act, Fact Sheet*, *supra* note 94.

130. *Id.* "An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 C.F.R. § 825.215(a) (2013).

131. 29 C.F.R. § 825.220(a)(1)-(3); King, *supra* note 31, at 330.

132. King, *supra* note 31, at 330.

133. *Id.*

134. *See* 29 C.F.R. § 825.306(a).

employee's family member's medical certification from a health care provider should contain the following information: (1) "Name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization";[135] (2) the approximate start date of the serious health condition and the probable duration of the condition;[136] (3) "[a] statement or description of the appropriate medical facts regarding the patient's health condition for which FMLA leave is requested";[137] (4) an estimated time "of the frequency and duration of the leave required in order to care for the family member";[138] and (5) "information sufficient to establish the medical necessity for such intermittent or reduced schedule leave" for a covered family member's serious health condition and "an estimate of the dates and duration of such treatments and any periods of recovery."[139]

The DOL has also developed an optional form for use "in obtaining medical certification, including second and third opinions, from health care providers."[140] Form WH-380F is specifically for when an employee needs to take leave in order to care for a family member with a serious health condition and meets the FMLA's certification requirements.[141] This optional form "reflect[s the] certification requirements so as to permit the health care provider to furnish appropriate medical information.[142] "[N]o information may be required beyond that specified in [sections] 825.306, 825.307, and 825.308."[143] For all situations, "the information on the form must relate only to the serious

135. *Id.* § 825.306(a)(1).

136. *Id.* § 825.306(a)(2).

137. *Id.* § 825.306(a)(3). These medical facts must be adequate to support the employee's need for leave. *Id.* The "medical facts may [also] include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment." *Id.*

138. *Id.* § 825.306(a)(5).

139. *Id.* § 825.306(a)(6).

140. *Id.* § 825.306(b) (explaining a prototype form located on the DOL website at www.dol.gov/whd).

141. *Id.*

142. *Id.*

143. *Id.* Section 825.307(b) specifies that "if an employer [] has reason to doubt the validity of a medical certification," the employer "may require the employee to obtain a second opinion [but] at the employer's expense." *Id.* § 825.307(b)(1). In addition, "[i]f the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable 'out of pocket' travel expenses incurred to obtain [the additional] medical opinions." *Id.* § 825.307(e). "[T]he employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country." *Id.* § 825.307(f). Section 825.308(a) specifies that "[a]n employer may request recertification no more often than every 30 days and only in connection with an absence by the employee." *Id.* § 825.308(a).

health condition for which the current need for leave exists."[144]

If the employer believes a certification is incomplete, the employer must give the employee seven calendar days to complete it.[145] An employer may contact the employee's health care provider or the provider of the family member for clarification of the certification in the event that an employee does not complete the certification.[146] However, an employee's direct supervisor is not permitted to contact the health care provider.[147] Instead, "the employer must use a health care provider, a human resources professional, a leave administrator," or another manager other than the employee's direct supervisor, to contact the employee's health care provider.[148]

If the employee does not rectify the deficiencies, the employer reserves the right to deny the FMLA leave.[149] For instance, an employee's failure to return a certification constitutes a failure to provide certification and the employer may deny the leave.[150] "An employer may request recertification no more often than every [thirty] days and only in connection with an absence by the employee."[151] If the employee's "medical certification indicates that the minimum duration of the [serious health] condition is more than [thirty] days, an employer must wait until that minimum duration expires before requesting a recertification."[152] For example, if the certification states that the employee will be unable to work for sixty days, then the employer must wait those sixty days before requesting a recertification.[153]

III. "CARE FOR" AND TRAVELING UNDER THE FMLA

A. To "Care For," In General, Under the FMLA

Currently, the FMLA has a general definition of what it means to "care for" a family member with a "seriously health condition" which includes providing care when a "family member is unable to care for his

144. *Id.* § 825.306(b).
145. *See id.* §825.305(c) (2013).
146. *Id.* § 825.307(a).
147. *Id.*
148. *Id.*
149. *Id.*
150. *See id.*
151. *Id.* § 825.308(a) ("Recertification for leave taken is because of an employee's own serious health condition or the serious health condition of a family member").
152. 29 C.F.R. § 825.308(b).
153. *See id.*

or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor."[154] Discussed earlier, caring for someone with a "serious health condition" has been criticized for being overly broad.[155] To "care for" someone may also be considered broad in that it includes providing comfort and reassurance "to a child, spouse or parent with a serious health condition who is receiving inpatient or home care."[156] In other words, providing psychological support alone can satisfy this "care for" requirement.[157]

In the Sixth Circuit case, *Stepp v. Castrucci of Alexandria, LLC*, an employee sued his employer after being fired for leaving work early in order to attend a ceremony honoring his five-year-old daughter, who had stage-four metastatic kidney cancer.[158] Though the event had nothing to do with the daughter's ongoing treatment, the girl's father needed to miss work to attend the event in order to transport her to the stadium, carry her out on the field, and to provide her with emotional support.[159] The court found that the employee's claim was not a frivolous one, and found "that an employee can satisfy the 'to care for' requirement by providing psychological care alone."[160]

Another Sixth Circuit case, *Bell v. Prefix, Inc.*, also applied a broad interpretation of the "care for" requirement.[161] In *Bell*, an employee requested leave in order to provide support and comfort to his dying father who was diagnosed with an aortic aneurism and hospitalized.[162] The court found that the employee brought comfort to his father by telling him that "everything would be all right" which was sufficient to satisfy the "care for" requirement.[163]

Through the broad interpretations of what it means to "care for," courts are now split on the interpretations of what it means to "care for" in relation to a sick family member when traveling, particularly when the

154. 29 C.F.R. § 825.124(a).

