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A SHIELD, NOT A SWORD: INVOLUNTARY LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT

Megan E. Blomquist

Abstract: Under the Family and Medical Leave Act of 1993 (FMLA), covered employers must grant an eligible employee's request for up to twelve weeks of unpaid leave to care for a new baby or an ill family member, or to accommodate the employee's own serious health condition. The statute prohibits employers from interfering with, restraining, or denying an employee's right to FMLA leave. Neither the statute itself nor its regulations directly address the practice of involuntary leave, a term that has been used to describe instances where an employer designates the leave of a qualifying employee as FMLA leave without an employee request or against the employee's wishes and instances where an employer places a non-qualifying employee on FMLA leave. The few federal courts that have examined this issue have failed to make this distinction and have interpreted the statute's silence to permit employers to put employees on involuntary FMLA leave in both instances. This Comment examines the text of the FMLA, its implementing regulations, and its legislative history to ascertain both Congress's intent and the Department of Labor's interpretation regarding involuntary leave. This Comment concludes that employers who put non-qualifying employees on involuntary FMLA leave violate the FMLA's prohibition on employer interference with employees' FMLA rights.

After recovering from complicated brain surgery to repair two aneurysms, Ed Keating¹ returned to his job as a freight handler in the receiving department of a volume discount store. Although Mr. Keating suffered some permanent short-term memory impairment as a result of the surgery, he successfully performed his essential job functions for the next nine years. However, when a new supervisor began assigning him new and more complex tasks, Mr. Keating found he needed minor accommodations such as a daily task list. Despite Mr. Keating's willingness and demonstrated ability to work with only minor accommodations, his employer placed him on twelve weeks of unpaid leave under the Family and Medical Leave Act (FMLA)² while it purportedly determined whether accommodations were necessary and feasible. During this leave, Mr. Keating had no income and did not qualify for unemployment benefits. As a result, he had no choice but to declare bankruptcy when he could not pay his creditors.

1. This illustration is loosely based on a case pending in the District Court for the Western District of Washington.

2. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (1994 & Supp. IV 1998)).

Given the prospect of twelve weeks without income, most employees in this situation would be forced to resign and seek work elsewhere. Even if Mr. Keating had found another job, he still would have been unable to take time off later that year in the event of another illness in his family, because he would no longer have been eligible for FMLA leave. Had Mr. Keating's employer ultimately agreed to accommodate his disability and return him to his position, he eventually may have been able to recoup some of his financial losses and restore his economic security, but he would have been similarly unable to take FMLA leave later that year. In either case, Mr. Keating would have lost something of great value: his annual entitlement to FMLA leave.

The FMLA entitles eligible employees to take twelve weeks of unpaid leave per year for specific reasons,³ including the employee's own serious health condition, and to return to the same or an equivalent position upon completion of leave.⁴ Examined in light of the legislative history, the statutory provisions and accompanying regulations make clear the FMLA's intent to grant employees a right to request leave when they find it necessary. The exercise of this right cannot be waived,⁵ interfered with, restrained, or denied.⁶ Nevertheless, in situations such as Mr. Keating's, employers have used the FMLA as a sword to deal with difficult or undesirable employees by placing them on involuntary FMLA leave. The few courts that have examined the issue of involuntary leave, where an employer places an employee who does not meet the statutory requirements on FMLA leave, have held that such a practice does not violate the employee's FMLA rights.⁷

Part I of this Comment examines the development and implementation of the Family and Medical Leave Act. Part II analyzes court decisions

3. Employees may use their annual FMLA leave entitlement for a variety of reasons, including caring for a newly born or adopted child, 29 U.S.C. § 2601(b)(2) (1994), caring for a family member with a serious health condition, and caring for the employee's own serious health condition, *id.* § 2601(a)(1). Employees most often use FMLA leave because of their own serious health condition. COMMISSION ON FAMILY AND MEDICAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 94 (1996) [hereinafter A WORKABLE BALANCE] Because the issue of involuntary FMLA leave typically arises in situations involving an employee's own serious health condition, the other reasons for FMLA leave are beyond the scope of this Comment.

4. 29 U.S.C. § 2614(a)(1).

5. 29 C.F.R. § 825.220(d) (2000).

6. 29 U.S.C. § 2615(a)(1).

7. *See, e.g.,* Love v. City of Dallas, No. 3:96-CV-0532-R, 1997 WL 278126, at *6 (N.D. Tex. May 14, 1997).

addressing involuntary leave, including cases both in which the employee had an FMLA-qualifying serious health condition and in which the employee was able to perform essential job functions and thus did not have a qualifying serious health condition. Applying principles of statutory interpretation and analyzing the Department of Labor's (DOL) regulations and advisory opinions, Part III critically evaluates the reasoning used in existing decisions on involuntary FMLA leave. It also considers the policy ramifications of permitting employers to put employees on involuntary FMLA leave. This Comment concludes that the statute, its accompanying regulations, and DOL advisory opinions prohibit employers from deducting leave from an employee's annual FMLA leave allotment when the employee does not have an FMLA-qualifying serious health condition. In light of these provisions and the statute's overall purpose of providing greater job security to employees with serious health conditions, employers who place non-qualifying employees who are willing and able to work on FMLA leave interfere with employees' FMLA rights in violation of the statute.

I. THE FAMILY AND MEDICAL LEAVE ACT

President Clinton signed the Family and Medical Leave Act (FMLA) into law on February 5, 1993,⁸ making it the first major piece of legislation of his administration.⁹ The text of the statute does not directly address the issue of involuntary FMLA leave, whereby an employer places a non-qualifying employee on FMLA leave. However, it does describe the process by which employees may avail themselves of their FMLA rights, as well as the penalties for employer interference with these rights. The regulations issued by the DOL also fail to address involuntary FMLA leave explicitly, but do provide relevant guidance regarding designation of leave and intermittent leave. The DOL has issued a number of advisory opinions interpreting these regulations in light of specific employment situations, thereby illustrating their intended application. The legislative history of the FMLA describes the evolution of the statute and offers insight into its purpose, revealing

8. See President's Statement on Signing the Family and Medical Leave Act of 1993, 29 WEEKLY COMP. PRES. DOC. 144 (Feb. 5, 1993).

9. Jill Zuckman, *As Family Leave Is Enacted, Some See End to Logjam*, 51 CONG. Q. WKLY. REP. 267, 267 (1993).

Congress's intent to instill rights in employees and safeguard those rights.

A. *Provisions of the FMLA*

The FMLA seeks to balance the demands of the workplace with the needs of families¹⁰ and to entitle employees to take reasonable leave for medical reasons or to care for a new baby or ill family member.¹¹ The FMLA contains detailed provisions describing employee leave entitlements and permissive employer rights. The statute also prohibits certain acts by employers and provides extensive remedies to employees seeking enforcement of their FMLA rights. Courts have interpreted this provision to prohibit employers from forcing employees to forfeit other employment benefits in exchange for FMLA leave and from interfering with employee scheduling of FMLA leave. Finally, the statute's construction provisions indicate that courts should liberally construe the FMLA in favor of employees.

1. *Mandatory Employee Rights and Permissive Employer Rights Under the FMLA*

In passing the FMLA, Congress determined there was inadequate job security for employees whose serious health conditions temporarily prevented them from working.¹² Accordingly, the FMLA creates mandatory leave rights for employees and grants limited permissive rights to employers to prevent fraud and protect the employer's economic viability.¹³

10. 29 U.S.C. § 2601(b)(1).

11. *Id.* § 2601(b)(2).

12. *Id.* § 2601(a)(4). Congress had earlier extended job opportunities to persons with disabling health conditions under the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 330 (codified at 42 U.S.C. §§ 12101-12213 (1994 & Supp. IV 1998)). The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more . . . major life activities." 42 U.S.C. § 12102(2) (1994 & Supp. IV 1998); *see also* 29 C.F.R. § 1630.2 (2000). Under the ADA, employers may not discriminate against qualified individuals with disabilities, and employers have an affirmative duty to provide reasonable accommodation to such individuals, unless the employer can demonstrate that to do so would cause the employer undue hardship. 42 U.S.C. §§ 12112(a), (b)(5)(A).

