# Stressing Over Stress: Making the FMLA Work For Employers Amidst Rising Employee Stress Claims

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**ABSTRACT**

Congress passed the Family and Medical Leave Act of 1993 (FMLA or the "Act") for the purpose of giving employees job security and a means of taking medical and other necessary leave. However, when the FMLA was enacted, employers did not realize that they would be forced to make major, and uncomfortable, decisions regarding medical leave: is the employee suffering from a serious ailment, or is he or she deceitfully taking advantage of an Act that was intended to aid workers truly in need of sick leave? With more employees claiming stress as a reason for seeking FMLA leave, employers struggle to ascertain whether stress fits within the FMLA's definition of a "serious health condition" while balancing the potential for FMLA abuse.

The "serious health condition" provision of the FMLA has several flaws that complicate the categorization of conditions such as stress that vary in duration and severity and are difficult to diagnose. Additionally, employers are not statutorily required to obtain certification from employees' doctors to validate their medical conditions and their need for leave. Employers are also prohibited from making certain types of direct contact with employees' doctors, which limits employers as to the amount and depth of information they may obtain when attempting to certify their employees' alleged medical conditions. Moreover, if litigation arises, the FMLA is silent as to whether expert medical testimony is required to back up an employee's claim.

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These issues, in addition to the discrepancies in how courts interpret the FMLA when employees seek leave for stress, put employers at greater risk for FMLA abuse and cause them to expend significant resources investigating and litigating FMLA claims. This Comment will suggest the following amendments to the FMLA to resolve these issues: (1) require that employers obtain medical certification in all cases; (2) permit employers to contact employees' health care providers directly, with certain limitations; and (3) require expert medical testimony when litigation over stress-related and other FMLA claims arises.

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## I. INTRODUCTION

Despite the purported goals and benefits of the Family and Medical Leave Act of 1993 (FMLA or the "Act"),[1] which include improving employees' work-life balance by promoting employment policies that accommodate and provide job security for working parents and employees who have serious health conditions, this system for permitting employee leave under certain circumstances is still far from ideal for a number of reasons.[2] One of the greatest concerns for employers is the potential for employee abuse of the FMLA, especially given the rise in the number of employees seeking FMLA leave due to stress.[3] Employers

1. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2012)).

2. *See infra* Part II.

3. *See* Aldo Svaldi, *Stress Leave a Rising Source of Contention for Employers*, DENVER POST (May 27, 2013, 2:56 PM), http://www.denverpost.com/2013/05/27/stress-

recognize that workplace stress, and stress in general, continue to be legitimate issues for employees, but often struggle to strike a proper balance between ensuring employees' satisfaction and health and preventing FMLA abuse.[4] Courts disagree over whether workplace stress is a "serious health condition" under the FMLA, and whether physical symptoms or a mental illness diagnosis are required in order for stress to qualify as a serious health condition.[5] These two issues make stress-related FMLA claims an immensely unsettled area of the law.[6] Clarificatory amendments to the FMLA are imperative for employers seeking solutions for dealing with rising employee stress and related requests for FMLA leave.[7]

One difficulty facing employers is predicting whether an employee's stress meets the FMLA's definition of a "serious health condition."[8] The FMLA and corresponding regulations provided by the Department of Labor (DOL) do not categorically require certification[9] by an employee's health care provider when an employee requests leave due to a serious health condition.[10] Thus, some employers do not seek such certification.[11] The lack of a clear certification requirement enables

leave-a-rising-source-of-contention-for-employers/ ("Employers report a rising number of employees seeking time off for stress-related conditions through the FMLA . . . .").

4. *See generally* Keshia A. McCrary & Natasha L. Wilson, *Stress Leave Under the FMLA*, FOR DEFENSE (Feb. 2013), http://docplayer.net/6665437-Stress-leave-under-the-fmla.html (discussing employers' problems addressing stress-related FMLA claims and relevant case law).

5. *See infra* Section IV.A.

6. *See infra* Section IV.A. *See generally* McCrary & Wilson, *supra* note 4 (listing varying standards among jurisdictions regarding whether stress qualifies as a serious health condition under the FMLA).

7. *See* Michael Fox, *Is 'Stress' an FMLA Serious Condition?*, BUS. MGMT. DAILY (July 14, 2014, 2:00 PM), http://www.businessmanagementdaily.com/39133/is-stress-an-fmla-serious-condition#_ (describing the current state of disaccord among courts regarding stress-related FMLA claims).

8. Svaldi, *supra* note 3 ("Employees, employers and health care providers are grappling with the question of when does stress rise to a level severe enough to justify leave."); *see* Leslie A. Barry, Note, *Determining the Proper Standard of Proof for Incapacity Under the Family and Medical Leave Act*, 97 IOWA L. REV. 931, 941–42 (2012) (discussing employers' and employees' confusion with the FMLA and DOL regulations relating to the "serious health condition" and medical certification provisions).

9. *See* 29 U.S.C. § 2613(b) (2012) (defining and describing "certification").

10. *See* Heather N. Collinet, *Employment Law: Gambling on Court Interpretations of Care: Approving Leave for Travel Under the FMLA*, 10 SEVENTH CIR. REV. 345, 380–81 (2015) ("The current FMLA certification provision does not require an employer to request a certification every time before granting FMLA leave to an employee.").

11. Mary Kalich, Note, *Do You Need a Doctor's Note? Lay Testimony Should Be Sufficient Evidence for FMLA Leave Unless Compelling Counter Conditions Exist*, 86 ST. JOHN'S L. REV. 603, 620 (2012).

employees to make fraudulent claims[12] and take advantage of employers, who incur the costs of covering the work of employees on FMLA leave.[13]

A related issue is that an employer can only contact an employee's health care provider for limited purposes.[14] The DOL regulations generally prohibit employers from contacting an employee's doctor to gain better insight and updates on an employee's condition, or to seek recommendations as to the duration and frequency of the employee's leave, except to obtain clarification on an FMLA medical certification or recertification.[15] This bar on employers' ability to gain useful and often necessary information opens the door for employees' abuse of the FMLA, which ultimately forces employers to expend indeterminate resources investigating whether an employee's claims are legitimate[16] and covering for the employee's absence.[17]

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12. *See* Barton A. Bixenstine, Vorys, Sater, Seymour and Pease LLP, *Tactics to Control Intermittent Leave Abuse—Checklist*, XPERTHR POLICIES & DOCUMENTS 7696 (2017) (stating that making effective use of medical certification is the most effective deterrent to FMLA abuse).

13. *See* Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. 35,550, 35,571 (proposed June 28, 2007) (to be codified at 29 C.F.R. pt. 825) (quoting YELLOW BOOK USA, DOC. 10021A, at 4) (stating that "[t]he use of unscheduled, intermittent FMLA leave" increases the financial burden on employers in bolstering human resources staff to track intermittent absence time used; hiring additional managers to manage employees on intermittent leave; and compensating for overtime costs, lost sales, missed deadlines, administrative costs, and negative employee morale); Barry, *supra* note 8, at 952–53 (citing Jonathan Hyman, *FMLA Eligibility: How Serious is That Serious Health Condition*, BUS. MGMT. DAILY (June 20, 2010, 1:00 AM), https://www.businessmanagementdaily.com/11508/fmla-eligibility-how-serious-is-that-serious-health-condition) (reporting that 88% of employers assign employees' workloads to their coworkers which may negatively affect "employee morale and productivity").

14. *See* 29 C.F.R. § 825.307(a) (2017) (stating that an employer may only contact an employee's health care provider to understand the handwriting or the meaning of a response on the form, but that "no additional medical information may be requested").

15. *See id.* ("Employers may not ask health care providers for additional information beyond that required by the certification form.").

16. *See* 29 U.S.C. § 2613(c)(1) (2012) ("In any case in which the employer has reason to doubt the validity of the certification provided . . . the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider . . . ."); Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 267–68 (2003) (discussing a study by the Society of Human Resource Management, which revealed that 30% of businesses found it too difficult to quantify the costs of administrating the FMLA).

17. *See* Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information, 72 Fed. Reg. at 35,571 (quoting YELLOW BOOK USA, DOC. 10021A, at 4) (discussing the financial burden on employers in covering for employees' FMLA intermittent leave); Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 347–50 (2014) (describing potential sources of increased expenditures for employers due to

Moreover, if litigation between an employee and employer arises regarding the employee's claim, the FMLA and DOL regulations do not specify whether expert medical testimony is required to prove that the employee suffered from a "serious health condition."[18] For this reason, courts are split over whether expert medical testimony, as opposed to the employee's or other witnesses' lay testimony, is necessary in an FMLA dispute.[19] Allowing courts to rely solely or primarily on lay testimony permits employees to assert fraudulent claims without adequate credibility and restriction,[20] and makes FMLA litigation especially difficult for employers faced with claims for illnesses that are ambiguous or challenging to diagnose.[21]

This Comment proposes amendments to the FMLA that would require employers to obtain medical certification in all cases involving an employee seeking leave due to a serious health condition, including stress.[22] The relevant DOL regulations should also be amended to provide that employers may contact employees' doctors, while still maintaining some limitations on contact in order to protect patient privacy.[23] Finally, this Comment proposes an additional amendment to the DOL regulations requiring expert medical testimony in litigation concerning an employee's FMLA claim.[24]

By establishing a better avenue for employers to gain more thorough information on an employee's condition, these amendments would make it easier for employers to distinguish between generalized claims of stress, which do not qualify for FMLA leave,[25] and stress that may be considered a serious health condition.[26] Moreover, these tighter

various forms of FMLA abuse by employees); Jessica Beckett-McWalter, Note, *The Definition of "Serious Health Condition" Under the Family Medical Leave Act*, 55 HASTINGS L.J. 451, 453–54 (2003) (stating that the certification provision is intended to "reduce the cost to employers by allowing them to anticipate a shortage in workforce").