155. *Serious Health Conditions*, *supra* note 124, at 21.

156. 29 C.F.R. § 825.124(a).

157. Gary D. Knopf, *What Happens in Vegas . . . Could Constitute "Caring For" a Family Member Under the FMLA*, TROUTMAN SANDERS (Mar. 4, 2013), http://www.troutmansanders.com/what-happens-in-vegascould-constitute-caring-for-a-family-member-under-the-fmla-02-27-2013/.

158. Stepp v. Castrucci of Alexandria, LLC, No. 10-146-WOB-CJS, 2011 WL 7046018, at *1 (E.D. Ky. Dec. 19, 2011).

159. *Id.*

160. *Id.* at *5.

161. *See* Bell v. Prefix, Inc., 321 F. App'x 423, 426 (6th Cir. 2009).

162. *Id.* at 425.

163. *Id.* at 427.

purpose of travel is for a non-medical reason.[164]

B. *To "Care For" When Traveling According to the First and Ninth Circuits*

In 2011, the First Circuit was faced with the question of what it meant to care for a seriously ill family member when traveling.[165] In *Tayag v. Lahey Clinic Hospital, Inc.*, Maria Tayag worked for Lahey as a health management clerk.[166] Under the employer's FMLA policy, Lahey consistently approved Tayag's requests for leave over a three-year span, which typically lasted a day or two, in order to care for her husband.[167] Tayag's husband "suffers from serious medical conditions, including gout, chronic liver and heart disease, rheumatoid arthritis, and kidney problems."[168] Tayag assisted her husband by, "transporting him to medical appointments, helping him with household activities, preparing his food, aiding him in moving around the house, providing medication, and providing psychological comfort."[169]

In May 2006, Tayag used her vacation time to travel with her husband to "a major site for Roman Catholic pilgrimage and reputed miraculous healings."[170] In June 2006, Tayag sent a vacation request, to her supervisor, for seven weeks of leave during the months of August and September.[171] Her supervisor informed her that if Tayag were to take this leave, it would cause the department to have inadequate coverage.[172] However, Tayag indicated the leave was for her husband's medical care, and her supervisor provided the paperwork for her to request FMLA leave.[173] On July 8, 2006, Tayag submitted an FMLA leave request in order to assist her husband while he traveled.[174] Tayag did not inform Lahey that they were going to the Philippines for a spiritual pilgrimage, and also failed to provide her employer "with any contact information to reach her during the trip."[175]

164. *See* Ballard v. Chicago Park Dist., 741 F.3d 838, 839 (7th Cir. 2014); Gradilla v. Ruskin Mfg., 320 F.3d 951, 953 (9th Cir. 2003).
165. Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788 (1st Cir. 2011).
166. *Id.* at 789.
167. *Id.* at 790.
168. *Id.* at 789.
169. *Id.*
170. *Id.* at 790.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

In July of 2006, Lahey's benefits administrator requested new FMLA recertification from Mr. Tayag's primary care physician, Stephen Dong.[176] Dr. Dong stated in his note that Mr. Tayag's "liver, kidney, and heart diseases 'significantly affect his functional capacity to do activities of daily living' and advised that Tayag receive medical leave 'to accompany Mr. Tayag on any trips as he needs physical assistance on a regular basis.'"[177] However, the doctor did not explain why the leave needed to be seven weeks.[178] Tayag also provided Lahey's benefits administrator with the fax number of Mr. Tayag's cardiologist, for similar certification.[179] On August 8, 2006, Mr. Tayag's cardiologist submitted a medical certification to Lahey explaining that Mr. Tayag was "'presently . . . not incapacitated' and that Tayag would not need leave" in order to take care of her husband.[180] Lahey's benefits administrator mailed Tayag letters on August 10, 2006, and on August 14, 2006, informing her that her request for FMLA leave was not approved.[181] In addition, representatives from the hospital left Tayag phone messages on August 8, 2006, and on August 17, 2006.[182] However, Tayag was unaware of these letters and phone messages since she was in the Philippines from August 7, 2006, to September 22, 2006.[183] Since Lahey received no response from Tayag, Lahey sent a letter to Tayag on August 18, 2006, terminating her employment.[184]

Tayag filed suit against Lahey claiming that her termination was in violation of the FMLA.[185] Tayag argued that she assisted her husband on the trip by, "administering medications, helping him walk, carrying his luggage, and being present in case his illnesses incapacitated him."[186] She also argued that the seven-week trip was a series of "'healing pilgrimages' with incidental socializing" that was covered by the FMLA.[187] However, in the Philippines, Mr. and Mrs. Tayag also went to "Mass, prayed, and spoke with the priest and other pilgrims at the

176. *Id.*
177. *Id.*
178. *See id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 791.