13. The FMLA uses the term "shall" with regard to employees' rights. 29 U.S.C. § 2612(a)(1) (stating that "eligible employee shall be entitled" to twelve weeks of leave); *id.* § 2614(a)(1) (stating that "eligible employee . . . shall be entitled" to be restored the same or an equivalent position on return from leave). In contrast, the statute uses the term "may" with regard to employer rights. *Id.*

The FMLA entitles eligible employees who work for covered employers to take up to twelve weeks of unpaid leave annually for specific qualifying reasons. While the FMLA guarantees twelve weeks of unpaid leave, an employee may elect or an employer may require the employee to substitute paid leave for unpaid leave.¹⁴ The reasons for taking FMLA leave include the birth or adoption of a child; caring for a seriously ill child, parent, or spouse; and attending to the employee's own serious health condition.¹⁵ The statute defines "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.¹⁶ The statute also requires that the serious health condition make the employee unable to perform the functions of his or her position.¹⁷ Where the leave is for the employee's own serious health condition, the employee is alternatively permitted to take leave on an intermittent or reduced schedule basis.¹⁸ An employee is eligible for leave when he or she has been employed by a covered employer for at least twelve months and has worked at least 1250 hours for that employer during the previous twelve months.¹⁹ Covered employers include private employers who employ at least fifty employees for each working day during twenty or more calendar weeks of the current or preceding year, as well as federal, state, and local governments.²⁰ Employees returning

§ 2613(a)(1) (stating that "employer may require" certification from employee's health care provider); *id.* § 2614(b)(1) (stating that "employer may deny restoration" of highly compensated employee to prevent substantial and grievous economic injury to employer's operations). Use of the term "may" is usually precatory, whereas use of the term "shall" is mandatory. *See, e.g.,* Mallard v. U.S. Dist. Court, 490 U.S. 296, 301–02 (1989).

14. 29 U.S.C. § 2612(d). Various forms of employer-provided paid leave may be substituted, including vacation, personal, family, and sick leave. 29 C.F.R. § 825.207. The employer may designate the substituted paid leave as FMLA leave and thus count it against the employee's annual FMLA allotment pursuant to the designation procedures in 29 C.F.R. § 825.208.

15. 29 U.S.C. § 2612(a)(1).

16. *Id.* § 2611(11); *see also* 29 C.F.R. § 825.114(a).

17. 29 U.S.C. § 2612(a)(1)(D). This is the requirement that is usually at issue in involuntary-leave cases. Thus, the use of the term "non-qualifying employee" in this Comment refers to an employee who is, in fact, able to perform the essential functions of his or her position.

18. *Id.* § 2612(b)(1).

19. *Id.* § 2611(2)(A).

20. *Id.* § 2611(4)(A). Limiting coverage to employers with fifty or more employees made the statute, at the time of its enactment, applicable to approximately ten percent of private sector employers, who employed nearly sixty percent of the private sector workforce. A WORKABLE BALANCE, *supra* note 3, at 58–60. Some members of Congress have sought to expand coverage to include employers with twenty-five or more employees, which would cover thirteen million more employees, an additional fourteen percent of the workforce. *See, e.g.,* S. 183, 105th Cong. (1997).

from leave are entitled to return to the same position they held before taking leave or an equivalent position.²¹ In addition, during any FMLA leave period, eligible employees are entitled to maintain their benefits under the employer's group health plan.²²

The FMLA grants employers a limited set of permissive rights that allow an employer to verify the employee's need for leave and preserve its economic viability. To prevent fraud or abuse, an employer may require employees seeking FMLA leave for their own serious health condition to provide medical certification from a health care provider,²³ periodic status reports,²⁴ and certification of the employee's ability to return to work following the leave period.²⁵ Employers may also preserve the economic viability of their businesses by denying restoration of certain highly compensated employees following a period of FMLA leave if such denial is necessary to prevent substantial and grievous economic injury to the employer's operations.²⁶ Additionally, the employer may recover premiums paid for group health plan coverage for an employee on FMLA leave if the employee fails to return to work after the leave period has expired.²⁷ However, in contrast to the mandatory rights granted to employees, the language of the statute expressly indicates that the rights granted to employers are permissive.²⁸

21. 29 U.S.C. § 2614(a)(1). An "equivalent position" is one that has equivalent employment benefits, pay, and other terms and conditions of employment. *Id.* § 2614(a)(1)(B).

22. *Id.* § 2614(c)(1). Employers and employees both maintain their existing contributions to the payment of group health care premiums during the employee's leave. *See* 29 C.F.R. § 825.209 (2000).

23. 29 U.S.C. § 2613(a).

24. *Id.* § 2614(a)(5).

25. *Id.* § 2614(a)(4). The employer may only impose this requirement if it is uniformly applied. *Id.*

26. *Id.* § 2614(b). A "highly compensated employee" is a salaried employee who is among the highest-paid ten percent of the employees employed within seventy-five miles of the facility where the employee is employed. *Id.*

27. *Id.* § 2614(c)(2). However, if the employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, or because of circumstances beyond the employee's control, the employer may not recover premiums paid to maintain the employee's group health coverage during the period of FMLA leave. *Id.*

28. *See, e.g., id.* § 2612(b)(2) ("[E]mployer may require such employee to transfer temporarily . . ."); *id.* § 2613(a) ("[E]mployer may require that a request for leave . . . be supported by certification . . ."); *see also supra* note 13.

2. *Prohibited Employer Acts and Liability for Violations of Employees' FMLA Rights*

In addition to describing what employers must do under the FMLA, the statute also describes what they cannot do. The FMLA prohibits interference with, restraint of, and denial of employees' FMLA rights. Courts have held that employers who delay granting an employee's FMLA leave request or force an employee to forfeit other employment benefits in exchange for FMLA leave violate the employee's FMLA rights. The statute provides for both agency and private enforcement of this provision. Employers are strictly liable for violations of employees' FMLA rights, and violations entitle employees to an array of remedies, including both monetary damages and equitable relief.

a. *The FMLA's Prohibition of Interference with, Restraint, or Denial of Employee FMLA Rights*

Section 2615(a)(1) of the FMLA expressly prohibits employers from interfering with, restraining, or denying the exercise of or attempt to exercise any rights granted to employees under the FMLA.²⁹ The statute also contains a retaliation provision, which prohibits employers from discharging or otherwise discriminating against any individual for opposing any practice made unlawful by the FMLA.³⁰ In addition to providing for enforcement by the Secretary of Labor,³¹ the FMLA grants employees a private right of action to enforce their FMLA rights³² and specifically contemplates class action suits for groups of similarly situated employees.³³ Courts have concluded that employers guilty of interfering with, restraining, or denying employees' FMLA rights are strictly liable for any such violations.³⁴ Under this standard, an employee

29. *Id.* § 2615(a)(1). Neither the statute nor the regulations define the terms "interfere," "restrain," and "deny." The legislative history also fails to explain the meaning of these terms. *See* S. REP. NO. 103-3, at 34-35 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 36-37; H.R. REP. NO. 103-8(I), at 46.

30. 29 U.S.C. § 2615(a)(2). While the legislative history says nothing about how to construe § 2615(a)(1), it indicates that Congress modeled § 2615(a)(2), the opposition clause, after the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1994 & Supp. IV 1998), and intended it to be construed in the same manner. S. REP. NO. 103-3, at 34, *reprinted in* 1993 U.S.C.C.A.N. at 36.

31. 29 U.S.C. § 2617(b).

32. *Id.* § 2617(a)(2)(A).

33. *Id.* § 2617(a)(2)(B).

34. *Kaylor v. Fannin Reg'l Hosp.*, 946 F. Supp. 988, 996-97 (N.D. Ga. 1996) (examining language and legislative history of FMLA and concluding that both point toward strict liability).

need not prove anything regarding the employer's intent in violating the statute;³⁵ the employee need only prove by a preponderance of the evidence that the employer deprived him or her of a benefit to which he or she was entitled under the statute.³⁶

In construing § 2615(a)(1), courts have found that certain acts not expressly prohibited by the statute nonetheless constitute violations of employee rights. For example, in *Mardis v. Central National Bank & Trust of Enid*,³⁷ the Tenth Circuit held that forcing an employee to forfeit other employment benefits, such as accrued paid sick leave and vacation time, in order to take FMLA leave to care for her seriously ill husband interfered with the employee's FMLA rights.³⁸ Also, in *Sherry v. Protection, Inc.*,³⁹ the district court found that delaying a decision on an employee's requests for FMLA leave constituted denial of the employee's FMLA rights, even where the employer ultimately granted the leave request.⁴⁰ Similarly, the court in *Williams v. Shenango*⁴¹ held that where the employee requested a particular week off to care for his seriously ill spouse, the employer's denial of the request interfered with the employee's FMLA rights, despite the fact that the employer granted the request for leave during a different week.⁴² These cases all suggest that an employee has the unilateral right to decide when he or she needs FMLA leave and an employer cannot compel the surrender of other employment benefits.

b. Employer Liability for Violations of Employees' FMLA Rights

Employers who violate employees' FMLA rights face serious penalties, including liability for the employee's wages and out-of-pocket expenses, double damages, equitable relief, and attorney's fees. The

standard); see also *Williams v. Shenango*, 986 F. Supp. 309, 317–18 (W.D. Pa. 1997) (adopting *Kaylor's* reasoning and applying strict liability standard for violations of § 2615(a)(1)).