18. Kalich, *supra* note 11, at 619 ("The DOL regulations are ambiguous because they do not clearly state if and when medical testimony is required to prove a serious medical condition.").

19. *Id.* at 611; *see, e.g.*, Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156, 161 (3d Cir. 2010); Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148–49 (8th Cir. 2001); Haefling v. United Parcel Serv., Inc., 169 F.3d 494, 500–01 (7th Cir. 1999); Gudenkauf v. Stauffer Commc'ns, Inc., 922 F. Supp. 465, 475–76 (D. Kan. 1996); *see also infra* Section IV.B.3.

20. Kalich, *supra* note 11, at 617 (stating that not requiring medical testimony in FMLA litigation may introduce a "risk that some employees will give false testimony and be able to present their case to a jury based solely on fraudulent claims," which could cause a potential "flood of FMLA litigation").

21. *See infra* Section IV.B.3.

22. *See infra* Section IV.B.1.

23. *See infra* Section IV.B.2.

24. *See infra* Section IV.B.3.

25. *See infra* Section IV.A.

26. *See infra* Section II.B.

requirements on FMLA certification and leave would prevent FMLA abuse by employees seeking leave for false or exaggerated stress claims.[27] Ultimately, these amendments to the FMLA and the DOL regulations would serve as a stable and consistent method for dealing with stress claims, as well as other claims that may be difficult for employers to interpret under the FMLA.[28]

## II. OVERVIEW OF THE FMLA AND DOL REGULATIONS

Beginning in 1985, changing national demographics and workforce statistics showed that an estimated 150,000 workers lost their jobs annually due to a lack of medical leave.[29] This situation placed pressure on lawmakers to formulate a national medical leave policy,[30] which ultimately occurred when President Bill Clinton signed the FMLA into law on February 5, 1993.[31] The FMLA enables employees to take "reasonable leave" for the "birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."[32] Additionally, the FMLA enables employees to care for their own serious health conditions in a manner that also "accommodates the legitimate interests" of their employers.[33] As the first legislation to impose an obligation on certain employers to provide family leave, many considered the FMLA groundbreaking.[34]

The FMLA's stated purpose is "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[35] This legislation strives to improve work-

27. Beckett-McWalter, *supra* note 17, at 453–54 (stating that the certification requirement is intended as a "check against employee abuse of leave").

28. *See infra* Part IV.

29. H.R. REP. NO. 103-8, pt. 1, at 28 (1993) (discussing a study by Eileen Trzcinski and William Alpert for the Small Business Association); Nancy R. Daspit, Comment, *The Family And Medical Leave Act of 1993: A Great Idea but a "Rube Goldberg" Solution?*, 43 EMORY L.J. 1351, 1355 (1994) (citing findings from a Small Business Association study by Eileen Trzcinski and William Alpert).

30. Daspit, *supra* note 29, at 1355.

31. *See* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–2654 (2012)).

32. 29 U.S.C. § 2601(b)(2).

33. *Id.* § 2601(b)(3).

34. Porter, *supra* note 17, at 327; Margaret Wright, Comment, *A Caring Definition of "Care": Why Courts Should Interpret the FMLA to Cover Unconventional Treatment of Seriously Ill Family Members*, 32 T.M. COOLEY L. REV. 35, 37 (2015); *see also* Lindsay R. B. Dickerson, *"Your Wife Should Handle It": The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. THIRD WORLD L.J. 429, 435–36 (2005) (reviewing SUSAN J. DOUGLAS & MEREDITH MICHAELS, THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN (2004)).

35. 29 U.S.C. § 2601(b)(1).

life balance by promoting employment policies that accommodate and provide job security for working parents[36] and employees who have serious health conditions that temporarily prevent them from working.[37] As President Clinton indicated, the FMLA aims to prevent American workers from "hav[ing] to choose between the job they need and the family they love,"[38] in a way that benefits not only employees, but also employers who depend on their employees' "full commitments" to the workplace.[39]

Although parental leave is a primary focus of the FMLA, in 2012 alone, 54.6 percent of employees reportedly took FMLA leave due to their own illnesses.[40] Thus, the FMLA's self-care provisions allowing for leave due to an employee's own serious health condition comprise a crucial component of the FMLA's goal of improving work-life balance while "protect[ing] employers from unforeseen costs associated with unexpected employee absences and employee abuse of leave provisions."[41] Despite this admirable goal, however, scholars have widely criticized the FMLA as being ineffective for various reasons.[42] In particular, employers continuously fear employee abuse of the FMLA and face difficulties in the administration of the statute's "serious health condition" language.[43]

### *A. Overview of the "Serious Health Condition" Provision*

The "serious health condition" provision in the FMLA is one of the most pivotal provisions in determining whether an employee will be

36. *See id.*; 29 C.F.R. § 825.101(a) (2017); Collinet, *supra* note 10, at 355; Wright, *supra* note 34, at 37.

37. *See* 29 U.S.C. § 2601(a)(4).

38. Statement on Signing the Family Medical Leave Act of 1993 29 WEEKLY COMP. PRES. DOC. 144, 144 (Feb. 5, 1993).

39. 29 C.F.R. § 825.101(c) ("The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace.").

40. KELLY DALEY, JACOB ALEX KLERMAN & ALYSSA POZNIAK, ABT ASSOCS., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 69 (2012), https://www.dol.gov/asp/evaluation/fmla/fmla-2012-technical-report.pdf.

41. Beckett-McWalter, *supra* note 17, at 451 (citing S. REP. NO. 103-3, at 25 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 27).

42. *See* Wright, *supra* note 34, at 38 (stating that because of the FMLA's "numerous eligibility and qualification requirements, the Act fails to provide the protection that workers need and fails to fulfill its policy goals").

43. *See* Porter, *supra* note 17, at 342 (discussing employers' complaints that the statute is "too broad, and too difficult and costly to administer" and that it provides too much coverage); *see also* Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J.L. & POL'Y 169, 169–70 (2004) (stating that members of the business community worried that the FMLA would impact the economic profitability of businesses).

granted leave. Under the FMLA, an eligible employee[44] is entitled to 12 workweeks of unpaid leave during any 12-month period.[45] Leave may be taken either all at once, intermittently, or on a reduced leave schedule depending upon the medical necessity of such leave.[46] In order to qualify for FMLA leave due to personal medical reasons, an employee must show that he or she has a "serious health condition that makes the employee unable to perform the functions of [his or her position]."[47] The FMLA defines "serious health condition" as an "illness, injury, impairment, 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."[48]

Although the FMLA does not mandate it, an employer may require that an employee's request for leave due to a serious health condition be "supported by a certification" issued by the employee's health care provider.[49] If an employer requests such certification, the FMLA requires that an employee provide certification at the employee's expense in a timely manner.[50] The certification must include:

> (1) the date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;" and "(4) . . . (B) . . . a statement that the employee is unable to perform the functions of [his or her position].[51]

If an employee requests intermittent leave or leave on a reduced leave schedule for planned medical treatment, the certification must include "the dates on which the treatment is expected to be given and the duration of such treatment," as well as "a statement of the medical necessity for intermittent leave" and "the expected duration of the . . . leave."[52] If the employer finds that necessary information is missing from the certification, it must notify the employee in writing of the

44. *See* 29 U.S.C. § 2611(2) (2012) (stating that the FMLA extends only to those employees (1) who work at a location where the employer has at least 50 employees within 75 miles of the employee's worksite and (2) who have been employed for at least 12 months by the employer, and worked for "at least 1,250 hours . . . during the previous 12-month period"); 29 C.F.R. § 825.104(a) (stating that in order to qualify for FMLA leave, an employee must first work for a covered employer, which is one that employs "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year").

45. 29 U.S.C. § 2612(a)(1).

46. *See id.* § 2612(b)(1).

47. *Id.* § 2612(a)(1)(D).

48. *Id.* § 2611(11).

49. *See id.* § 2613(a).

50. *Id.*

51. *Id.* § 2613(b)(1)–(4).