Pilgrimage of Healing Ministry at St. Bartholomew's Parish."[188] They also visited other churches, visited friends and family, went to Mass, and met with officials of the Catholic Church.[189] Mr. Tayag did not receive conventional medical treatment and did not see any doctors or other health care providers on their trip.[190] The First Circuit Court of Appeals held that a "healing pilgrimage" did not comprise medical care within the meaning of the FMLA.[191] The court determined that the employee's care for her husband was not consistent within the meaning of the FMLA.[192] The court also explained that "psychological comfort" and "psychological reassurance" under FMLA does not extend to accompanying an ill spouse on "lengthy trips unrelated to medical care."[193] The court concluded that the employer did not violate the FMLA by terminating Tayag for taking unapproved leave, and affirmed summary judgment for the employer.[194]

In 2005, the Ninth Circuit Court of Appeals analyzed the type of activities under the FMLA that may constitute "caring for a family member with a serious health condition" in *Tellis v. Alaska Airlines, Inc.*[195] Charles Tellis was an employee at Alaska Airlines in Washington.[196] When his wife was having complications with her pregnancy, Tellis informed his supervisor that he needed to take a couple of weeks off from work.[197] Tellis' supervisor recommended that he obtain the required FMLA forms from the company's Health Benefits office.[198] Tellis had initially requested a holiday and vacation leave seeking three days off.[199] Subsequently, Tellis requested FMLA leave forms from his company, which were later sent to him.[200]

A few days later Tellis' car broke down and since he owned another car in Atlanta, he decided to fly to Atlanta and drive his other car back to Washington.[201] During the trip to get his second car, Tellis' wife went

188. *Id.* at 790.
189. *Id.*
190. *Id.*
191. *Id.* at 791.
192. *Id.*
193. *Id.* at 791 n.2.
194. *Id.* at 793.
195. Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1047 (9th Cir. 2005).
196. *Id.* at 1046.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*

into labor and he was able to make multiple phone calls to his wife.[202] After three days of his requested leave, he was scheduled to work but failed to return.[203] Tellis' employer attempted to contact him but was unable to do so.[204] Tellis was consequently terminated, as a result of his unexcused absences.[205]

Tellis filed suit against his employer and claimed that his leave from work was covered under the FMLA since it was taken in order to "care for" his pregnant wife.[206] Tellis argued that his trip to retrieve his other car provided "psychological reassurance" to his wife so that they would have reliable transportation.[207] In addition, Tellis argued that the phone calls he made to his wife on the trip "back to Seattle provided moral support and psychological comfort."[208]

The Ninth Circuit court, however, did not agree with Tellis, and held that "providing care to a family member under the FMLA requires some *actual* care which did not occur here."[209] He did not participate in her treatment, but instead was absent for days.[210] The court found that the "care for" requirement of the FMLA requires a degree of "close and continuing proximity" to the seriously ill family member.[211] Therefore, in the Ninth Circuit, traveling without a family member in need of is not protected under the FMLA.[212]

An example of where an employee "cares for" a family member who is in "close and continuing proximity" can be seen in *Scamihorn v. General Truck Drivers*, another Ninth Circuit case.[213] The court held that when a son moved to his father's town in order to help his father cope with depression raised a genuine issue of material fact as to whether he did so "to care for" his father.[214] The son's activities included talking with his father daily, performing household chores, and driving his father to see his counselor.[215] The court concluded the son "participated in the treatment through both his daily conversations with

202. *Id.*
203. *See id.*
204. *Id.*
205. *Id.*
206. *See id.*
207. *Id.* at 1046-47.
208. *Id.* at 1047.
209. *Id.* at 1047 (emphasis added).
210. *Id.* at 1048.
211. *Id.* at 1047.
212. *See id.* at 1047-48.
213. Scamihorn v. Gen. Truck Drivers, Local 952, 282 F.3d 1078 (9th Cir. 2002).
214. *See id.* at 1080, 1088.
215. *Id.* at 1084.

his father . . . and his constant presence in his father's life." [216]

In 2003, the Ninth Circuit reviewed an employee's termination in relation to caring for and traveling with his wife who has a serious heart condition in relation to the FMLA.[217] In *Gradilla v. Ruskin Manufacturing*, Gradilla's wife had a serious heart condition and was prescribed heart medication for it.[218] If Mrs. Gradilla experienced a stressful event, her blood pressure would rise leaving her dizzy, faint, and unable to care for herself.[219] During these stressful events, *only* Gradilla could help his wife take the appropriate amount of her medication while offering her support to help her heart rate decrease to a normal level.[220]

Gradilla was employed by Ruskin's Mira Loma plant "which required employees to call in if they were going to miss work."[221] Ruskin had a policy that if a worker failed to call in or to attend work for three days, then the employee was to be terminated.[222] Gradilla was later fired for failing to contact his employer and failing to show up for work for three days.[223]

The reason Gradilla failed to show up for work was because his wife had informed him that her father passed away in an automobile accident and she needed him to accompany her to Mexico for the funeral.[224] Because of the stressful event of the funeral, Mrs. Gradilla anticipated that she would become ill and would need her husband's assistance with her medication.[225] Gradilla's supervisors were aware of his wife's heart condition, though Gradilla had never requested leave under the California Family Rights Act ("CFRA").[226] Before going to Mexico, Gradilla requested to leave work in order to accompany his wife to her father's funeral, where he would be able to take care of her and her needs.[227] Gradilla even clarified that he needed to travel with his wife "because of her heart condition, not because he personally wanted to attend the funeral."[228] Gradilla was then given permission to leave.[229]