35. See *Kaylor*, 946 F. Supp. at 996–7.

36. *Id.*

37. 173 F.3d 864, text available at 1999 WL 218903 (10th Cir. Apr. 15, 1999) (unpublished table decision).

38. *Id.* at *2; see also *Goodwin-Haulmark v. Menninger Clinic, Inc.*, 76 F. Supp. 2d 1235, 1242 (D. Kan. 1999).

39. 981 F. Supp. 1133 (N.D. Ill. 1997).

40. *Id.* at 1136.

41. 986 F. Supp. 309 (W.D. Pa. 1997).

42. *Id.* at 320–21.

statute explicitly provides for multiple legal remedies: lost wages, salary, employment benefits, or other compensation.⁴³ The employer also may be liable for other economic losses sustained by the employee, such as out-of-pocket medical expenses.⁴⁴ Furthermore, employers must pay interest on money damages for both lost compensation and out-of-pocket expenses.⁴⁵ Congress further emphasized the gravity of employer violations of employee FMLA rights by creating a presumption that employers who violate such rights are liable to the employee for an additional amount of liquidated damages, equal to the sum of the two types of damages described above, plus interest.⁴⁶ To overcome this presumptive liability for double damages, the employer must prove that it acted in good faith and with reasonable grounds for believing it was not in violation of the FMLA.⁴⁷ Employees may also seek equitable relief for violations of their FMLA rights,⁴⁸ which may include employment, reinstatement, or promotion.⁴⁹ Finally, employees who prevail in FMLA enforcement actions receive reasonable attorney's fees, reasonable expert-witness fees, and other costs.⁵⁰ This award of fees and costs to a prevailing plaintiff is mandatory,⁵¹ even where an employee receives only nominal damages.⁵²

3. *The FMLA's Liberal Construction Provisions*

The FMLA's construction provisions demonstrate Congress's intent to provide for and protect employees. The FMLA sets a minimum standard, a floor beneath which employee leave benefits may not drop.⁵³ The

43. 29 U.S.C. § 2617(a)(1)(A)(i)(I) (1994).

44. *Id.* § 2617(a)(1)(A)(i)(II).

45. *Id.* § 2617(a)(1)(A)(ii).

46. *Id.* § 2617(a)(1)(A)(iii).

47. *Id.*

48. *Id.* § 2617(a)(1)(B).

49. *Id.*

50. *Id.* § 2617(a)(3).

51. See S. REP. NO. 103-3, at 36 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 38 (noting that FMLA's fee-shifting provision is modeled after FLSA provision and that award of attorney's fees under FLSA is "mandatory and unconditional").

52. See *McDonnell v. Miller Oil Co.*, 968 F. Supp. 288, 293, 295 (E.D. Va. 1997) (reducing attorneys' fees award by ten percent to \$19,698.81 in case involving employee to whom jury had awarded \$2.00 in damages), *aff'd*, 110 F.3d 60 (4th Cir. 1997), *remanded*, 134 F.3d 638 (4th Cir. 1998) (ordering trial court to consider further reducing award of attorneys' fees).

53. S. REP. NO. 103-3, at 4-5, *reprinted in* 1993 U.S.C.C.A.N. 3, 6-7.

FMLA states that nothing in the Act shall be construed to modify or affect any federal or state law prohibiting discrimination.⁵⁴ The FMLA also specifies that it shall not be construed to supersede any state or local law⁵⁵ or collective bargaining agreement or other benefit program⁵⁶ that provides greater family or medical leave rights to employees. Finally, the FMLA is not meant to discourage employers from adopting or retaining leave policies that are more generous than those contained in the statute.⁵⁷

B. Department of Labor Regulations and Advisory Opinions Relevant to Involuntary FMLA Leave

Congress vested the Secretary of Labor with authority to administer the FMLA.⁵⁸ While the DOL's regulations do not specifically address involuntary leave, numerous regulatory provisions guarantee employee FMLA rights while allowing certain protections for employers. Regulations regarding the designation of leave and the amount of leave to be charged in cases of intermittent leave shed light on the issue of involuntary leave. In addition, the DOL has issued advisory opinions to employers seeking guidance on how to interpret the FMLA in particular circumstances. One such advisory opinion affirmed that employers may designate FMLA leave as such when the employer and employee have satisfied all of the statutory requirements for leave. Two additional opinions held that when an employee is on intermittent FMLA leave, employers may not deduct more leave from the employee's annual FMLA allotment than is necessary to meet the employee's specific qualifying need.

1. FMLA Regulations and Department of Labor Advisory Opinions Regarding Designation of Leave as FMLA Leave

While the DOL's FMLA regulations do not expressly address involuntary leave, the regulations do describe the process by which an employer may charge leave against an employee's annual FMLA leave

54. 29 U.S.C. § 2651(a).

55. *Id.* § 2651(b).

56. *Id.* § 2652(a).

57. *Id.* § 2653.

58. *Id.* § 2654.

allotment. The FMLA regulations extensively address the employer's designation of leave as FMLA leave, which occurs in response to an employee's request for leave or upon receipt of information from the employee or his or her spokesperson indicating a need and desire to take FMLA leave.⁵⁹ According to the regulations, "(i)n all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee."⁶⁰ The regulations explain that the employer must base this designation solely on information received from the employee or the employee's spokesperson.⁶¹ Thus, while the regulations give the employer the responsibility for designating leave as FMLA leave, this responsibility only arises upon receipt of information from the employee or his or her spokesperson indicating a need and desire to take leave.⁶² A sample form entitled "Employer Response to Employee Request for Family and Medical Leave" further evidences this procedure.⁶³

In a 1995 advisory opinion,⁶⁴ the DOL addressed the specific issue of whether an employer may designate leave as FMLA leave if the employee has not requested that it be designated as such. The opinion stated that if the employer meets the definition of a covered employer, the employee meets the definition of an eligible employee, and the reason for the leave meets the definition of a serious health condition, then the employer may designate the leave as FMLA leave and count it against the employee's twelve-week entitlement, even if the employee has not requested that it be counted as such.⁶⁵ This opinion affirmed that

59. 29 C.F.R. § 825.208 (2000). Designation is the process by which the employer determines whether the leave is for an FMLA-qualifying reason and thereby counts the leave against the employee's annual twelve-week leave entitlement. *Id.*

60. *Id.* § 825.208(a).

61. *Id.*

62. *See, e.g., id.* § 825.208(a)(1) (Noting that employee must give notice of need for unpaid FMLA leave to employer); *id.* ("[I]n explaining the reasons for a request to use paid leave . . . an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave."); *see also id.* § 825.208(a)(2) (referring to employee's request or notification to employer of intent to use accrued paid leave); *id.* ("[A]n employee . . . who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason.").

63. *Id.* § 825 app. D, Form WH-381 (2000).

64. 99 Wage & Hour Manual (BNA) 3067, Op. FMLA-68 (July 21, 1995).

65. *Id.* A prior DOL advisory opinion indicated that an employer's decision to make FMLA leave mandatory for employees taking leave for a qualifying reason was permissible under the statute but not required. 99 Wage & Hour Manual (BNA) 3044, Op. FMLA-49 (Oct. 27, 1994). A subsequent opinion confirmed that it is the employer's prerogative to designate leave as FMLA leave, and that an employee may not bar the employer from designating any qualifying absence as FMLA leave. 99

the employer may designate leave as FMLA leave and count it against an employee's annual allotment only where the employer and employee satisfy all of the statutory prerequisites.

2. *Regulations and DOL Advisory Opinions Regarding the Calculation of Intermittent FMLA Leave*

When an employee takes leave on an intermittent or reduced schedule basis,⁶⁶ the regulations specify that only the amount of leave actually taken counts toward the annual twelve-week leave entitlement.⁶⁷ Thus, if an employee needs only two hours off for an FMLA-qualifying medical appointment, an employer may only deduct those two hours from the employee's FMLA leave balance. This is true even where the nature of the employee's job prevents him or her from returning to work for the remainder of the workday.⁶⁸ For example, if a flight attendant has a qualifying two-hour medical appointment in the morning that results in missing the flight on which he or she was to work that day, the employee can nonetheless only be charged with two hours of FMLA leave.⁶⁹ The fundamental principle underlying this regulation is that employers may not require employees to take more FMLA leave than necessary to address the circumstance that precipitated the need for leave.⁷⁰

Wage & Hour Manual (BNA) 3086, Op. FMLA-83 (Aug. 7, 1996). The term "involuntary leave" has been used to describe this type of situation, where the employee qualifies for FMLA leave but has not requested such leave or has expressed a desire to have qualifying leave not count against the annual FMLA leave entitlement. *E.g.*, *Moss v. Formosa Plastics Corp.*, 99 F. Supp. 2d 737, 740 (M.D. La. 2000). However, the regulations and advisory opinions authorize the employer to designate FMLA-qualifying leave as such, regardless of the employee's request or consent. This is therefore a designation issue and is not what is meant by the term "involuntary leave" as it is used in this Comment.