52. *Id.* § 2613(b)(5)–(6).

information needed to complete the certification.[53] If supplementation of the certification is required, the employee must provide the additional information within seven days.[54]

Should the employer find "reason to doubt the validity of the certification provided" by an employee, the employer may require, at the employer's own expense, that the employee "obtain the opinion of a second health care provider designated or approved by the employer" regarding any information included within the initial certification.[55] If the second opinion differs from the opinion in the initial certification, the employer may require, again at the employer's own expense, that the employee obtain the opinion of a third health care provider "designated or approved jointly by the employer and the employee."[56] The third opinion then binds the employer and employee.[57]

An employer may request recertification, but may not do so more often than every 30 days, and if the duration of the employee's condition lasts longer than 30 days, the employer must wait to request recertification until the "minimum duration" of the condition expires.[58] An employer may demand, however, that an employee obtain subsequent recertifications in less than 30 days under certain circumstances, such as if the employee's leave continues for an extended period of time or if it changes significantly.[59]

Congress delegated responsibility to the DOL to "prescribe such regulations as are necessary to carry out" the requirements of the FMLA.[60] The DOL intended to make the FMLA "accessible, understandable, and usable by a person not familiar with the FMLA" by clarifying and laying out the FMLA's limitations and terms.[61] For example, the DOL regulations provide that for purposes of defining "serious health condition," an "incapacity" must last "more than three consecutive, full calendar days."[62] Additionally, in order to fulfill the incapacity and serious health condition requirements, the regulations state that the patient must be treated by a health care provider "two or more times, within 30 days of the first day of incapacity," or be treated at

53. 29 C.F.R. § 825.305(c) (2017).
54. *Id.*
55. 29 U.S.C. § 2613(c)(1).
56. *Id.* § 2613(d)(1).
57. *Id.* § 2613(d)(2).
58. 29 C.F.R. § 825.308(a)–(b).
59. *Id.* § 825.308(c).
60. 29 U.S.C. § 2654.
61. Kalich, *supra* note 11, at 604 (quoting Maegan Lindsey, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. TEX. L. REV. 559, 567 (2009) (quoting THE FAMILY AND MEDICAL LEAVE ACT 24 (Michael J. Ossip & Robert M. Hale eds., 2006))).
62. 29 C.F.R. § 825.115(a).

least once, with such treatment resulting in a "regimen of continuing treatment under the supervision of the health care provider."[63]

Notably, Congress previously proposed that the "serious health condition" requirement be "broad and . . . cover various types of physical and mental conditions,"[64] an objective which conflicts directly with the strict constraints the DOL regulations impose on what constitutes a serious health condition.[65] This incongruence demonstrates the ongoing struggle to strike a balance between achieving the FMLA's overall purpose and allowing for effective and efficient determinations to be made regarding what qualifies as a "serious health condition."[66] Yet despite the DOL's effort to establish a bright-line rule to help employers differentiate between medical claims that fall within the scope of the FMLA and those that do not,[67] the DOL regulations, and the FMLA itself, lack sufficient clarity in many ways.[68] As a result, courts have interpreted the FMLA inconsistently, causing "uncertainty for employees and employers and decreas[ing] stability and economic security."[69]

### *B. Issues and Inconsistencies in Implementing the FMLA*

While Congress had sound goals in mind when enacting the FMLA, employers, employees, and courts have encountered obstacles in interpreting its language and requirements.[70] Rather than simplifying the process of obtaining medical leave, the FMLA has become an unwieldy

63. *Id.* § 825.115(a)(1)–(2).

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

65. *See* Beckett-McWalter, *supra* note 17, at 462 ("The Department of Labor's regulations are rigid, and, therefore, many conditions fall outside FMLA protection. At the same time, the bright-line test also serves to grant protection to some illnesses that Congress did not intend the FMLA to cover."); Druten, *supra* note 64, at 201 (stating that the "specific guidelines and limitations" proposed by the DOL regulations seek to balance interpretation and expansion of the FMLA, "which itself is to be construed broadly").

66. *See* Druten, *supra* note 64, at 201 (stating that the DOL regulations attempt to "give meaning to the vague terms" of the FMLA "without diluting the intent").

67. Beckett-McWalter, *supra* note 17, at 452.

68. Druten, *supra* note 64, at 183 ("Despite the good intentions behind the FMLA, its ambiguous regulations . . . hinder interpretation and application of the FMLA.").

69. Kalich, *supra* note 11, at 605.

70. *See* Debra E. Christenson, Victorelli v. Shadyside Hospital—*Chronic Serious Health Conditions Covered by the Family and Medical Leave Act of 1993 Create Administrative Headaches for Employers*, 43 VILL. L. REV. 973, 989–90 (1998) (stating that employers and employees have disagreed over what conditions qualify for FMLA protection, leaving courts to make determinations as to what constitutes a serious health condition).

device in many respects.[71] One primary issue employers must navigate relates to employees' assertions of ambiguous claims.[72] This problem, coupled with the vagueness of the FMLA and DOL regulations and the inconsistencies among courts in construing the legislation, make the FMLA and DOL regulations difficult to comply with and effectively utilize.[73]

Employers face a particular level of difficulty in determining whether employees' medical claims fit within the statutory definition of a serious health condition.[74] Numerous disputes regarding whether conditions qualify under the FMLA as serious health conditions have resulted in courts granting summary judgment in favor of the employer.[75] Meanwhile, other courts have had difficulty deciding whether a serious health condition existed, and instead have reached decisions based on other grounds.[76]

Additionally, if employees seek FMLA leave due to ambiguous claims such as stress,[77] employers face greater confusion and uncertainty

71. *See* Kenza Bemis Nelson, Note, *Employer Difficulty in FMLA Implementation: A Look at Eighth Circuit Interpretation of "Serious Health Condition" and Employee Notice Requirements*, 30 J. CORP. L. 609, 625 (2005) ("[E]mployers have found it increasingly difficult and cumbersome to implement the FMLA in their businesses in a way that will successfully avoid liability.").

72. *See, e.g.*, Porter, *supra* note 17, at 352 ("Possibly the requirement that causes employers the most difficulty and confusion under the FMLA is tracking intermittent leave."); *see infra* Part IV (discussing employers' difficulty and uncertainty in interpreting stress claims, one example of an ambiguous claim, under the FMLA).

73. *See* Nelson, *supra* note 71, at 615–18 (arguing that the FMLA burdens employers attempting to determine whether an employee's condition qualifies as a serious health condition).

74. John E. Matejkovic & Margaret E. Matejkovic, *If It Ain't Broke. . .Changes to FMLA Regulations Are Not Needed; Employee Compliance and Employer Enforcement of Current Regulations Are*, 42 WILLAMETTE L. REV. 413, 420 (2006) ("Employers have suggested that the 'vague language describing a "serious health condition" creates opportunities for employees to request leave for conditions that fall well outside of the intent of the FMLA.'"); Nelson, *supra* note 71, at 614 (stating that employers have difficulty ascertaining whether leave should be granted because of courts' expansion of the scope of "serious health condition").

75. 7 N. PETER LAREAU ET AL., LABOR AND EMPLOYMENT LAW § 166.02.01 (2017); *see, e.g.*, Bauer v. Dayton-Walther Corp., 910 F. Supp. 306, 311 (E.D. Ky. 1996), *aff'd sub nom.* Bauer v. Varity Dayton-Walther Corp., 118 F.3d 1109, 1113 (6th Cir. 1997) (finding that the employee's rectal bleeding was not a serious health condition within the meaning of the FMLA); Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238, 246 (E.D. Pa. 1994) (finding that an ear infection was a minor illness and not a serious health condition qualifying an employee for FMLA leave).

76. *See, e.g.*, Miller v. AT & T Corp., 250 F.3d 820, 835 (4th Cir. 2001) (focusing on the employer's attack on the regulations rather than on the nature of the employee's condition); Price v. City of Fort Wayne, 117 F.3d 1022, 1027 (7th Cir. 1997) (finding disputed material questions of fact as to whether the plaintiff suffered from a serious health condition).

77. *See* discussion *infra* Part III.

over whether an employee is entitled to FMLA leave.[78] Navigating these claims may become costly because an employer is generally prohibited from contacting an employee's health care provider except to clarify certification information or obtain recertification.[79] Therefore, employers often expend their own resources in validating an employee's claims through a second or third opinion.[80] Unfortunately, because of the ambiguity surrounding conditions that are difficult to define or diagnose, courts have been unpredictable when it comes to interpreting the FMLA, leaving employers with little guidance.[81]

### *C. Judicial Attempts to Interpret the "Serious Health Condition" Provision*

Courts have devised multiple interpretations and standards for implementing the FMLA in an attempt to fill in the Act's gaps, particularly with respect to the confusing "serious health condition" provision.[82] These differing standards are complicated and contradictory in many ways and leave gaps in the general understanding of the Act, therefore making them difficult for employers to actually apply.

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78. *See* Svaldi, *supra* note 3 ("A scan can show a damaged knee, but getting inside a broken psyche is more difficult, especially if it falls outside standard diagnoses, such as bipolar disorder, schizophrenia, or severe depression.").

79. 29 C.F.R. § 825.307 (2017); DEP'T OF LABOR, FREQUENTLY ASKED QUESTIONS AND ANSWERS ABOUT THE REVISIONS TO THE FAMILY AND MEDICAL LEAVE ACT 7, https://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.pdf ("[C]ontact between an employer and an employee's health care provider must comply with the Health Insurance Portability and Accountability Act (HIPAA) privacy regulations.").

80. *See* G. John Tysse & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361, 370 (1994); *see also infra* Section IV.B.2.