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216. *Id.* at 1088.
217. Gradilla v. Ruskin Mfg., 320 F.3d 951 (9th Cir. 2003).
218. *Id.* at 953.
219. *Id.* at 953-54.
220. *See id.* at 954.
221. *Id.* at 953.
222. *Id.*
223. *Id.* at 954-55.
224. *Id.* at 954.
225. *See id.* at 953-54.
226. *Id.*
227. *Id.* at 954.
228. *Id.*

When Gradilla went to the airport to go to Mexico, he even called his employer to let them know "he was about to leave for Mexico and would be back in two or three days."[230] Gradilla's son also called Gradilla's employer to let them know that his father would not be coming into work on Thursday or Friday, but would be returning to work on Monday.[231] In Mexico, Mrs. Gradilla experienced heart problems which her husband cared for by administering her medication and helping her remain calm.[232]

While Gradilla was in Mexico, "Ruskin had scheduled a mandatory overtime workday on [that] Saturday," a schedule that Gradilla did not know about.[233] This caused Gradilla to miss three days of work and was later terminated for violating Ruskin's "three day no-call/no-show policy."[234] Gradilla filed a state court action alleging violation of the CFRA.[235] Though Gradilla "cared for" his wife with a "serious health condition" by administering medication, the court held that Gradilla's claim "failed because the personal travel to Mexico for a funeral [was] not within the scope of the statute."[236]

The court compared Gradilla's case with *Marchisheck v. San Mateo County* by explaining that the persons with a serious medical condition in both cases were traveling and actually "distancing themselves from [their] medical treatment."[237] In *Marchisheck*, an employee took leave from work in order to help move her son to the Philippines.[238] The court in *Marchisheck* held that if the employee's son had a serious medical condition, the employee would still not be entitled to FMLA leave because moving her son was not related to him receiving medical or psychological treatment.[239] In continuing its comparison of the two cases, the *Gradilla* court specified that "the *purpose* and *destination* of the travel was to travel *away from home* for personal, not medical, reasons."[240] The court also cited to examples of "caring for a family member" where the person is "*unable to transport himself or herself to*

229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 954-55.
235. *Id.*at 955. "The CFRA was modeled on the federal Family and Medical Leave Act (FMLA)." *Id.* at 956.
236. *Id.* at 954, 960.
237. *Id.* at 957-58.
238. *Id.* at 957.
239. *See* Marchisheck v. San Mateo Cty., 199 F.3d 1068, 1076, 1078 (9th Cir. 1999).
240. *Gradilla*, 320 F.3d at 957-58 (emphasis in original).

the doctor" or "*transfer to a nursing home.*"[241] Therefore, the court found that "[t]hese examples suggest that 'caring for' a family member with a serious health condition involves some level of participation in "ongoing medical or psychological treatment of that condition, *either inpatient or at home.*"[242]

C. To "Care For" When Traveling According to the 7th Circuit

The holding in *Ballard v. Chicago Park District* is in direct contrast with the First and Ninth Circuit courts. *Ballard* attempts to answer what constitutes "caring for" a family member under the FMLA.[243] More specifically, the inquiry is "whether the FMLA applies when an employee requests leave [in order to] provide physical and psychological care to a terminally ill parent while the parent is traveling away from home."[244]

The plaintiff, Beverly Ballard, was a former employee of the Chicago Park District.[245] Beverly's mother "was diagnosed with end-stage congestive heart failure and began receiving hospice support through Horizon Hospice & Palliative Care."[246] In addition to living with her mother, Beverly was her mother's primary caregiver.[247] Beverly cared for her mother by cooking her meals, managing her mother's medication, draining fluids from her heart, bathing and dressing her, and preparing her for sleep.[248] One year after Beverly's mother was diagnosed, a Horizon Hospice social worker met with Beverly's mother to discuss her "end-of-life goals."[249] Beverly's mother "said that she had always wanted to take a family trip to Las Vegas."[250] The hospice's social worker managed to secure funding from a nonprofit organization that facilitated these types of end-of-life goals for terminally ill patients and scheduled a six-day trip for the next year.[251] Ballard requested leave from her employer in order to accompany her

241. *Id.* at 958 (emphasis in original).
242. *Id.* (emphasis in original).
243. Ballard v. Chicago Park Dist., 741 F.3d 838, 839 (7th Cir. 2014).
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*

mother on this trip to Las Vegas.[252] Chicago Park District denied her request to take time off from work to join her mother on this trip, however, Ballard insists that her employer did not inform her of this denial.[253] Nevertheless, "Ballard and her mother traveled to Las Vegas as planned, where they spent time together and participated in typical tourist activities."[254] During the trip, Ballard still served as her mother's primary caregiver and continued to perform her usual responsibilities attendant to caring for her mother.[255] Additionally, due to an unexpected fire that prevented Ballard and her mother from reaching their hotel room, Ballard took her mother to a hospital where her mother's medicine was kept.[256]