66. The statute allows for this type of leave in cases where it is medically necessary because of the employee's own serious health condition or that of a family member. 29 U.S.C. § 2612(b)(1) (1994 & Supp. IV 1998). Both the employee and employer must agree to such leave. *Id.* Intermittent leave is leave taken in separate blocks of time for a single qualifying reason; a reduced leave schedule reduces the employee's usual number of working hours per day or per week. 29 C.F.R. § 825.203.

67. 29 C.F.R. § 825.205(a).

68. 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994).

69. *Id.*

70. 29 C.F.R. §§ 825.203(d), .204(e).

DOL advisory opinions clarify that it is the employee's need, not the employer's dictates, that determines the terms of FMLA leave.⁷¹ In August 1994, the Wage and Hour Division of the DOL issued an advisory opinion regarding intermittent leave in response to a series of inquiries from an employer.⁷² One of the questions the advisory opinion addressed involved a flight attendant who requested intermittent FMLA leave to care for a seriously ill parent.⁷³ The employee needed three hours off every other Friday for two months.⁷⁴ The three-hour absence caused the employee to miss her flight assignment for that day.⁷⁵ The employer wished to know how much leave to charge against the employee's twelve-week entitlement for these absences.⁷⁶ In response, the DOL stated that the employee should be charged only three hours of FMLA leave per absence.⁷⁷ The opinion cited regulations providing that an employer may only charge an employee taking intermittent leave with the amount of leave actually taken for the FMLA-qualifying reason.⁷⁸

The DOL issued a second advisory opinion on this topic in July 1997.⁷⁹ In that case, the DOL examined intermittent FMLA leave for salaried executive, administrative, and professional employees who are exempt under the Fair Labor Standards Act (FLSA).⁸⁰ The agency again concluded that requiring exempt employees to take a full day of leave in circumstances where the employee does not need a full day to attend to an FMLA-qualifying need violates FMLA regulations.⁸¹ These two opinions affirm that employers cannot require employees to take FMLA leave beyond what is necessary to meet the employee's FMLA-qualifying need.

71. See 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89 (July 3, 1997); 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994).

72. 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (citing 29 C.F.R. § 825.205(a) (1994)).

79. 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89 (July 3, 1997).

80. *Id.*; 29 U.S.C. §§ 201-262 (1994 & Supp. IV 1998).

81. 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89 (July 3, 1997) (citing 29 C.F.R. § 825.203(d) (1997)). In this situation, requiring exempt employees to use more FMLA leave than necessary would also violate FLSA regulations. *Id.* (citing 29 C.F.R. § 541.118(a)(1) (1997)).

C. *The Legislative History of the FMLA*

In response to a “demographic revolution”⁸² in the composition of the American workforce and the increasing difficulty employees faced in trying to balance work and family responsibilities,⁸³ Congress introduced the first family leave legislation in 1985.⁸⁴ Increasing numbers of women in the workforce, greater numbers of single-parent households, and the overall aging of the American population contributed to the tension employees felt between their jobs and personal obligations.⁸⁵ Also, because other developed countries provide extensive family and medical leave benefits to employees,⁸⁶ concerns about maintaining worker productivity and global competitiveness were instrumental in the FMLA’s development.⁸⁷ After many years of revisions and compromises, Congress enacted the FMLA in 1993, guaranteeing employees a minimum amount of annual leave to balance the demands of their personal and professional lives.⁸⁸

The legislative history of the FMLA affirms a consistent purpose: to provide both beneficial rights and greater job security for employees with serious health conditions.⁸⁹ The FMLA’s legislative history contains numerous examples of ways in which Congress sought to protect employee rights. For example, Congress established a “stringent standard”⁹⁰ requiring that employees returning from leave be returned to the same position or an equivalent position, not merely a comparable or similar position.⁹¹ Although the FMLA provides an exception to this restoration provision for certain highly compensated employees,⁹² Congress nonetheless mandated that such employees be provided with

82. S. REP. NO. 103-3, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 7.

83. 29 U.S.C. § 2601(a); *see also* S. REP. NO. 103-3, at 4-7, *reprinted in* 1993 U.S.C.C.A.N. 3, 6-9.

84. Zuckman, *supra* note 9, at 267.

85. S. REP. NO. 103-3, at 4-7, *reprinted in* 1993 U.S.C.C.A.N. 3, 6-9.

86. *Id.* at 19-20, *reprinted in* 1993 U.S.C.C.A.N. 3, 21-22. Congress noted that among the major industrialized countries, the average minimum amount of paid leave for medical reasons was twelve to fourteen weeks. *Id.* Many countries also provide at least one year of unpaid medical leave. *Id.*

87. *See id.* at 11-12, *reprinted in* 1993 U.S.C.C.A.N. 3, 15-17.

88. 29 U.S.C. § 2601(b).

89. *See* S. REP. NO. 103-3, at 11-12, *reprinted in* 1993 U.S.C.C.A.N. 3, 13-14.

90. S. REP. NO. 103-3, at 30, *reprinted in* 1993 U.S.C.C.A.N. 3, 32.

91. *Id.*

92. 29 U.S.C. § 2614(b).

continued group health benefits for the duration of the leave period, even after the employer notifies them that it will deny restoration.⁹³ Furthermore, Congress modeled the FMLA's remedies and enforcement mechanisms after those of the FLSA.⁹⁴ Because of this explicit reference and the similarities between the FLSA and FMLA, courts have looked to the FLSA and its interpretive case law for guidance in interpreting the FMLA.⁹⁵ Courts have overwhelmingly held that the FLSA warrants liberal construction in favor of employees.⁹⁶

Some of the legislators who opposed the FMLA did so on grounds that it was too favorable to employees.⁹⁷ The legislative history contains references to comments by legislators noting that the Act "allows employees almost unrestrained discretion as to when to take leave"⁹⁸ and "grants the employee a unilateral right to schedule and take the leave."⁹⁹ Yet, during the eight years in which Congress crafted the FMLA, it never explicitly considered the issue of involuntary leave, whereby an employer places an employee on FMLA leave without the employee requesting leave. Neither the committee reports submitted in support of the FMLA¹⁰⁰ nor the floor debates¹⁰¹ contain any reference to involuntary leave.

93. S. REP. NO. 103-3, at 30–31, *reprinted in* 1993 U.S.C.C.A.N. 3, 32–33.

94. S. REP. NO. 103-3, at 34–35, *reprinted in* 1993 U.S.C.C.A.N. 3, 36–38.

95. *See, e.g.*, *Frizzell v. S.W. Motor Freight*, 154 F.3d 641, 643–44 (6th Cir. 1998) (holding that while FMLA does not explicitly grant employees right to jury trial, legislative history of FMLA indicates its enforcement provisions mirror FLSA; courts have interpreted FLSA to provide employees with right to jury trial); *Freemon v. Foley*, 911 F. Supp. 326, 330–32 (N.D. Ill. 1995) (holding that identical definitions of "employer" in FMLA and FLSA and similarities between statutes require finding individual liability for supervisors under FMLA as under FLSA).

96. *See, e.g.*, *Tenn. Coal, Iron & R.R. Co. v. Muscoda*, 321 U.S. 590, 597 (1944) (holding that FLSA is remedial and must be given liberal construction in accordance with its obvious intent and purpose); *Wirtz v. Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir. 1967) (holding courts should liberally construe remedial social legislation such as FLSA to fulfill its purpose of protecting workers).

97. *See* H.R. REP. NO. 103-8, pt. 1, at 57, 66–67, 70–72, 75–76 (1993) (delineating House minority's views on legislation); H.R. REP. NO. 103-8, pt. 2, at 21 (1993).

98. H.R. REP. NO. 103-8, pt. 1 at 70.

99. H.R. REP. NO. 103-8, pt. 2 at 21.

100. *See* S. REP. NO. 103-3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3; H.R. REP. NO. 103-8, pts. 1, 2.

101. *See* 139 CONG. REC. 1823–75, 1958–2047, 2158–66 (1993).

II. JUDICIAL OPINIONS ADDRESSING INVOLUNTARY FMLA LEAVE

In the eight years since President Clinton signed the FMLA, courts have decided many cases involving employees' FMLA rights, but few of these decisions have examined the issue of involuntary leave. The few involuntary-leave cases decided to date have involved both employees with and without FMLA-qualifying serious health conditions, a definition that hinges upon whether the employee is able or unable to perform essential job functions. Most courts have failed to make this distinction and have therefore held that employers may place even non-qualifying employees such as Mr. Keating on FMLA leave reasoning that no FMLA provision expressly prohibits such a practice.