81. *See* Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148–49 (8th Cir. 2001) (stating that the plaintiff's testimony that she was "too sick to work" while suffering from the flu, along with medical records and testimony regarding conversations with nurses about her symptoms, created a genuine issue of material fact as to her incapacity); Thorson v. Gemini, Inc., 205 F.3d 370, 379 (8th Cir. 2000) (concluding that although the plaintiff's condition may not have been "serious," it satisfied the incapacity requirement of the DOL regulations to qualify for FMLA leave); Oswalt v. Sara Lee Corp., 74 F.3d 91, 92–93 (5th Cir. 1996) (determining that high blood pressure, but not food poisoning, constitutes a "serious health condition"); Roberts v. Human Dev. Ass'n, 4 F. Supp. 2d 154, 162–63 (E.D.N.Y. 1998) (finding that the plaintiff failed to meet the DOL regulations' incapacity requirement because she did not show that she had been incapacitated for a full three days during an emergency medical situation); Stubl v. T.A. Sys., Inc., 984 F. Supp. 1075, 1088–89 (E.D. Mich. 1997) (concluding that a doctor's visits to procure a letter to send to a disability carrier that resulted in a diagnosis and evaluation regarding the plaintiff's emotional state fell within the FMLA's continuing treatment requirement).

82. *See, e.g.*, Miller v. AT & T Corp., 250 F.3d 820, 830–31 (4th Cir. 2001); Caldwell v. Holland of Tex., Inc., 208 F.3d 671, 677 (8th Cir. 2000); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 163 (1st Cir. 1998).

For example, in *Hodgens v. General Dynamics Corp.*,[83] an employee sued his employer for terminating the employee for taking FMLA leave due to a heart problem.[84] At the trial court level, the U.S. District Court for the District of Rhode Island found that the leave was not protected by the FMLA because the employee did not have a serious health condition, reasoning that the employee was not considered incapacitated, as his condition did not fully prevent him from performing his job.[85] On appeal, however, the First Circuit found that the serious health condition requirement may be satisfied where an employee takes medically necessary absences for the purpose of seeking the diagnosis and treatment of symptoms, the seriousness of which has not yet been determined at the time of the absences.[86] Ultimately, the First Circuit found that "treatment" of a serious health condition can include "visits to a doctor when the employee has symptoms that are eventually diagnosed as constituting a serious health condition, even if, at the time of the initial medical appointments, the illness has not yet been diagnosed nor its degree of seriousness determined."[87]

Additionally, in *Caldwell v. Holland of Texas, Inc.*,[88] the plaintiff took more than three days off of work to care for her allegedly incapacitated son.[89] The Eighth Circuit found that even if the plaintiff's son was not originally incapacitated, his condition resulted in an incapacity that lasted more than three days, and thus, a factfinder could find that he suffered a serious health condition qualifying for leave under the FMLA.[90] The Eighth Circuit thus found that an employer who discharges or penalizes an employee who later claims benefits under the FMLA bears the risk that the employee's condition will develop into a serious health condition covered by the FMLA.[91]

Furthermore, in *Miller v. AT & T Corp.*,[92] an employee sought FMLA leave for an episode of the flu, an illness that the employer argued could not be considered a serious health condition.[93] The court reasoned that flu symptoms satisfied the regulatory criteria for a serious health condition and rejected the employer's argument that the definition of "treatment" was overly broad in including both the evaluation and

83. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151 (1st Cir. 1998).
84. *Id.* at 155–56.
85. *See id.* at 158.
86. *Id.* at 165.
87. *Id.* at 163.
88. Caldwell v. Holland of Tex., Inc., 208 F.3d 671 (8th Cir. 2000).
89. *See id.* at 673–74.
90. *Id.* at 677.
91. *Id.* at 677.
92. Miller v. AT & T Corp., 250 F.3d 820 (4th Cir. 2001).
93. *Id.* at 827–29.

treatment of an employee's condition.[94] The Fourth Circuit concluded that a follow-up evaluation with a doctor, which included a physical examination and blood tests, constituted "treatment" for purposes of the serious health condition requirement.[95]

These cases demonstrate that the "serious health condition" provision could potentially apply to anything from latent illness and seemingly unrelated symptoms[96] to blood tests and mere evaluations by a health care provider.[97] Although cases like these provide some insight for employers, the "serious health condition" provision still causes contention.[98] Particularly when it comes to complex illnesses like stress, employers still grapple with determining when an employee makes a valid claim under the FMLA due to a serious health condition.[99]

## III. BACKGROUND ON STRESS

One medical condition that courts have found extremely difficult to interpret under the FMLA is stress. Therefore, employers spend significant amounts of time and resources trying both to remedy workplace stress and to determine when stress amounts to a serious health condition.[100] However, differing and expansive definitions of stress worry employers who are concerned with FMLA abuse.[101] Ultimately, the proposed amendments will help strike the appropriate balance between employee needs and employer concerns.

Hans Selye coined the term "stress" in 1936, defining it as "the non-specific response of the body to any demand for change."[102] As the American Institute of Stress notes, stress may ultimately be so challenging to define because it manifests differently in each individual depending on the stressor and the individual's unique response at a given time.[103] As with many health conditions, stress, and especially workplace stress, can be a legitimate issue for employees and their employers.[104]

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94. *Id.* at 833–35.
95. *Id.* at 830–31.
96. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 165 (1st Cir. 1998).
97. *Miller*, 250 F.3d at 830–31.
98. *See infra* Part III.
99. *See infra* Part III.
100. *See infra* note 115 and accompanying text.
101. *See infra* notes 102–03, 120–28 and accompanying text.
102. *What Is Stress?*, AM. INST. STRESS, http://www.stress.org/what-is-stress/ (last visited Oct. 9, 2016).
103. *See id.*; *see also* Svaldi, *supra* note 3 ("Further complicating matters, not everyone deals with stress in the same way. And even the same person may handle workplace stress differently depending on other things going on at a given time.").
104. *See* Svaldi, *supra* note 3 ("[I]gnoring workplace stress can leave employers open to a multitude of problems, including poor customer relations, absenteeism, increased physical injuries, turnover and even workplace violence.").

Many employees suffer from stress in the workplace, especially stress that stems from work itself. A survey by Northwestern National Life shows that 40 percent of workers report that their jobs are "very or extremely stressful," 26 percent report they are "often or very often burned out or stressed by their work," and 29 percent report they feel "quite a bit or extremely stressed at work."[105] While not all stress is detrimental, chronic stress can suppress important body functions and systems, leading to increased health problems.[106]

Additionally, people may manifest stress in different ways, including with any combination of digestive symptoms, headaches, sleeplessness, depression, anger, irritability, and viral infections,[107] each of which, when taken alone, may or may not qualify as a serious health condition under the FMLA.[108] According to the American Psychological Association, chronic stress can lead to suicide, violence, heart attacks, strokes, and cancer.[109] The International Labour Organization (ILO) published a 2016 report defining "psychological hazards"[110] that can cause stress and that may influence employees' health and work performance.[111] The ILO report also found that workplace stress can increase occupational accidents; harmful lifestyle behaviors that contribute to employees' health risks; cardiovascular and other diseases; and mental disorders, including anxiety and depression.[112]

Not only is stress detrimental to employees, but it often has a negative impact on job performance, making it a serious issue for employers as well.[113] Stressed employees have decreased job performance and productivity, increased absenteeism, and conditions such as alcoholism, drug abuse, and health problems that impact

105. NW. NAT'L LIFE INS. CO., EMPLOYEE BURNOUT: CAUSES AND CURES: A RESEARCH REPORT (1992).

106. *See Fact Sheet on Stress*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/publications/stress/index.shtml (last visited Oct. 9, 2016).

107. *Id.*

108. *See* Price v. City of Fort Wayne, 117 F.3d 1022, 1024–25 (7th Cir. 1997).

109. *See Stress: The Different Kinds of Stress*, AM. PSYCHOL. ASS'N, http://www.apa.org/helpcenter/stress-kinds.aspx (last visited Oct. 26, 2016).

110. INT'L LABOUR ORG., WORKPLACE STRESS: A COLLECTIVE CHALLENGE 2 (2016), http://www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-protrav/—-safework/documents/publication/wcms_466547.pdf (defining "psychological hazards" as "interactions between and among work environment, job content, organizational conditions and workers' capacities, needs, culture[,] [and] personal extra-job considerations").

111. *Id.*

112. *See id.* at 6.

113. *See* Shakil Ahmad & Subha Imtiaz, *Impact of Stress on Employee Productivity, Performance and Turnover; An Important Managerial Issue*, 5 INT'L REV. BUS. RES. PAPERS 468, 470 (2009).

employees' efficiency and success.[114] Employers accordingly spend significant sums on wellness programs, although a majority of employees with high stress levels report being too stressed to take advantage of those programs.[115]

It is estimated that the illnesses and performance issues caused by stress cost employers approximately $300 billion per year.[116] Meanwhile, fewer than ten percent of employers say their efforts to reduce employee stress levels have been successful.[117] Given that approximately "one million employees miss work each day because of stress," costing employers an approximate average of $702 per employee per year,[118] employers must have a more meaningful method for dealing with employee stress. This Comment recommends amending the portions of the FMLA that make the serious health condition provision difficult to implement, particularly in the context of stress claims.[119]

While employers are usually aware of the effects of stress on employee performance and recognize the need to take employee stress seriously, employers are also concerned with the potential for FMLA abuse when claiming stress as a justification for leave. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), one of the most important sources used by mental health professionals to define stress, recently expanded existing psychological disorders, which makes it easier for employees to be diagnosed with acute stress disorder.[120] The fifth and most current edition

114. *See id.*

115. NEW LIFE SOL., INC., THE COST OF STRESS IN YOUR ORGANIZATION & WHAT YOU SHOULD DO ABOUT IT 5 (2013), https://www.mequilibrium.com/wp-content/uploads/2013/03/3-1-13-FINAL.pdf.