Months after Ballard's trip, Ballard's employer fired her for the unauthorized absences during her trip, which resulted in Ballard filing a lawsuit under the FMLA.[257] "The Park District moved for summary judgment, arguing [] that Ballard did not 'care for' her mother in Las Vegas because she was already providing [her mother] with care at home and because the trip was not related to a continuing course of medical treatment."[258] The district court denied the employer's motion, stating that "[s]o long as the employee provides 'care' to the family member, where the care takes place has no bearing on whether the employee receives FMLA protections."[259]

The court explained that the employer does not dispute that Ballard's mother suffered from a serious health condition as defined within the text of the statute.[260] Instead, Chicago Park District claimed that Ballard was not "caring for" her mother while they were away in Las Vegas.[261] The employer read "care for" in a narrow sense, meaning that Ballard's care would only be considered sufficient under the FMLA if she cared for her mother while traveling in order to help her mother obtain services in relation to an ongoing medical treatment.[262]

The court reasoned that Chicago Park District's argument is flawed

252. *Id.*
253. *Id.* at 840.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*; *see also* Family Medical Leave Act, 29 U.S.C. § 2612(a)(1)(C) (2012).
261. *Ballard*, 741 F.3d at 840.
262. *Id.*

in that the statute does not equate "care for" to "treatment."[263] Though "treatment" appears in other sections of the statute, it is not specifically mentioned in [section] 2612(a)(1)(C).[264] However, Ballard does not rest her argument on the other sections of the statute that mention "treatment."[265] In addition, the court mentioned that Chicago Park District did not distinguish or explain why ongoing treatment is necessary for an employee to provide care when traveling away from home, even though ongoing treatment is not required when providing care at home.[266] The court looked to the statute for such a distinction and said there was "no textual basis" for it.[267] Furthermore, the FMLA text does not mention anything about restricting care to any geographical location.[268] The FMLA does not require or mention that an employee must provide care specifically "at home" for their sick family member, just that the family member needs to have a serious health condition.[269] The court explains their reluctance to interpret any such limitation of the FMLA in light of the fact that Congress did not choose to provide such a limitation on the statute.[270]

Though the court sees no limitation in regards to caring for a family member in another geographical location, and the text of the FMLA does not have a clear definition of "care," the court wanted to see if Ballard actually did "care for" her mother while in Las Vegas.[271] The court looked to other regulations from the Department of Labor, such as 29 CFR section 825.124(a), to help define "care."[272] The court notes that "care for" is broad and includes "both physical and psychological care" without making any mention of a geographic limitation.[273] Though the

263. *See id.*

264. *Id.*; 29 U.S.C. § 2612(a)(1)(C).

265. *Ballard*, 741 F.3d at 840; *see, e.g.*, 29 U.S.C. § 2612(b)(2) ("If an employee requests intermittent leave, or leave on a reduced leave schedule . . . that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified"); 29 U.S.C. § 2612(e)(2) ("In any case in which the necessity for leave . . . is foreseeable based on planned medical treatment, the employee . . . shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer.").

266. *Ballard*, 741 F.3d at 840.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 840 n.1, 841 (The court turned to 29 C.F.R. §825.116 (2008) to clarify how the Department of Labor defines "care for," however, this regulation has since been amended and can now be found, in relevant part, within 29 C.F.R. section 825.124.).

273. *Id.* at 841; *see also* 29 C.F.R. § 825.124(a) (2013).

statute suggests a location when an employee provides "psychological comfort and reassurance to [a family member] . . . who is receiving inpatient or home care," the court explains that this only pertains to psychological care, and even that does not seem to be exclusive.[274]

For physical care, the statute does not use any "location-specific language."[275] While in Las Vegas, Ballard's mother's "medical, hygienic, and nutritional needs did not change," and Ballard continued to help her mother with those needs throughout the trip.[276] The court even noted that Ballard's attendance on the trip "proved quite important indeed," when the unexpected fire at the hotel made going to their room impossible, causing Ballard to have to find alternative sources for her mother's medicine.[277] The court noted that Ballard provided "physical care" when she took her mother to a hospital in order to obtain the proper medications for her mother, satisfying 29 U.S.C. section 2612(a)(1)(C).[278]

Chicago Park District continued to argue that any assistance Ballard offered in Las Vegas was not related to ongoing medical treatment, which it maintained was required for Ballard to be protected by the Act.[279] However, the court cites to 29 C.F.R. section 825.114(a)(2)(iv) (2008), explaining how the statute explicitly says that a person who is terminally ill may have a serious health condition if he is "under the continuing supervision of . . . a health care provider, even if he is 'not . . . receiving active treatment.'"[280] The court notes how Chicago Park District relies on out-of-circuit cases to support the "ongoing-treatment argument."[281] The employer relies on the Ninth Circuit cases *Tellis* and *Marchisheck* which held that "caring for a family member with a serious health condition 'involves some level of participation in ongoing treatment of that condition.'"[282] Chicago Park District also relied on First Circuit case, *Tayag*, which held that an employee caring for her husband does not obtain protected leave under the FMLA if the

274. *See Ballard*, 741 F.3d at 841 (emphasis in original).

275. *See id.* at 841; 29 C.F.R § 825.124(a) (physical care "includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety.").

276. *Ballard*, 741 F.3d at 841.