A. *Cases in Which Employees Were Unable To Perform Essential Job Functions*

Two cases purporting to deal with involuntary FMLA leave involved employees whose serious health conditions prevented them from performing an essential function of their respective positions and thus qualified them for FMLA leave. Because these were qualifying employees, the real issue in these cases was one of designation.¹⁰²

In *Moss v. Formosa Plastics Corp.*,¹⁰³ an employer placed an epileptic employee on disability leave after the employee suffered epileptic seizures at work.¹⁰⁴ After receiving conflicting reports regarding the effect of the employee's medical condition on his ability to perform essential job functions, the employer decided to terminate the employee because of his medical problems.¹⁰⁵ Instead of firing the employee, however, the employer placed the employee on FMLA leave to allow him to "get his situation under control."¹⁰⁶ The employer ultimately terminated the employee, and the employee sued, claiming the employer violated his FMLA rights by unilaterally forcing him to take twelve weeks of FMLA leave.¹⁰⁷ The court found the employee was unable to

102. See *supra* note 65 and accompanying text.

103. 99 F. Supp. 2d 737 (M.D. La. 2000).

104. *Id.* at 738-39.

105. *Id.* at 738.

106. *Id.*

107. *Id.* at 740.

perform the essential functions of his position as a control-panel operator because he could not respond to emergency situations if rendered unconscious by a seizure.¹⁰⁸ The court held that nothing in the FMLA prohibits employers from requiring employees to take unpaid leave.¹⁰⁹

In *Harvender v. Norton*,¹¹⁰ a pregnant employee's physician advised her not to work with or be exposed to chemicals during her pregnancy.¹¹¹ When budget constraints prevented the employer from placing the employee on light duty, the employer instead placed her on FMLA leave.¹¹² The employee had not requested leave; in fact, she objected to it.¹¹³ She brought suit claiming the employer knowingly and intentionally violated the FMLA by committing a prohibited act under § 2615(a)(1),¹¹⁴ which prohibits employers from interfering with, restraining, or denying employee FMLA rights. The court reasoned that whether an employee requested FMLA leave is irrelevant because the statute does not specify that FMLA leave be granted only when the employee wishes it.¹¹⁵ Instead, the court held if the required conditions for leave are met, namely that the employee is eligible and has an FMLA-qualifying reason for leave, the employer is required to provide the employee with leave and may designate it as FMLA leave.¹¹⁶

108. *Id.* at 742–43.

109. *Id.* at 741 (citing *Harvender v. Norton*, No. 96-CV-653, 1997 WL 793085, at *7 (N.D.N.Y. Dec. 15, 1997)). Under the employment at-will doctrine, employers may place employees on unpaid leave, just as they may terminate them, for any reason or for no reason. *See, e.g.*, *Smoot v. Boise Cascade*, 942 F.2d 1408, 1410 (9th Cir. 1991) (stating that, under Washington law, employer generally may terminate employment contract of indefinite duration at any time, with or without cause). *Id.* However, there is a distinction between simply placing an employee on unpaid leave and placing an employee on unpaid FMLA leave in that the latter deprives the employee of a statutory right to a guaranteed amount of annual leave. Congress demonstrated its intent to grant employees this unique right and protect it by its inclusion of § 2615, prohibiting employer interference with, restraint of, and denial of the exercise of these rights. 29 U.S.C. § 2615(a)(1) (1994).

110. No. 96-CV-653, 1997 WL 793085 (N.D.N.Y. Dec. 15, 1997).

111. *Id.* at *1.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at *7.

116. *Id.* at *7–8. Under the FMLA regulations and DOL advisory opinions regarding designation of leave, such designation would not be mandatory. 99 Wage & Hour Manual (BNA) 3044, Op. FMLA-49 (Oct. 27, 1994). Thus, an employer would be permitted, but not required, to count the leave against the employee's annual twelve-week entitlement.

B. Involuntary-Leave Cases in Which Employees Were Willing and Able To Perform Essential Job Functions

To date, only one circuit court has examined a case involving involuntary FMLA leave where an employer placed a non-qualifying employee on FMLA leave.¹¹⁷ Yet, the Sixth Circuit declined to decide the involuntary-leave issue and rendered an unpublished decision.¹¹⁸ In *Hicks v. Leroy's Jewelers*,¹¹⁹ a pregnant employee requested FMLA leave to begin immediately after the birth of her child.¹²⁰ Prior to the birth, the employee spent one night in a hospital because of a kidney infection.¹²¹ The employer designated the employee as being on FMLA leave as of the date of her hospitalization for the kidney infection, despite the fact the employee indicated she was willing and able to work for the final month remaining prior to her delivery date.¹²² Her twelve-week leave thus expired one month earlier than it would have as originally scheduled. After the expiration of the leave period, as calculated from the earlier date of hospitalization, the employer terminated the employee when she did not return to work.¹²³

The employee claimed that by placing her on involuntary leave at the time of hospitalization the employer interfered with her FMLA rights and thus violated § 2615(a)(1).¹²⁴ The employee maintained that her hospitalization for a kidney infection did not meet the regulatory definition of a serious health condition; thus, because she was not eligible for FMLA leave, she argued that her employer could not place her on FMLA leave.¹²⁵ The trial court found that the employee's initial hospitalization was an FMLA-qualifying absence that made her eligible for FMLA leave.¹²⁶ The trial court further concluded that because the employee was

117. *Hicks v. Leroy's Jewelers, Inc.*, 225 F.3d 659, text available at 2000 WL 1033029 (6th Cir. July 17, 2000) (unpublished table decision), cert. denied, 121 S. Ct. 1084 (Feb. 20, 2001) (No. 00-891).

118. *Id.* at *4.

119. 225 F.3d 659, text available at 2000 WL 1033029 (6th Cir. July 17, 2000) (unpublished table decision), cert. denied, 121 S. Ct. 1084 (Feb. 20, 2001) (No. 00-891).

120. *Id.* at *1.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at *2. The employee also claimed the employer violated the FMLA by failing to restore her to her position. *Id.*

125. *Id.* at *3.

126. *Id.*

eligible for FMLA leave, the employer had authority to place her on involuntary FMLA leave.¹²⁷ On appeal, the Sixth Circuit held that the employee's stated willingness and ability to work created an issue of material fact regarding her eligibility for FMLA leave; therefore the trial court had erred in granting summary judgment to the employer on that ground. However, the court declined to remand on this issue because it was able to resolve the case on unrelated grounds.¹²⁸

A federal district court in Texas was the first to hear a case on the issue of involuntary FMLA leave. In *Love v. City of Dallas*,¹²⁹ the employer placed two employees who suffered from carpal tunnel syndrome on light duty to conform to restrictions necessitated by their medical condition.¹³⁰ These employees were willing and arguably able to perform the essential functions of their positions.¹³¹ The employer subsequently issued a new policy stating that it would not allow employees to remain on limited duty indefinitely.¹³² When the employer determined that the two employees were unable to return to regular duty, it placed them on involuntary FMLA leave for a total of twenty-four weeks over two years.¹³³

The employees argued that the employer violated their FMLA rights by placing them on involuntary FMLA leave because, without a qualifying serious health condition, they were not entitled to FMLA leave.¹³⁴ The employer argued that the employees failed to state a claim under the FMLA because nothing in the statute prohibits the practice of placing employees on involuntary FMLA leave.¹³⁵ The court dismissed the employees' assertion that nothing in the FMLA or its regulations

127. *Id.*

128. *Id.* at *4. The court held that the employee's failure to return to work after the expiration of her twelve-week leave period, when calculated either from the original date her leave was to begin or from the date of her hospitalization, precluded any recovery under the FMLA. *Id.*

129. No. 3:96-CV-0532-R, 1997 WL 278126 (N.D. Tex. May 14, 1997).

130. *Id.* at *1.

131. The employees' ability to perform raises issues of reasonable accommodation under the ADA. *See supra* note 12. However, these issues are beyond the scope of this Comment.

132. *Love*, 1997 WL 278126, at *1.

133. *Id.* at *2.

134. *Id.* at *6. The court had "difficulty" with the employees arguing in the same motion that they were disabled under the ADA but did not have a serious health condition under the FMLA. *Id.* The ADA's definition of disability is markedly different from the FMLA's definition of serious health condition; thus there is no inconsistency in such an argument. *See supra* note 12.