116. *Id.* at 4.

117. *Id.* at 6.

118. *Id.* at 4.

119. *See infra* Section IV.B.

120. Douglas A. Hass, *Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction Between the DSM-5 and Employment Law*, 44 LOY. U. CHI. L.J. 683, 683–685, 692–94 (2013) (describing the DSM as having become a persuasive text and "de facto legal treatise" for courts, government agencies, and the legal community in cases that require categorization of mental disorders and as influencing interpretations of legislation such as the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the FMLA); *DSM-5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/questions/frequently-asked-questions (last visited Oct. 9, 2016) (stating that the DSM lists diagnostic criteria for every psychiatric disorder recognized by the U.S. healthcare system, and provides the standard classification for mental disorders used by mental health professionals); *see, e.g.*, Clark v. Arizona, 548 U.S. 735, 774 (2006) (citing to the DSM-IV to define schizophrenia in order to make a determination regarding a state insanity defense); Fuller v. J.P. Morgan Chase & Co., 423 F.3d 104, 105–06 (2d Cir. 2005) (discussing the employer's Disability Plan Administrator's reliance on the DSM-IV for making determinations under a disability coverage plan); Boldini v. Postmaster

of the DSM, the DSM-5,[121] is more inclusive than its predecessor, the DSM-IV, as it significantly expands existing psychological disorders and adds several new disorders.[122] As a result, employers are more concerned about employees abusing the FMLA when claiming stress or other psychological disorders as a justification for leave because this new manual, with its authoritative weight, gives them greater leeway to do so.[123] With regard to acute stress disorder, the most common form of stress,[124] the DSM-5 has less restrictive criteria for a diagnosis than the previous edition of the DSM.[125] This demonstrates the DSM's move toward a "spectrum model of mental illness," which could cause an increase in the number of people who qualify for certain diagnoses, including acute stress disorder.[126] As a "de facto legal treatise,"[127] the DSM-5 and its broader criteria would more likely lead courts and employers to interpret an individual's condition as diagnosable acute stress, and therefore, as a serious health condition under the FMLA.[128]

This Comment's proposed amendments to the FMLA and DOL regulations focus on ways to more efficiently and accurately evaluate an employee's stress claim given these many ambiguities in both the

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Gen. U.S. Postal Serv., 928 F. Supp. 125, 130 (D.N.H. 1995) (stating that "in circumstances of mental impairment, a court may give weight to a diagnosis of mental impairment which is described in the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association").

121. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

122. Hass, *supra* note 120, at 683.

123. *See id.* at 713 ("[T]he DSM-5 will create millions of new diagnosed 'illnesses,' whether or not they exist medically (or legally).").

124. *Stress: The Different Kinds of Stress*, *supra* note 109 (defining acute stress as deriving from the "demands and pressures of the recent past and anticipated demands and pressures of the near future").

125. AMERICAN PSYCHIATRIC ASSOCIATION, HIGHLIGHTS OF CHANGES FROM DSM-IV-TR TO DSM-5 9 (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM_Changes_from_DSM-IV-TR_-to_DSM-5.pdf (stating that the "DSM-IV's emphasis on dissociative symptoms is overly restrictive" and individuals may instead "meet diagnostic criteria in DSM-5 for acute stress disorder if they exhibit any 9 of 14 listed symptoms" in the categories of "intrusion, negative mood, dissociation, avoidance, and arousal"); Brett T. Litz, Carol G. Hundert, & Alexander H. Jordan, *Acute Stress Disorder* 4–5, http://www.dartmouth.edu/~ajordan/papers/Litz,%20Hundert,%20&%20Jordan%20-%20ASD%20entry.pdf (stating that the DSM-5 removed the previous requirement from the DSM-IV that "an individual endorse at least three dissociative symptoms").

126. *See* Hass, *supra* note 120, at 712–15 (stating that the DSM-5's move toward the "spectralization" of mental illness will lead to an increase in the number of "disabled" individuals, and that courts and government agencies must shift away from using the DSM as a primary authority).

127. *Id.* at 685.

128. *Cf. id.* at 714 ("With the relaxation of the DSM-5's standards, one million presumably unfairly excluded individuals may pale in comparison to the total number of newly 'disabled' individuals under the DSM-5.").

definition of stress and the FMLA.[129] The goal of the proposed amendments is to balance the needs of employers by providing a streamlined process for evaluating employee FMLA stress claims and preventing FMLA abuse with the needs of employees by allowing them to more easily obtain leave when necessary.[130] These suggestions are built upon the models formulated by similar legislative texts that involve the interpretation of stress claims.[131]

## IV. ANALYSIS AND PROPOSED SOLUTION

First, this Part analyzes the way in which courts have treated stress-related FMLA claims in order to demonstrate the lack of clear standards to interpret such claims. After discussing courts' treatment of stress-related FMLA claims, this Part proposes three amendments to the FMLA that aim to address problems associated with stress claims.[132] These amendments are based on workers' compensation statutes[133] and the Americans with Disabilities Act (ADA),[134] as the FMLA and its treatment by courts are similar to courts' treatment of these enactments.

### *A. Analysis of FMLA Stress-Related Case Law*

The DOL regulations state that mental illness and psychological disorders, which may include stress,[135] can constitute a serious health condition only if all other requirements of the regulations are satisfied.[136] For example, the condition must "make[] the employee unable to perform the functions of [his or her position],"[137] and must either involve "inpatient care in a hospital, hospice, or residential medical care facility" or "continuing treatment by a health care provider."[138] Because stress tends to vary in duration, manifests in different ways, and has no clear definition or diagnosis, courts diverge as to whether stress constitutes a serious health condition under the FMLA.[139] Several cases demonstrate

129. *See infra* Section IV.B.
130. *See infra* Section IV.B.
131. *See infra* Part IV.
132. *See infra* Sections IV.B.1–.3.
133. *See, e.g.*, CAL. LAB. CODE § 3208.3 (West 2017); N.J. STAT. ANN. § 34:15-31 (West 2017).
134. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2012)).
135. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 121, at 265 (listing stressor-related disorders, including acute stress disorders, as recognized psychological disorders).
136. 29 C.F.R. § 825.113(d) (2017).
137. 29 U.S.C. § 2612(a)(1)(D) (2012).
138. *Id.* § 2611(11)(A)–(B).
139. *See, e.g.*, Price v. City of Fort Wayne, 117 F.3d 1022, 1023–27 (7th Cir. 1997); Hurley v. Kent of Naples, Inc., Nos. 2:10-cv-334-FtM-29SPC, 2:10-cv-752-FtM-29DNF,

attempts by courts to construe the "serious health condition" provision as it relates to stress. Despite these cases, there remains no clear standard for determining whether stress constitutes a serious health condition.

In *Price v. City of Fort Wayne*,[140] the employer terminated the plaintiff for excessive absences although the plaintiff had shown that she suffered from numerous diagnoses including elevated blood pressure, hyperthyroidism, back pain, headaches, sinusitis, and feelings of stress and depression.[141] The plaintiff's doctor also testified that the plaintiff had come into his office "on the edge of a break-down, both physically and mentally," and that "there was no way [the plaintiff] could perform her job due to her mental and physical state."[142] The Seventh Circuit found that such diagnoses, when taken together, were sufficient for the plaintiff's claim to survive summary judgment even though the plaintiff's symptoms, considered individually, likely would have not survived summary judgment; it was then up to the trier of fact to determine whether the diagnoses constituted a serious health condition.[143] Therefore, job-related stress may constitute a serious health condition when considered alongside other diagnoses, even though it may not rise to the level of a serious health condition alone.[144]

Similarly, in *Snelling v. Stark Properties, Inc.*,[145] the plaintiff-employee requested more responsibilities at work, but due to conflicts with her supervisors, she sought medical treatment for anxiety attacks, insomnia, and depression.[146] The plaintiff demonstrated that she was under a regimen of continuing treatment with multiple prescription medications.[147] The U.S. District Court for the Middle District of Georgia found that the plaintiff presented sufficient evidence that she had notified her employer that she "*may have* been suffering from a 'serious health condition'" due to her treatment for these symptoms.[148] The court thus found that job-related stress causing insomnia, anxiety attacks, and

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2011 WL 2217770, at *2–8 (M.D. Fla. June 7, 2011); Pierce v. Teachers Fed. Credit Union Found., No. 09-780 (JNE/FLN), 2010 WL 550998, at *1–5 (D. Minn. Feb. 9, 2010); Deleva v. Real Estate Mortg. Corp., No. 1:04cv1299, 2007 U.S. Dist. LEXIS 45136, at *35 (N.D. Ohio June 21, 2007); Maitland v. Employease, Inc., No. Civ.A. 1:05-CV-0661-, 2006 WL 3090120, at *15 (N.D. Ga. Oct. 13, 2006); Snelling v. Stark Props., Inc., No. 5:05CV46 DF, 2006 WL 2078562, at *12 (M.D. Ga. July 24, 2006).