277. *Id.* at 841-42.

278. *Id.* at 842.

279. *Id.*

280. *Id.*; *see also* 29 C.F.R. §§ 825.113 – 825.115.

281. *Ballard*, 741 F.3d at 842.

282. *Id.*; Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1047 (9th Cir. 2005) (quoting Marchisheck v. San Mateo Cty., 199 F.3d 1068, 1076 (9th Cir. 1999)).

couple travelled for a reason "unrelated to medical treatment."[283] In evaluating whether or not to rely on these cases, the court states:

> We respectfully part ways with the First and Ninth Circuits on this point . . . . The relevant rule says 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 member, even if that care is not part of ongoing treatment of the condition. Furthermore, none of the cases explain why certain services provided to a family member at home should be considered 'care,' but those same services provided away from home should not be. Again, we see no basis for that distinction in either the statute or the regulations.[284]

The court then explains that perhaps the real problem with the employer granting Ballard leave under the FMLA was that this trip seemed to be 'recreational' or a 'non-medically related pleasure trip.'[285] The court also realizes that such a ruling may encourage employees to "help themselves" to personal vacations by abusing the benefits afforded under the FMLA and taking leave under the FMLA, under the ruse of bringing seriously ill family members with them.[286] The court notes that if an employer is worried about the risk of their employees abusing the FMLA's (unpaid) leave, the employer "may of course require that requests be certified by the family member's health care provider."[287]

The court concludes that if Ballard did not live in Chicago and sought leave from her employment to travel to Chicago in order to care for her mother, that leave would be covered under the FMLA, just as if Ballard's mother lived in Las Vegas, Ballard would be able to travel to Las Vegas in order to care for her mother, within the scope of the FMLA.[288] Essentially, the court is not bothered by Chicago Park District's concern that a plain reading of the statute will "open the door

283. *Ballard*, 741 F.3d at 842; Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788, 791 n.2 (1st Cir. 2011).

284. *Ballard*, 741 F.3d at 842-43.

285. *Id.* at 843 (the court describing the Chicago Park District's argument against the alleged FMLA leave taken by Ballard).

286. *Id.*

287. *Id.*; *see also* Family Medical Leave Act, 29 U.S.C. § 2613 (2012) (certification requirements for FMLA leave).

288. *Ballard*, 741 F.3d at 843.

to increased FMLA requests," since, as the court states, the "'[d]esire for what we may consider a more sensible result cannot justify a judicial rewrite' of the FMLA."[289]

IV. THE POTENTIAL IMPACT OF *BALLARD* AND A PROPOSED SOLUTION

Before the *Ballard* ruling, employers were generally allowed "to deny FMLA leave for out-of-town travel where treatment of the family member's serious health condition was not involved."[290] According to Jeff Nowak, the Chicago-based co-chair of Franczek Radelet's labor and employment practice, the *Ballard* ruling "signals a need for employers and HR to approach FMLA leave requests from a new angle."[291] Nowak also stated, "in light of this decision, employers should carefully study the leave request and determine whether the employee actually will care for the family member during the duration of the leave."[292] Another practicing labor and employment law attorney, Mary Leigh Pirtle, explained that the employee in *Ballard* "hit the FMLA jackpot after a federal court denied her employer's motion to deny her FMLA protection while she accompanied her dying mother on a vacation to Las Vegas."[293] Now, "care" will be given a fairly expansive meaning under the FMLA, since the statute fails to impose particular limitations on it.[294] For example, it will include physical and psychological assistance, even if such assistance may not be medical treatment (i.e., hygiene, nutrition, or safety).[295] It can also include care provided in locations other than the family member's residence, such as, for example, at a hotel.[296]

Though the court in *Ballard* correctly identifies that the Act does not require care as "on going treatment," and does not specify a geographic location, it seems that the problem and worry of many employers is when employees start taking FMLA leave by bringing sick

289. *Id.*

290. Mark McGraw, *Leave in Las Vegas*, HUMAN RESOURCE EXECUTIVE ONLINE (Dec. 11, 2012), http://www.hreonline.com/HRE/view/story.jhtml?id=534354637.

291. *Id.*

292. *Id.*

293. Professional Biography of Mary Leigh Pirtle, BASS, BERRY & SIMS, http://www.bassberry.com/professionals/p/pirtle-mary-leigh (last visited Apr. 14, 2017); Mary Leigh Pirtle, *Employee hits FMLA Jackpot*, KING & BALLOW (Jan. 31, 2013), http://www.kingballow.com/employment-blog/42-employment-blog/141-employee-hits-fmla-jackpot.

294. *See Ballard*, 741 F.3d at 841.