135. *Love*, 1997 WL 278126, at *5-6.

allows employers to put employees on involuntary FMLA leave.¹³⁶ As in *Moss*, the court instead found it more relevant that “nothing in the statute prohibits an employer from doing so.”¹³⁷

*Burton v. Neumann*¹³⁸ also involved an employer placing an employee on involuntary FMLA leave when the employee was willing and able to perform job functions. The employee in *Burton* suffered from iritis.¹³⁹ Iritis is a permanent condition affecting the eyes and characterized by recurring periods of inflammation interspersed with periods of months or years without symptoms.¹⁴⁰ The employee’s doctor determined that work-related stress contributed to the onset of symptomatic episodes, and the employee sought to discuss with her employer reasonable accommodations that might reduce her stress level at work.¹⁴¹ In response, her employer “summarily” placed her on involuntary FMLA leave.¹⁴² The employee claimed involuntary leave was unlawful under the FMLA.¹⁴³ She also claimed the employer violated the FMLA by failing to restore her to her position following placement on involuntary FMLA leave.¹⁴⁴ First, citing *Love*, the court held that the FMLA does not prohibit involuntary leave, and thus, the employee had no basis for an involuntary-leave claim.¹⁴⁵ Second, although the employee’s physician provided a letter stating there was no medical reason why she could not continue working, with or without reasonable accommodation, the employee failed to submit this required letter in a timely fashion.¹⁴⁶ Accordingly, she lost her FMLA claim for failure to restore her to her position.¹⁴⁷

136. *Id.* at *6.

137. *Id.* (emphasis in original). While the court found that the practice of involuntary FMLA leave does not violate the provisions of the FMLA, it stated that such a practice could be an adverse employment action for which a plaintiff may have a cause of action under another statute such as the ADA. *Id.*; see also *supra* note 12.

138. 5 Wage & Hour Cas. 2d (BNA) 1138 (S.D. Fla. Apr. 8, 1999).

139. *Id.* at 1139.

140. *Id.*

141. *Id.* at 1140.

142. *Id.*

143. *Id.* at 1139.

144. *Id.*

145. *Burton*, 5 Wage & Hour Cas. 2d (BNA) at 1140–42 (citing *Love v. City of Dallas*, No. 3:96-CV-0532-R, 1997 WL 278126 (N.D. Tex. May 14, 1997)).

146. *Id.* at 1141–42.

147. *Id.* at 1142.

III. EMPLOYERS WHO PLACE EMPLOYEES WHO CAN PERFORM THEIR ESSENTIAL JOB FUNCTIONS ON INVOLUNTARY FMLA LEAVE INTERFERE WITH EMPLOYEE FMLA RIGHTS

Courts deciding involuntary FMLA leave cases have wrongly held that the FMLA permits employers to place employees who are able to perform essential job functions on involuntary FMLA leave. The central issue courts must examine in involuntary-leave cases is whether the employee actually meets the statutory prerequisites for leave, particularly the requirement that the employee be unable to perform an essential job function of his or her position.¹⁴⁸ Instead, most courts have focused on the fact that the text of the statute and its regulations are silent on the issue of involuntary leave. They have interpreted this silence to allow employers to force non-qualifying employees to take involuntary FMLA leave.

However, courts must resolve the ambiguity created by legislative silence by examining the language of the statute, the statutory scheme as a whole, the administrative regulations and interpretive guidance, and its legislative history. Such an analysis reveals not only Congress's intent to provide employees greater job security by guaranteeing them the right to a minimum amount of family and medical leave, but also that allowing employers to place employees who are willing and able to perform their essential job functions on involuntary FMLA leave unlawfully interferes with the employees' FMLA rights. If the requirements for FMLA leave are met, the issue becomes one of designation, and the employer may choose to designate FMLA-qualifying leave as such and count it against an employee's annual entitlement. However, if the prerequisites for leave are not met, an employer may neither grant nor impose FMLA leave.¹⁴⁹

148. The *Hicks* court alluded to this distinction and noted that it is an issue of material fact in determining whether involuntary FMLA leave is permissible. See *Hicks v. Leroy's Jewelers, Inc.*, 225 F.3d 659, No. 98-6596, 2000 WL 1033029, at *3 (6th Cir. July 17, 2000), cert. denied, 121 S. Ct. 1084 (Feb. 20, 2001) (No. 00-891).

149. In borderline cases where it is unclear whether the statutory requirements for leave have been met, there may be a reasonable accommodation issue for employees who qualify under the ADA. See *supra* note 12. Employees who do not meet the ADA's stringent definition of disability may be left unprotected by either the ADA or the FMLA. In light of the statute's stated purpose of giving employees with serious health conditions greater job security, courts must not permit employers to use the FMLA as a weapon against employees in these types of borderline cases to precipitate termination of their employment.

A. *Employers May Not Place Non-Qualifying Employees on Involuntary FMLA Leave*

The FMLA prohibits employers from placing employees who are capable of performing their essential job functions on involuntary FMLA leave. Case law interpreting § 2615(a)(1) suggests that placing non-qualifying employees on involuntary FMLA leave interferes with employees' FMLA rights. The statutory scheme as a whole reveals Congress's strong intent to protect employee rights; because involuntary FMLA leave interferes with employee FMLA rights, it compromises the structural integrity of the Act. Finally, allowing involuntary leave contradicts the command of the statute's construction provisions that the Act be broadly construed in favor of protecting employee leave rights.

1. *Involuntary Leave Violates § 2615(a)(1) As Construed by Case Law*

An employer who places an employee on involuntary FMLA leave interferes with the employee's FMLA rights and thus violates § 2615(a)(1). In *Mardis v. Central National Bank & Trust of Enid*, the Tenth Circuit construed interference with FMLA rights to prohibit employers from requiring employees to forfeit employment benefits in exchange for being granted FMLA leave.¹⁵⁰ In *Williams v. Shenango*¹⁵¹ and *Sherry v. Protection, Inc.*,¹⁵² the district courts also concluded that this provision of the statute prohibits employers from interfering with an employee's scheduling of FMLA leave.¹⁵³ These courts held that delaying or postponing the employee's FMLA leave request constituted interference, even where the employee was ultimately granted FMLA leave.¹⁵⁴

Placing an employee on involuntary FMLA leave in essence requires the employee to forfeit his or her right to use that FMLA leave at a later date. For example, when Mr. Keating's employer placed him on twelve

150. *Mardis v. Cent. Nat'l Bank & Trust of Enid*, 173 F.3d 864, text available at 1999 WL 218903 (10th Cir. Apr. 15, 1999) (unpublished table decision); see also *supra* notes 37–38 and accompanying text.

151. 986 F. Supp. 309 (W.D. Pa. 1997).

152. 981 F. Supp. 1133 (N.D. Ill. 1997).

153. *Williams*, 986 F. Supp. at 320–21; *Sherry*, 981 F. Supp. at 1136; see also *supra* notes 39–42 and accompanying text.

154. *Williams*, 986 F. Supp. at 320–21; *Sherry*, 981 F. Supp. at 1136; see also *supra* notes 39–42 and accompanying text.

weeks of involuntary FMLA leave, it precluded him from using that FMLA leave later in the year, were he or his wife to suffer from a serious medical condition.¹⁵⁵ Alternatively, the practice of involuntary FMLA leave interferes with the employee's ability to schedule his or her FMLA leave, which the statute also prohibits.¹⁵⁶ For example, in *Hicks*, the employee was unable to schedule FMLA leave following the birth of her child because her employer had placed her on FMLA leave when she arguably did not have a qualifying serious health condition.

The *Love* and *Burton* courts failed to recognize this statutory violation. In both cases, the employees were arguably willing and able to perform the essential functions of their respective positions and thus did not qualify for FMLA leave.¹⁵⁷ Because these courts failed to appreciate that these were non-qualifying employees, they also failed to recognize that by putting non-qualifying employees on FMLA leave, the employers in *Love* and *Burton* were interfering with the employees' right to schedule and use their FMLA leave. Judicial interpretation of § 2615(a)(1) makes clear that the statute prohibits this type of interference; thus these employers violated their employees' FMLA rights.

2. *Involuntary Leave Compromises the Structural Integrity of the FMLA*

Examination of the FMLA's entire statutory and regulatory scheme reveals that allowing employers to place employees who are able to perform their essential job functions on involuntary leave violates § 2615(a)(1). This scheme is based on the employee's initiation of the leave process, either by requesting leave in advance where the need is foreseeable, or by providing the employer with adequate notice of the need for leave where it is unforeseeable.¹⁵⁸ The designation procedures, the recordkeeping procedures, and even the sample forms are all based on having the employer respond to the employee's initial leave request or notification.¹⁵⁹ No other manner of initiating the leave process appears in

155. See *supra* note 1 and accompanying text.

156. See *supra* notes 39–42 and accompanying text.

157. See *Burton v. Neumann*, 5 Wage & Hour Cas. 2d (BNA) 1138, 1140–41 (S.D. Fla. Apr. 8, 1999); *Love v. City of Dallas*, No. 3:96-CV-0532-R, 1997 WL 278126, at *1–2 (N.D. Tex. May 14, 1997).