140. Price v. City of Fort Wayne, 117 F.3d 1022 (7th Cir. 1997).

141. *See id.* at 1023.

142. *Id.* at 1025.

143. *See id.*

144. *See id.*

145. Snelling v. Stark Props., Inc., No. 5:05CV46 DF, 2006 WL 2078562 (M.D. Ga. July 24, 2006).

146. *Id.* at *1, *3–5.

147. *Id.* at *9.

148. *Id.*

depression raised a question of fact about whether an employee had a serious health condition.[149] Although not definitively decided by the court in *Snelling*, this decision implies that stress, especially when it causes a number of related symptoms, may qualify as a serious health condition under the FMLA.

Yet such symptoms may *not* qualify as a serious health condition without a showing of a higher degree of specificity as to the employee's condition.[150] In *Maitland v. Employease, Inc.*,[151] the plaintiff sought counseling and complained that she experienced stress associated with the increased volume of work after being promoted and given more responsibilities by Employease.[152] Although the plaintiff was diagnosed with adjustment disorder and depression, she did not disclose her diagnoses to Employease, but rather told her supervisor she felt "psychologically stressed" and experienced "severe fatigue," making it "difficult for [her] to come to work."[153] The U.S. District Court for the Northern District of Georgia held that her complaints gave Employease "no reason . . . to believe that [the plaintiff's] request for time off related to anything other than these generalized complaints of 'stress,'" and thus, the plaintiff was not entitled to FMLA leave.[154] The court therefore ruled that generalized complaints of stress, fatigue, sadness, or sickness do not qualify as a serious health condition for purposes of the FMLA.[155] The FMLA may thus require some level of detail or diagnosis when it comes to stress claims, such as a medical diagnosis or certification from a health care provider.

However, a diagnosis or certification may not always be enough; even more specificity may be required in some cases. For example, in *Deleva v. Real Estate Mortgage Corp.*,[156] the plaintiff testified that he felt "stress and uncertainty" over work-related duties, but admitted that he was nonetheless able to perform the functions of his employment remotely while taking temporary leave.[157] The U.S. District Court for the Northern District of Ohio found that "[t]he mere incantation of the word 'stress'" was not sufficient to create a federal case.[158] The court also

149. *Id.* at *12.
150. *See* Maitland v. Employease, Inc., No. Civ.A. 1:05-CV-0661-, 2006 WL 3090120, at *16 (N.D. Ga. Oct. 13, 2006).
151. Maitland v. Employease, Inc., No. Civ.A. 1:05-CV-0661-, 2006 WL 3090120 (N.D. Ga. Oct. 13, 2006).
152. *Id.* at *2–3, *16.
153. *Id.* at *16.
154. *Id.* at *15–16.
155. *Id.* at *16.
156. Deleva v. Real Estate Mortg. Corp., No. 1:04cv1299, 2007 U.S. Dist. LEXIS 45136 (N.D. Ohio June 21, 2007).
157. *See id.* at *9–10.
158. *Id.* at *38.

indicated that because the plaintiff had not presented evidence that his inability to work was due to a diagnosed medical condition, his FMLA claim failed.[159] The court thus found that without evidence of mental illness, stress alone cannot constitute a serious health condition;[160] therefore, the FMLA arguably requires an actual diagnosis of mental or medical illness from a health care provider when an employee presents a stress claim.

Similarly, in *Pierce v. Teachers Federal Credit Union Foundation*,[161] the plaintiff initially took FMLA leave for cancer, which went into remission within one year.[162] When the plaintiff returned to work, her employer informed her that her position might be eliminated.[163] The plaintiff thereafter sought treatment from health care professionals due to "anxiety and stress during the daytime," along with symptoms from the cancer medication.[164] The plaintiff's employer later informed her that "stress resulting from not having enough work was not covered by FMLA," which caused the plaintiff to suffer a panic attack.[165] The employer subsequently eliminated the plaintiff's position.[166] The U.S. District Court for the District of Minnesota found that the plaintiff's mental health conditions resulted from stress and could be considered "chronic serious health conditions" under the FMLA.[167] The court therefore found that when stress causes a diagnosable mental illness, the stress constitutes a serious health condition.[168] Again, however, the court's conclusion appears to be predicated on an actual diagnosis of a mental illness or related treatment by a health care provider.[169]

Likewise, in *Hurley v. Kent of Naples, Inc.*,[170] the plaintiff was diagnosed with work-related depression and anxiety, and his health care providers recommended he take time off work to manage his stress.[171] The U.S. District Court for the Middle District of Florida found that the evidence raised a question of fact as to whether the plaintiff's stress-

159. *See id*. at *38–43.
160. *See id.* at *38.
161. Pierce v. Teachers Fed. Credit Union Found., No. 09-780 (JNE/FLN), 2010 WL 550998 (D. Minn. Feb. 9, 2010).
162. *Id.* at *1.
163. *Id.*
164. *Id.*
165. *Id.* at *2.
166. *Id.*
167. *Id.* at *5.
168. *Id.*
169. *Id*. at *5–6 (focusing on the existence of multiple diagnoses as evidence that the plaintiff suffered from a serious health condition).
170. Hurley v. Kent of Naples, Inc., Nos. 2:10-cv-334-FtM-29SPC, 2:10-cv-752-FtM-29DNF, 2011 WL 2217770 (M.D. Fla. June 7, 2011).
171. *Id.* at *2.

related depression was a serious health condition.[172] The court concluded that "[b]ecause there was a factual dispute as to whether [the plaintiff] had a serious condition such that he was unable to perform his job, which is material to whether [he] was entitled to FMLA leave" due to his depression, the court was required to deny both plaintiff's and defendants' motions for summary judgment.[173] *Hurley* thus highlights the importance courts place on the incapacity of an employee or the inability of an employee to perform the functions of his or her job in defining "serious health condition" under the FMLA.[174]

Ultimately, these cases are working models that courts and employers can use to navigate stress-related FMLA claims. While courts seem willing to consider stress as being or causing a serious health condition,[175] courts disagree as to what criteria an employee must show to demonstrate a serious health condition. Thus, Congress must amend the FMLA to facilitate the leave process for employees and to better assist courts and employers in making these determinations. Because many courts look to whether there was a diagnosis or treatment by a health care provider when determining whether stress is a serious health condition,[176] amending the FMLA to clarify its provisions related to obtaining information from employees' health care providers is crucial.

### *B. Proposed Amendments to the FMLA*

There are three amendments that should be made to the FMLA in order to enable employers to take a more proactive approach in accurately determining whether stress claims allow for FMLA leave, while simultaneously preventing FMLA abuse. First, the FMLA and DOL regulations should be amended to require medical certification for stress claims.[177] Second, the FMLA and DOL regulations should be

172. *Id.* at *7.
173. *Id.*
174. *Id.* at *7–8.
175. *See, e.g.*, Pierce v. Teachers Fed. Credit Union Found., No. 09-780 (JNE/FLN), 2010 WL 550998, at *5 (D. Minn. Feb. 9, 2010) (suggesting that when stress causes a diagnosable mental health condition, the stress can constitute a serious health condition); Deleva v. Real Estate Mortg. Corp., No. 1:04cv1299, 2007 U.S. Dist. LEXIS 45136, at *38 (N.D. Ohio June 21, 2007) (suggesting that a diagnosis of mental or medical illness from a health care provider may allow an employee to seek FMLA leave due to stress).
176. *See, e.g.*, *Hurley*, 2011 WL 2217770, at *6–7 (stating that "the Court must look at to [sic] whether plaintiff's depression involves 'continuing treatment by a health provider'"); *Pierce*, 2010 WL 550998, at *5; *Deleva*, 2007 U.S. Dist. LEXIS 45136, at *38 (suggesting that absent evidence of mental illness, "the mere incantation of the word 'stress' does not necessarily entitle an employee to FMLA leave); Maitland v. Employease, Inc., No. 1:05-CV-0661, 2006 WL 3090120, at *16 (N.D. Ga. Oct. 13, 2006).
177. *See infra* Section IV.B.1.

amended to allow an employer to contact an employee's health care provider directly not only to gain clarification on an FMLA certification or recertification, but also to receive general information on the employee's condition as it relates to his or her incapacity and inability to perform the job.[178] Third, the DOL regulations should be amended to require expert medical testimony in cases where litigation arises over an employee's claim.[179]

1. Requiring Medical Certification

Under the FMLA, an employer *may* require an employee to support a request for leave with a certification issued by the employee's health care provider.[180] If an employer has reason to question the validity, appropriateness, or duration of the leave, it may additionally request subsequent recertification.[181] However, certification for an employee's claim is not required in all cases; instead, the employer has discretion to decide if certification is necessary.[182]

Many courts and employers find certification to be "de facto mandatory"[183] and as a result, some employers have policies in place to routinely request certification. Nonetheless, if an employer does not properly request medical certification, an employee does not need to provide support from a health care provider for his or her FMLA claim.[184] This lack of a blanket certification requirement opens the door to FMLA abuse because employees may assert claims that are based simply on their own individual assessments of their conditions.[185] This potential for abuse demonstrates the necessity of an amendment to the FMLA's certification provision.