295. *Id.*

296. *Id.* at 842-43.

family members with them on trips that seem like vacations.[297] Before this ruling, employers worried that the current definition of "serious health condition" is overly broad, and covers minor illnesses that the Act did not intend to cover.[298] Those same employers may be worried that traveling with a family member with a serious health condition, such as an upset stomach or a less serious condition, will "open the door to increased FMLA requests."[299]

For example, if *Ballard* became the new law, the employee in *Marchisheck* would be permitted to leave from work in order to help move her son, if he had a serious health condition, to the Philippines.[300] If his serious health condition did not make him terminally ill or was not life threatening, the employee would still be able to take leave, so long as it was qualified as a serious health condition or it caused him to be unable to care for himself.[301] In other words, if the employee obtained medical certification from a doctor saying that her son's upset stomach qualified as a "serious health condition," then under *Ballard*, she would be able to take off work to travel, move her son, and explore this new town.[302] So, even though *Ballard* says a medical certification may be required,[303] this still would not prevent employees from abusing the rule because a "serious health condition" is broadly defined.[304]

The *Ballard* ruling should be followed because it is consistent with the FMLA's legislative intent and encourages a work-life balance for employees.[305] If *Ballard* is reversed, and travel with "on-going treatment" persists, we are no longer reading a statute through its plain meaning. Though forbidding unpaid leave to those traveling with a family member without on-going treatment would limit the potential abuse of employees who may travel with their not-so seriously ill family members, this would also limit employees from traveling with their family members who have a serious, even life threatening condition, like those with terminal illnesses traveling through foundations like Make-A-Wish.

A plain reading of the statute will continue to sustain a work-life balance and reduce the possibility of ambiguities. The deference will be

297. *Id.* at 840, 842-43.
298. *See Serious Health Conditions*, *supra* note 124, at 21.
299. *Id.*; *Ballard*, 741 F.3d at 843.
300. *See* Marchisheck v. San Mateo Cty., 199 F.3d 1068, 1071-72 (9th Cir. 1999).
301. *See Ballard*, 741 F.3d at 841.
302. *See id.*
303. *See id.*
304. *See id.*
305. *See* Steenland & Towns, *supra* note 55.

given to doctors to make sure that the medical certifications are legitimate, and that the reason for an employee's travel with a sick family member is to provide physical and psychological care when traveling.[306] Although employers may be concerned that employees will abuse this type of leave, it is important to keep in mind that this leave is still unpaid.[307] In addition, when an employer respects an employee's responsibilities outside of work, it will encourage the employee to respect and be loyal to the company.[308]

Perhaps the court in *Ballard* was influenced by the terminal illness of the employee's family member, since Ballard's mother's dying wish was to visit Las Vegas with her family.[309] Taking off from work in order to take care of a terminally ill loved one is the type of leave that the FMLA wants to protect.[310] An employee is not trying to "take advantage" of the employer by leaving work in order to, for example, miss work to attend a ceremony honoring his five-year-old daughter, who has stage-four metastatic kidney cancer, because he has to transport her to the stadium, carry her out on the field, and care for her during the ceremony.[311] This situation causes a family member to make a decision to put their family before work. It is these types of decisions that laid the foundation for the FMLA's enactment, in order to protect employees and to balance their work and life responsibilities.[312]

In the earlier example involving Grant Lafoon, had his mother taken all of her sick days and vacation days from work in order to take care of her seriously ill son, (if we do not follow *Ballard*) she would not have been able to fulfill her son's dying wish and travel with him to see the Super Bowl.[313] However, under *Ballard*, she would be able to take the leave and it would be covered under the FMLA.[314] Perhaps, *Ballard* may open the door for family members to take leave from work with their not so seriously ill family members, but a doctor's certification is still required and the employee must still provide for the "family

306. *See Ballard*, 741 F.3d at 841.

307. *See id.* at 843.

308. *See* Miguel Salcido, *4 Ways to Keep Employees at Your Company*, https://www.allbusiness.com/four-ways-to-keep-employees-at-your-company-24148-1.html (last visited Apr. 14, 2017).

309. *See Ballard*, 741 F.3d at 839.

310. *See Family and Medical Leave Act (FMLA)*, *supra* note 29.

311. *See* Stepp v. Castrucci of Alexandria, LLC, No. 10-146-WOB-CJS, 2011 WL 7046018, at *1, *5 (E.D. Ky. Dec. 19, 2011).

312. *See Family and Medical Leave Act (FMLA)*, *supra* note 29.

313. *See Raleigh Man Who Survived Brain Tumor Gets Super Bowl Trip to See Panthers*, *supra* note 6.

314. *See Ballard*, 741 F.3d at 843.

member's basic medical, hygienic, or nutritional needs."[315] The employer may be losing a day's worth of work without the employee, but the employer would not have to pay for the trip or for the leave.

V. AN ANALYSIS OF HOW THE *BALLARD* RULING WOULD INFLUENCE OTHER CASE DECISIONS

If *Ballard* became the new law then "so long as the employee attends to a family member's basic medical, hygienic, or nutritional needs, that employee is caring for the family member, even if that care is not part of ongoing treatment of the condition."[316] The services provided to a seriously ill family member at home will be considered "care," just as those same services provided to a seriously ill family member away from home would be.[317]

If it is established that the services provided at the home are similar to the services provided at the Pilgrimage, the plaintiff in *Tayag*, who took off work to go on a trip with her husband, would be considered appropriate leave.[318] The husband's "liver, kidney, and heart diseases [that] 'significantly affect[ed] his functional capacity to do activities of daily living,'" would qualify as having a serious illness under the statute, provided that Tayag submits a medical certification to her employer, which she did.[319] Even though the "lengthy trip" was "unrelated to medical care," under *Ballard*, if Tayag was providing for her husband's "basic medical, hygienic, or nutritional needs," she is caring for her husband in accordance with the statute.[320]