158. See 29 U.S.C. § 2612(e) (1994); 29 C.F.R. §§ 825.302–.303 (2000).

159. See 29 C.F.R. §§ 825.208, .500, app. D.

either the statute or the regulations.¹⁶⁰ Allowing employers to place employees who are able to perform essential job functions on involuntary leave is an entirely different process that is outside the procedures described in the statute. Congress wanted employees, not employers, to initiate the leave process; thus, only employees may avail themselves of their FMLA rights when they deem it necessary.

In addition, the statutory scheme provides further evidence of Congress's intent to instill leave rights in employees and protect those rights. For example, the FMLA's strong enforcement provisions and generous remedies, including a presumption of double damages, shows Congress's intent that employers not interfere with employees' FMLA rights.¹⁶¹ Likewise, by modeling these enforcement provisions after the FLSA,¹⁶² a statute which protects employees' most basic rights regarding wages and hours, Congress unmistakably signaled that it meant to guarantee employees FMLA rights of equal strength and provide strong incentives for employers to honor such rights. Finally, by making employee rights mandatory and employer rights merely permissive,¹⁶³ Congress demonstrated that employee FMLA rights are stronger than employer FMLA rights and should thus control.

Courts that have examined involuntary FMLA leave have failed to review closely the entire statutory scheme. The *Love* and *Burton* courts looked only to whether the statute contained a provision regarding involuntary FMLA leave.¹⁶⁴ Finding none, they concluded that involuntary leave was permissible.¹⁶⁵ These courts failed to recognize that the statute's silence on this issue creates an ambiguity, and thus failed to look at the statutory scheme as a whole to resolve this ambiguity. Had they done so, they would have found that the statutory scheme favors the creation and protection of employee rights that are stronger than those of employers. Allowing employers to place employees who are willing and

160. The canon *expressio unius est exclusio alterius* ("the expression of one excludes another") dictates that where a law delineates a specific process for doing something it excludes or prohibits the use of other processes. See *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1872).

161. See *supra* notes 31–36, 43–52, and accompanying text.

162. 29 U.S.C. §§ 201–262 (1994 & Supp. IV 1998); see *supra* notes 94–96 and accompanying text.

163. See *supra* note 13 and accompanying text.

164. *Love v. City of Dallas*, No. 3:96-CV-0532-R, 1997 WL 278126, at *6 (N.D. Tex. May 14, 1997); *Burton v. Neumann*, 5 Wage & Hour Cas. 2d (BNA) 1138, 1140 (S.D. Fla. Apr. 8, 1999).

165. *Love*, 1997 WL 278126, at *6; *Burton*, 5 Wage & Hour Cas. 2d (BNA) at 1140.

able to work on involuntary FMLA leave thus clearly violates the integrity of the statute as a whole.

3. *Permitting Involuntary FMLA Leave Contradicts the Command of the Statute's Construction Provisions that the FMLA Be Construed Broadly in Favor of Employees*

Finally, the construction provisions of the FMLA and its remedial nature mandate liberal construction of the statute. While the statute does not explicitly call for liberal construction, §§ 2651–2653 indicate that courts should construe the FMLA both to maximize employee leave rights and to encourage employers to offer leave policies more generous than those contained in the statute.¹⁶⁶ In addition, the legislative history of the FMLA reveals that the enforcement and remedy provisions of the statute were modeled after those of the FLSA.¹⁶⁷ Courts interpreting the FLSA have repeatedly held that because the FLSA is a remedial statute, courts must interpret it liberally to benefit the workers it seeks to protect.¹⁶⁸ Similarly, because the FMLA is a remedial statute designed to solve workplace problems involving job security and personal obligations, courts should liberally interpret it consistent with this stated purpose and prohibit employers from placing employees who are able to perform their job functions on involuntary leave.

B. *FMLA Regulations Prohibit Employers from Placing Employees Who Can Perform the Essential Functions of Their Positions on Involuntary FMLA Leave*

Courts examining the issue of involuntary leave have ignored the DOL's regulations and advisory opinions on designation of leave and intermittent FMLA leave. One set of regulations and advisory opinions addresses designation of leave and indicates that an employer may designate leave as FMLA leave and count it against an employee's annual allotment when the employee and employer meet all of the statutory requirements.¹⁶⁹ Another set of regulations and advisory opinions addresses intermittent leave and indicates that an employer may

166. See 29 U.S.C. §§ 2651–2653.

167. S. REP. NO. 103-3, at 34–36 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 36–38.

168. See *supra* note 96 and accompanying text.

169. See *supra* Part I.B.1.

only charge an employee with the amount of FMLA leave necessary to meet the employee's qualifying need.¹⁷⁰ Both sets of regulations and advisory opinions illustrate the broader principle that it is the employee's need, and whether that need qualifies under the statute, that dictates whether leave may be taken, and if so, how much. Employers who place employees who are able to perform their essential job functions on involuntary FMLA leave violate this principle.

1. *Employers May Only Designate Leave as FMLA Leave Where Such Leave Meets All Statutory Requirements*

The regulations and advisory opinions regarding designation of leave affirm that the employer may not designate leave as FMLA leave and deduct it from an employee's annual entitlement unless the employee meets all of the statutory prerequisites. The FMLA regulations give employers the responsibility of designating leave as FMLA leave.¹⁷¹ In 1995, the DOL issued an advisory opinion stating that where the employer is a covered employer, the employee is eligible for leave, and the reason for leave meets the definition of a serious health condition, the employer may designate leave as FMLA leave and count it against the employee's allotment, regardless of whether the employee has requested it.¹⁷² Thus, where the employee satisfies the requirements for leave, including the statutory definition of a serious health condition, which requires that the employee be unable to perform an essential function of his or her position,¹⁷³ employers may designate leave as FMLA leave and deduct it from the employee's annual allotment.¹⁷⁴ It follows that where the employee does not meet the statutory requirements for leave, such as not having a serious health condition that prevents him or her from performing essential job functions, the employer may not designate leave as FMLA leave.

Case law illustrates this important distinction. For example, in both *Moss v. Formosa Plastics Corp.*¹⁷⁵ and *Harvender v. Norton*,¹⁷⁶ the

170. See *supra* Part I.B.2.

171. 29 C.F.R. § 825.208 (2000).

172. 99 Wage & Hour Manual (BNA) 3067, Op. FMLA-68 (July 21, 1995); see also *supra* notes 64–65 and accompanying text.

173. 29 U.S.C. § 2612(a)(1)(D) (1994).

174. 99 Wage & Hour Manual (BNA) 3067, Op. FMLA-68 (July 21, 1995); 29 C.F.R. § 825.208.

175. 99 F. Supp. 2d 737, 742 (M.D. La. 2000).

176. *Harvender v. Norton*, No. 96-CV-653, 1997 WL 793085, at *7 (N.D.N.Y. Dec. 15, 1997).

employees were in fact unable to perform their respective job functions.¹⁷⁷ In *Moss*, the employee's epileptic seizures rendered him unconscious and thus unable to respond to emergency situations at the chemical plant where he was a control-panel operator.¹⁷⁸ In *Harvender*, the employee's pregnancy precluded her from handling chemicals, which was an essential function of her position as a lab technician.¹⁷⁹ Thus, their employers acted in accordance with the FMLA regulations and the advisory opinion in placing them on FMLA leave. The *Hicks* court recognized the importance of whether the employee has a qualifying need and correctly held that summary judgment was inappropriate where there remained an issue of fact as to whether the employee had an FMLA-qualifying need for leave.¹⁸⁰

In contrast, in *Love* the employees did not have a serious health condition as defined by the statute. Although the employees suffered from carpal tunnel syndrome, they were arguably willing and able to perform their essential job functions.¹⁸¹ Likewise, in *Burton* the employee was willing and able to perform her essential job functions with reasonable accommodation.¹⁸² By placing these non-qualifying employees on involuntary FMLA leave, these employers deprived the employees of the right to schedule and use their FMLA leave should a genuine qualifying need arise and thereby unlawfully interfered with the employees' FMLA rights in violation of § 2615(a)(1).

Furthermore, this distinction between those with a qualifying need and those without a qualifying need is very important for individuals with permanent disabilities.¹⁸³ Individuals with permanent disabilities include

177. *Moss*, 99 F. Supp. 2d at 742; *Harvender*, 1997 WL 793085, at *7.

178. *Moss*, 99 F. Supp. 2d at 742-43.

179. *Harvender*, 1997 WL 793085, at *7.

180. *Hicks v. Leroy's Jewelers, Inc.*, 225 F.3d 659, text available at 2000 WL 1033029, at *3 (6th Cir. July 17, 2000) (unpublished table decision), cert. denied, 121 S. Ct. 1084 (Feb. 20, 2001) (No. 00-891).