Furthermore, if no request for certification is made, an employer must use its own judgment to determine whether the employee's stress

178. *See infra* Section IV.B.2.
179. *See infra* Section IV.B.3.
180. 29 U.S.C. § 2613(a) (2012).
181. 29 C.F.R. § 825.305(b) (2017).
182. *See* Kalich, *supra* note 11, at 620.
183. *See id.* (stating that because many employers do require certification, courts have a tendency to view certification as "de facto mandatory" although not all employers require certification).
184. Lubke v. City of Arlington, 455 F.3d 489, 496–98 (5th Cir. 2006).
185. *See* Barry, *supra* note 8, at 953 ("If employees are in essence allowed to determine their own incapacity or that they are required to care for a family member, arbitrary standards will govern each employee's case, which gives neither employees nor employers any guidance in terms of what will and what will not qualify as incapacity."). *But cf.* Beckett-McWalter, *supra* note 17, at 453–54 (stating that the certification provision is intended to "reduce the cost to employers by allowing them to anticipate a shortage in workforce and to control potential employee abuse of the leave provisions").

claim qualifies as a serious health condition.[186] Forcing an employer to make this subjective decision can lead to erroneous assessments of an employee's need for FMLA leave and costly litigation.[187] This obligation imposed on the employer also presents yet another discrepancy within the FMLA: although the FMLA allows an employer to make determinations as to whether an employee is entitled to leave from work due to a serious health condition, it does not permit an employer to make a determination regarding whether an employee is fit to *return* to work from leave due to a serious health condition.[188] To remedy this discrepancy, the FMLA should be amended to prohibit an employer from making its own assessment as to whether an employee is suffering from a serious health condition in deciding whether the employee is ultimately entitled to FMLA leave.

To correct this inconsistency, Congress should amend the FMLA to follow the models set by workers' compensation statutes.[189] From a legislative and judicial point of view, stress itself may not be considered a protected condition.[190] Nonetheless, stress can manifest itself in other conditions that are protected under laws that govern employment leave[191] and workers' compensation.[192] Under the California workers'

186. *See* Konrad Lee, *The Employees' Quest for Medical Record Privacy Under the Family and Medical Leave Act*, 41 SUFFOLK U. L. REV. 49, 54 (2007) ("When an employee makes a request for personal medical leave pursuant to the FMLA, the employer must determine whether the request qualifies for leave because the employee has a serious medical condition.").

187. *See, e.g.*, George v. Associated Stationers, 932 F. Supp. 1012, 1015–16 (N.D. Ohio 1996) (indicating that because the defendant company did not require certification, "obligation shifted to the employer to determine whether leave was sought under the [FMLA] and to obtain any additional information," which ultimately led to litigation over discrepancies between the employer's and employee's interpretations of whether chicken pox constitutes a serious health condition).

188. *See* 29 C.F.R. § 825.311(c) (2017) (indicating that it is up to the employee to make a determination as to when he or she is fit to return to work); Albert v. Runyon, 6 F. Supp. 2d 57, 62–63 (D. Mass. 1998) (stating that an employer "may not force an employee to submit to a further examination before allowing her to return to work," particularly in the context of military caregiver leave under the FMLA).

189. *See, e.g.*, CAL. LAB. CODE § 3208.3 (West 2017); N.J. STAT. ANN. § 34:15-31 (West 2017).

190. Michael C. Schmidt, *Avoiding the Hazards of Economy-Driven Decisions*, LAW360 (Nov. 19, 2008, 12:00 AM), http://www.law360.com/articles/77543/avoiding-the-hazards-of-economy-driven-decisions; *see also* Deleva v. Real Estate Mortg. Corp., No. 1:04cv1299, 2007 U.S. Dist. LEXIS 45136, at *38 (N.D. Ohio June 21, 2007).

191. Schmidt, *supra* note 190.

192. *See* Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME L. REV. 879, 887 (1987); *see also* CAL. LAB. CODE § 3208.3; N.J. STAT. ANN. § 34:15-31 (allowing for "personal injuries" caused by "any compensable occupational disease arising out of and in the course of his [or her] employment," and defining "compensable occupational disease" as "all diseases arising out of and in the course of employment . . . due in material degree to causes and

compensation statute, for example, stress itself is not a mental disorder.[193] Nonetheless, an employee seeking workers' compensation for stress under California law may obtain compensation by showing that the stress caused a disability or need for medical treatment attributed to employment and that he or she has been professionally diagnosed.[194]

A second example of a workers' compensation statute that could provide relief to a stressed employee is New Jersey's workers' compensation statute.[195] According to the court in *Knight v. Audubon Savings Bank*,[196] this statute requires a petitioner asserting a stress-related claim to establish that a permanent disability resulted materially from "objectively verified" job-related stress.[197] The petitioner in *Knight* argued that having her supervisor scream at her, in addition to her heavy workload, made her job so stressful that it gave rise to a compensable psychiatric claim.[198] The Appellate Division of the Superior Court of New Jersey agreed with the trial judge that there was no compensable claim because the petitioner failed to provide evidence that the disability resulted from an "objectively verified" job-related stress situation,[199] which must be supported by evidence that above-normal work stress was the cause of the permanent psychiatric condition.[200] Thus, although the petitioner's evidence did not satisfy the statute, the court recognized that stress-related claims *could* be compensable.[201]

Under other workers' compensation statutes, a claimant must similarly show unusual stress that is "greater than the stress of everyday

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conditions . . . characteristic of or peculiar to a particular trade, occupation, process[,] or place of employment"); 4 LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 56.06 (2017) (describing the approach of various states' workers' compensation statutes toward claims involving stress); Logan Burke, *Finding a Way Out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 W. VA. L. REV. 889, 901—02 (2015).

193. Aya V. Matsumoto, *Reforming the Reform: Mental Stress Claims Under California's Workers' Compensation System*, 27 LOY. L.A. L. REV. 1327, 1327 n.3 (1994).

194. *See id.*

195. N.J. STAT. § 34:15-31.

196. Knight v. Audubon Sav. Bank, No. A-0173-11T1, 2012 N.J. Super. Unpub. LEXIS 1493 (N.J. Super. Ct. App. Div. June 26, 2012).

197. *Id.* at *7.

198. *Id.* at *1–2.

199. *Id.* at *10 (suggesting that had the petitioner established "that her psychiatric disability resulted from job-related stress," her stress-related claim could have been compensable).

200. Rolf C. Schuetz, Jr., American Bar Association, *Stressed at Work? You Might Have a Workers Compensation Claim*, GPSOLO EREPORT, July 2013, https://www.americanbar.org/publications/gpsolo_ereport/2013/july_2013/stressed_at_work_might_have workers compensation claim.html.

201. *See Knight*, 2012 N.J. Super. Unpub. LEXIS 1493, at *7.

life, or sometimes greater than that of ordinary employment."[202] For example, *Caron v. Maine School Administration District No. 27*[203] found that a petitioner must demonstrate stress that is "extraordinary and unusual in comparison to pressures and tensions experienced by the average employee."[204] The Supreme Judicial Court of Maine awarded benefits to a teacher who was assigned an increased teaching load, travel responsibilities, and other duties, and whose preparation time was reduced, causing stress-related symptoms that were found by the Workers' Compensation Commission to be beyond average or generalized stress.[205]

However, what exactly constitutes "extraordinary"[206] stress? In *Bedini v. Frost*,[207] the Supreme Court of Vermont upheld the Vermont Department of Labor and Industry Commissioner's standard that a claimant seeking compensation benefits for a stress-related disability must show that his stress levels at work were "of a significantly greater dimension than the daily stresses encountered by all employees."[208] The court found that it was reasonable to require a greater showing on the part of the claimant seeking benefits for mental injuries because of the greater degree of uncertainty in his diagnosis.[209] Thus, the court endorsed a standard whereby an employee's stress level should be measured based on a comparison to the stress of other employees.[210] Similarly, New York's workers' compensation law requires a showing that a claimant's stress was "greater than that which usually occurs in the normal work environment."[211] That showing must be substantiated by medical evidence and expert opinions that support a finding that the claimant's stress was extraordinary.[212] Yet the Commonwealth Court of Pennsylvania in *Jeanes Hospital v. Workmen's Compensation Appeal Board*[213] held that witnessing the death of a co-worker due to natural

202. LARSON & ROBINSON, *supra* note 192, § 56.06.
203. Caron v. Me. Sch. Admin. Dist. No. 27, 594 A.2d 560 (Me. 1991).
204. *Id.* at 562.
205. *Id.* at 562–63.
206. *Id.* at 562.
207. Bedini v. Frost, 678 A.2d 893 (Vt. 1996).
208. *Id.* at 894.
209. *Id.*
210. *Id.*
211. Marillo v. Cantalician Ctr. for Learning, 693 N.Y.S.2d 687, 688 (N.Y. App. Div. 1999) (quoting Troy v. Prudential Ins. Co., 649 N.Y.S.2d 746, 747 (N.Y. App. Div. 1996)).
212. *See* Paeth v. Hawk Frame & Axle, 643 N.Y.S.2d 737, 738 (N.Y. App. Div. 1996) (focusing on medical evidence and expert opinions in deciding whether substantial evidence existed to support the Workers' Compensation Board's determination regarding the permanency of the claimant's condition).
213. Jeanes Hosp. v. Workmen's Comp. Appeal Bd., 595 A.2d 725, 729 (1991).

causes is not so abnormal as to support an award of workers' compensation benefits due to stress.[214] Thus courts may still have discrepancies in determining when an employee's stress meets the requisite level of extraordinariness sufficient to warrant FMLA leave just as with workers' compensation.