Further, consistent with the *Ballard* ruling, the ruling in *Tellis* will most likely be affirmed. Tellis' pregnant wife was having pregnancy complications when he left her in Washington to drive a car from Atlanta back to Washington.[321] Though the plaintiff claimed he was providing on-going treatment to his wife by providing psychological comfort via telephone, these facts would not be enough to satisfy appropriate leave under *Ballard*.[322] The certain services that he could have provided to his wife at home, do not equate to the same services

315. *Id.* at 841-42.
316. *Id.* at 842.
317. *Id.* at 842-43.
318. *See* Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788, 790-91 (1st Cir. 2011).
319. *Id.* at 790, 792.
320. *Id.* at 791 n.2.; *see also Ballard*, 741 F.3d at 841.
321. Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1046 (9th Cir. 2005).
322. *Compare id.* at 1048, *with Ballard*, 741 F.3d at 839.

that he provided away from home.[323] In other words, the emotional support he could have provided to his wife in labor, if he was home, is not the same as the support he provided when he was hundreds of miles away in a car while she was in labor, without him there.[324] Therefore, Tellis' leave would not be considered appropriate leave under a plain reading of the FMLA.[325]

In *Marchisheck*, the court held that the employer did not violate the FMLA when the employee took leave to move her son to the Philippines.[326] Though the employee's son did not have a serious health condition, the court noted that the employee would still not be entitled to FMLA leave because moving her son was not related to him receiving medical or psychological treatment.[327] However, under *Ballard*, this leave would be considered appropriate, because she was providing "care for" her son, even if it wasn't necessarily "active treatment."[328] From *Ballard*, we learn that the *purpose* and *destination* of the travel is irrelevant to whether leave is proper since the Act does not mention anything about travel.[329] If the employee's son had a serious medical condition and she was providing the same support that she would be providing at home, then leave would be appropriate.[330] Thus, if the employee's son actually did have a serious health condition, the defendant employer would have violated the FMLA under the *Ballard* holding.[331]

Finally, the plaintiff in *Gradilla* provided the "basic medical, hygienic, or nutritional needs" to his wife who had a serious heart condition.[332] If his wife experienced a stressful event, Gradilla, and *only* Gradilla, needed to be there to give her proper medication for her heart and provide her with emotional support.[333] The care that Gradilla provided at home would be the same as the physical and psychological care that he provided to his wife for her father's funeral in Mexico. Under *Ballard*, the court's decision in *Gradilla* should be reversed, indicating that leave was appropriate and that the defendant violated the

323. *See Tellis*, 414 F.3d at 1047-48.
324. *See id.*
325. *See id.* at 1048; 29 C.F.R. § 825.100 (2013).
326. Marchisheck v. San Mateo Cty., 199 F.3d 1068, 1076, 1078 (9th Cir. 1999).
327. *See id.*
328. *See* Ballard v. Chicago Park Dist., 741 F.3d 838, 842 (7th Cir. 2014).
329. *See id.* at 841-43.
330. *See Marchisheck*, 199 F.3d 1068, 1076.
331. *Compare id., with Ballard*, 741 F.3d 842-43.
332. Gradilla v. Ruskin Mfg., 320 F.3d 951, 962-63 (9th Cir. 2003).
333. *See id.* at 953-54.

FMLA.[334]

With the exception of *Tellis*, the rulings would grant leave to plaintiffs who would not ordinarily be granted leave before *Ballard*.[335] These rulings are consistent with the legislative intent that focuses on traditional family values.[336] The National Partnership for Women and Families' key theme of their campaign for workplace fairness was the "importance of [parenthood] and family."[337] The FMLA has been used for the traditional reasons of caring for a newborn, seriously ill child, spouse, or parent.[338] The Act also considers employers needs because there is a direct correlation between stability in the family and productivity in the workplace.[339] Though "some workplace stress is normal, excessive stress can interfere with your productivity and performance—and impact your physical and emotional health."[340] 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."[341]

VI. CONCLUSION

Though the provisions of the FMLA do not specify what kind of care is required when traveling with a seriously ill loved one, there should not be an amendment to the current rule. Amending the rule will only limit an already restricted—unpaid statute on leave. By parting ways with the First and Ninth Circuit court decisions, the *Ballard* ruling will allow mothers, like Melinda Pupp, the opportunity to leave work and travel to help their loved ones feel better emotionally and even physically. The *Ballard* ruling is consistent with the FMLA's legislative intent and this ruling will allow employees to leave work and travel with a seriously ill family member who needs their loving support to not only feel better, but to become better.

* *Lindsay Korn*

334. *See Ballard*, 741 F.3d at 840.

335. *See* Tellis v. Alaska Airlines, Inc., 414 F.3d 1045 (9th Cir. 2005).

336. *See* Steenland & Towns, *supra* note 55.

337. *Id.*

338. Lenhoff, *supra* note 69, at 2.

339. 29 C.F.R. § 825.101(a) (2013).

340. Jeanne Segal, Melinda Smith, Lawrence Robinson, & Robert Segal, *Stress in the Workplace: How to Deal with Job and Workplace Stress*, HELPGUIDE.ORG (Apr. 2017), http://www.helpguide.org/articles/stress/stress-at-work.htm.

341. 29 C.F.R. § 825.101(a).

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