181. See *Love v. City of Dallas*, No. 3:96-CV-0532-R, 1997 WL 278126, at *1-2 (N.D. Tex. May 14, 1997).

182. *Burton v. Neumann*, 5 Wage & Hour Cas. 2d (BNA) 1138, 1140-41 (S.D. Fla. Apr. 8, 1999).

183. If the employee's permanent condition meets the ADA's definition of a disability, reasonable accommodation must be granted where it does not place an undue burden on the employer. See *supra* note 12. This accommodation could remedy the employee's inability to perform an essential job function. In the *Love* decision, while the court denied the employees' claim that their employer interfered with their FMLA rights when it forced them to take involuntary FMLA leave, the court suggested that putting them on involuntary leave may have given rise to a claim under another

Mr. Keating, whose brain injury resulted in memory impairment, and potentially the *Love* employees with carpal tunnel syndrome.¹⁸⁴ Many such employees have a permanent disability that limits their abilities but do not suffer from any recurring periods of illness. Without such flare-ups that meet the FMLA's definition of a serious health condition, the FMLA simply does not apply. In these situations, if a non-qualifying employee were to request FMLA leave, the employer would be legally required to deny such a request. It follows that it is equally impermissible for an employer to place a non-qualifying employee on FMLA leave. If the employer needs time to assess whether and how to accommodate an employee who is disabled, as was the case with Mr. Keating's employer, putting the non-qualifying employee on involuntary FMLA leave as an interim measure violates the FMLA. By allowing employers to do exactly that, an employee who could not request such leave faces the prospect of twelve weeks without pay and loses the right to use his or her FMLA leave later in the year should a genuine serious health condition or other qualifying need arise.

2. *Employers May Only Deduct Leave from an Employee's Annual FMLA Allotment Where There Is a Qualifying Need*

Regulations regarding intermittent leave forcefully demonstrate the principle that the employee must have a qualifying need for FMLA leave. These regulations dictate that an employer may only charge an employee taking intermittent leave with the amount of leave necessary to meet his or her FMLA-qualifying need.¹⁸⁵ The DOL has issued two advisory opinions clarifying this regulation.¹⁸⁶ These opinions affirm that where an employee is taking FMLA leave on a reduced time or intermittent basis, the employer may not force the employee to take more

statute such as the ADA. *Love*, 1997 WL 278126, at *6. While it is true that failure to accommodate ADA-covered employees would give rise to such a claim, it does not follow that involuntary leave is solely an ADA issue.

184. The *Love* court held that the employees had presented evidence sufficient to create an issue of fact regarding whether their carpal tunnel syndrome met the ADA's definition of disability. 1997 WL 278126, at *6.

185. 29 C.F.R. § 825.205(a) (2000).

186. See 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89 (July 3, 1997); 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42 (Aug. 23, 1994). For further discussion of these opinions, see *supra* Part I.B.2.

leave than is necessary.¹⁸⁷ For example, an employee who needs to take a few hours of leave for a qualifying medical appointment in the morning cannot be charged with an entire day's worth of leave, even if the employee works on a plane, train, or boat and is unable to return to the worksite after the appointment.¹⁸⁸ Therefore, if an employer cannot require an employee to take more FMLA leave than actually necessary for a qualifying need, it follows that the employer cannot require an employee to take FMLA leave where the employee has no qualifying need. To hold otherwise would allow absurd results: an employee whose two-hour doctor's appointment for a qualifying serious health condition caused him to miss a full day's work assignment would be charged with two hours of FMLA leave, while an employee with no qualifying serious health condition could nonetheless be charged with up to twelve weeks of FMLA leave.

C. *Employers Who Place Non-Qualifying Employees on Involuntary FMLA Leave Violate § 2615(a)(1)*

Finally, the legislative history of the FMLA suggests that employers may not place employees who are able to perform their essential job functions on involuntary FMLA leave. The *Love* and *Burton* courts failed to review thoroughly the history of the FMLA to ascertain true legislative intent. Indeed, the *Burton* court made no reference to the statute's legislative history or its purpose,¹⁸⁹ and the *Love* court only briefly mentioned the demographic reasons that led to the statute's enactment.¹⁹⁰ Neither of these courts recognized that permitting employers to place employees who are able to perform their essential job functions on involuntary FMLA leave undermines the FMLA's stated purpose of providing greater employee job security.

Congress enacted the FMLA as a remedial statute in response to demographic trends that made it difficult for workers to balance the competing demands of their personal and professional lives.¹⁹¹

187. See 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89; 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42; see also *supra* Part I.B.2.

188. See 99 Wage & Hour Manual (BNA) 3097, Op. FMLA-89; 99 Wage & Hour Manual (BNA) 3034, Op. FMLA-42.

189. *Burton v. Neumann*, 5 Wage & Hour Cas. 2d (BNA) 1138 (S.D. Fla. Apr. 8, 1999).

190. *Love v. City of Dallas*, No. 3:96-CV-0532-R, 1997 WL 278126, at *6 (N.D. Tex. May 14, 1997).

191. 29 U.S.C. § 2601 (1994); see also *supra* notes 82–87.

Congress's primary purpose in enacting the FMLA was to provide employees greater job security by granting them this right to leave.¹⁹² As shown in the *Love* and *Burton* cases and in Mr. Keating's case, permitting involuntary FMLA leave in fact results in less job security, especially for employees with disabilities that may place them at risk of falling victim to their employer's use of the FMLA as a sword to precipitate their resignation. Even if an employer does not terminate an employee after a period of involuntary FMLA leave, that employee's future job security will be at risk because he or she will be unable to take FMLA leave later that year should a true qualifying need arise. Had the *Love* and *Burton* courts delved into the legislative history when examining the issue of involuntary leave and given greater consideration to the social context in which Congress passed the FMLA, they would not have allowed employers to place employees who are able to perform their job functions on involuntary FMLA leave.

Furthermore, the *Love* and *Burton* courts failed to consider the undesirable social consequences of permitting employers to place employees on FMLA leave involuntarily. Allowing employers to place employees on involuntary FMLA leave results in undue hardship on employees who are forced to go without pay for the duration of any such leave.¹⁹³ Because employees in this situation cannot collect unemployment benefits,¹⁹⁴ they have no source of income and may be forced to quit their jobs to find new positions. Thus, permitting involuntary leave reduces an employee's job security, which directly contradicts the statute's express purpose of giving employees greater job security.¹⁹⁵

Similarly, under the rationale of the *Love* and *Burton* courts, employers may use involuntary FMLA leave as a pretext for terminating "undesirable" employees who have permanent disabilities¹⁹⁶ or who have a family member with such problems. The facts in *Burton* suggested this type of covert disability discrimination, where the employer summarily placed the employee on leave as soon as she expressed a desire to discuss

192. See 29 U.S.C. §§ 2612, 2614.

193. While the employee may choose or the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave, leave guaranteed by the FMLA is unpaid leave. *Id.* §§ 2612(c)-(d); see also 29 C.F.R. § 825.207 (2000).

194. Because an employer who places an employee on involuntary FMLA leave has not terminated the employee, the employee is generally ineligible for unemployment benefits. See, e.g., WASH. REV. CODE § 50.04.310 (2000).

195. 29 U.S.C. § 2601.

196. See *supra* notes 12 & 183.

reasonable accommodations for her health problems.¹⁹⁷ When employers place employees, particularly disabled employees, on involuntary, unpaid leave, the employees are likely to face financial hardship and may have no choice but to seek other employment. By using involuntary FMLA leave, the employer can get rid of an employee without going through the disability-accommodation process and without terminating the employee, thereby avoiding the risk of discriminatory-discharge allegations.

IV. CONCLUSION

During the eight arduous years required for passage, the FMLA had one central purpose: to create and protect leave rights guaranteeing employees a minimum amount of unpaid leave in times of family or medical need. With such rights, employees would no longer be forced to choose between attending to their most important personal needs and keeping their jobs. Despite its detailed history, provisions, and procedures, the FMLA fails to address the practice of employers putting employees who are willing and able to perform essential job functions on involuntary FMLA leave. Congress probably never contemplated such a practice. However, courts examining the issue of involuntary leave have concluded, with little analysis, that the FMLA's silence on the issue unequivocally permits the practice. Yet, the language of the statute, the overall statutory and regulatory scheme, the legislative history, and policy concerns are all evidence that Congress intended the FMLA to be a shield for employees, protecting their basic rights and affording them greater job security. The DOL's regulations and advisory opinions explicitly effectuate this intent. Therefore, employers who use involuntary FMLA leave as a sword against employees who are able to perform their essential job functions, causing them financial hardship and precipitating their job separation, unlawfully interfere with employees' FMLA rights.

197. *Burton v. Neumann*, 5 Wage & Hour Cas. 2d (BNA) 1138, 1140 (S.D. Fla. Apr. 8, 1999).