Similar to this predominant pattern in workers' compensation law of requiring a showing of above-normal stress, and given prior FMLA case law determining that generalized stress claims do not qualify for FMLA leave,[215] the FMLA should likewise require employees to demonstrate above-normal levels of stress in order to qualify for leave. To do so, and to avoid confusing interpretations of what constitutes above-normal levels of stress, the FMLA should require employees to provide objective medical evidence and expert opinions in the form of medical certifications, including diagnoses from health care providers, when seeking leave due to stress and other conditions. To promote consistency, such medical certifications should be mandated by the FMLA, rather than merely leaving the decision of whether to seek certification to the discretion of individual employers.

### 2. Allowing Broader Contact Between Employers and Health Care Providers

In order to facilitate the medical certification requirement, an employer should be permitted to contact an employee's health care provider directly in order to gain information on the employee's condition. The DOL regulations state that an employer may not contact an employee's doctor directly, except to clarify the information provided on the medical certification with the employee's permission.[216] During recertification for FMLA leave, an employer may inform the health care provider if an employee has a pattern of excessive absences or absences indicating FMLA abuse, such as absences occurring on a "Friday/Monday basis."[217] The employer may ask the health care provider whether such a pattern is consistent with the employee's condition and may subsequently request recertification more frequently than the

214. *Id.*

215. Maitland v. Employease, Inc., No. 1:05-CV-0661-, 2006 WL 3090120, at *15–16 (N.D. Ga. Oct. 13, 2006).

216. 29 C.F.R. § 825.307(a) (2017).

217. *Cf.* U.S. Dep't of Labor, Opinion Letter FMLA2004-2-A (May 25, 2004), at 1, https://www.dol.gov/whd/opinion/FMLA/2004_05_25_2A_FMLA.pdf (citing 29 C.F.R. § 825.308(a)(2)) (stating that "a pattern of Friday/Monday absences" without a medical reason for the timing of such absences may "cast[] doubt upon the employee's stated reason for the absence" and justify recertification "more frequently than every 30 days").

FMLA's standard 30-day minimum for recertification requests.[218] However, an employer generally may not "request additional information from the employee's health care provider"[219] regarding the severity or validity of the employee's condition or certification, but may obtain updated information to some extent on the employee's condition by requesting a recertification.[220]

The reason for this limitation lies in the need to protect the confidentiality of employees' medical records by prohibiting broad contact between employers and health care providers[221] as well as to prevent "an employer from coercing a provider to change an employee's certification."[222] However, this limitation often leaves it up to the employer to determine both the validity of an employee's claim and the severity of the condition, determinations that can have a serious impact on whether and in what form the employee can take FMLA leave.[223] Prohibiting such contact places an additional burden on employers and employees alike, forcing the expense of obtaining a second or third certification on employers when the validity of the first certification is in question, and forcing employees to give up their time to meet with another health care provider.[224]

To correct for these additional burdens, employers should be allowed to contact an employee's health care provider directly with the employee's permission, or in the employee's presence, for broader purposes in addition to clarification and recertification. Enabling employers to discuss the employee's situation more generally with health

218. *Id.*; *see also* 29 C.F.R. §825.308(c)(3) (stating that if an employee "plays in company softball league games" while on FMLA leave "due to the employee's knee surgery," the employer may be justified in doubting "the continuing validity of the certification allowing the employer to request a recertification in less than 30 days").

219. 29 C.F.R. § 825.307(a).

220. *See id.* § 825.308(e) (implying that although an "employer may [only] ask for the same information when obtaining recertification as that permitted for the original certification," such recertification can provide the employer with updated information on the employee's condition).

221. *See id.* § 825.307(a) ("The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule . . . which governs the privacy of individually-identifiable health information . . . must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider.").

222. Daspit, *supra* note 29, at 1378.

223. *See id.* (stating that "[i]t is unclear just how literally one should interpret" the prohibition on an employer requesting "additional information" from an employee's health care provider, which imposes an "undue burden on both the employer and the employee" in interpreting FMLA claims).

224. *See id.* (arguing that an absolute ban on contact between an employer and an employee's health care provider is an "undue burden on both the employer and the employee" in that "forcing an employer to pay for an employee's second opinion is more expensive and time consuming than a phone call").

care providers would give employers more information on the necessity and form of leave that would most benefit the employee, without leaving the employer at a loss in terms of cost and productivity.[225]

Although the recertification and clarification requirements serve as a check on employers to protect employees' medical records, they also impose limitations that make getting adequate information difficult.[226] In particular, the fact that employers may only request recertification "no more often than every 30 days" and must wait until the "minimum duration" of the condition expires if that duration is longer than 30 days places a time constraint on employers who may be struggling with employee FMLA abuse.[227] To balance the need for employees' privacy with the employers' need for more accurate and comprehensive information, the proposed amendment to the DOL regulations would not necessarily eliminate the clarification or recertification boundaries.[228] Instead, it would allow employers to ask broader questions about the condition at both the clarification and recertification stages. The ability to ask broader questions would ultimately prevent employers from having to rely on vague and incomplete information regarding the employee's condition before recertification can take place.

If an employee must show above-normal levels of stress to qualify for FMLA leave as suggested above, an employer should be allowed to contact an employee's health care provider directly and with greater leeway than the FMLA and DOL regulations currently provide. Allowing for this level of contact would provide the employer with the opportunity to obtain comprehensive, objective, and expert information showing that the employee's symptoms exceed those of generalized or average stress claims. This requirement would ultimately benefit not only employers, but also employees by making the process for seeking certification smoother.

An additional model for the proposed amendment can be found in the ADA and its Enforcement Guidance, in which the Equal Employment Opportunity Commission (EEOC) recommends that an

225. *See id.*

226. *See id.* ("[I]f the employer has questions or needs clarification regarding the certification, but does not question its validity, it could contact the provider and resolve the questions. However, the regulations broaden the Act's language by adding that 'the employer may not request additional information from the employee's health care provider.'").

227. *See* 29 C.F.R. § 825.308(a)–(b) (2017).

228. *See id.* § 825.307(a) ("The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule . . . which governs the privacy of individually-identifiable health information . . . must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider.").

employer consult directly with an employee's doctor, with the employee's consent, if medical documentation is insufficient.[229] In light of this provision, some criticize the FMLA's prohibition on direct contact between an employer and an employee's health care provider as being "purely a product of the regulation" that is contrary to Congress's goals in enacting the ADA only three years before the FMLA.[230]

This contact prohibition also creates inconsistency for employers dealing with claims under both the FMLA and ADA, one of which enables them to contact doctors directly while the other does not, increasing the confusion and inefficiency of both Acts.[231] If the DOL regulations were amended to permit employers to contact employees' doctors directly in a manner and format similar to that provided by the ADA, not only would this solve the current issue of employers having inadequate information about employees' stress-related health conditions, but it would also facilitate better uniformity with the ADA, another major piece of legislation which employers must routinely interpret.

3. Requiring Medical Testimony

Another major problem with DOL regulations is that they do not clearly state if and when medical testimony is required at trial to prove a serious health condition.[232] Additionally, the regulations do not explicitly require testimony from an employee's health care provider.[233] Under the Federal Rules of Evidence, "[e]very person is competent to be a witness"[234] so long as the witness has "personal knowledge of the matter,"[235] meaning that anyone including laypersons with personal knowledge of an employee's health condition may testify as to that condition.[236] Although this type of testimony may be useful in some respects, it should not be the sole or primary source of evidence in

229. U.S. DEP'T OF LABOR, THE FAMILY AND MEDICAL LEAVE ACT: A REPORT ON THE REQUEST FOR INFORMATION 84, 88 (2007), https://www.dol.gov/whd/FMLA2007 Report/Chapter7.pdf; U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (2000), https://www.eeoc.gov/policy/ docs/guidance-inquiries.html.

230. *See* U.S. DEP'T OF LABOR, *supra* note 229, at 88.

231. *See id.*

232. Kalich, *supra* note 11, at 619.

233. 29 C.F.R. §§ 825.100–.803.

234. FED. R. EVID. 602.

235. FED. R. EVID. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony.").

236. *See* Kalich, *supra* note 11, at 619.

FMLA litigation.[237] A much more efficient and consistent standard should be introduced in the context of FMLA claims whereby medical testimony is necessary in all cases where certification is required in order to provide courts with better information regarding an employee's condition.

Courts have adopted varying standards for whether medical testimony is required for an FMLA case to survive summary judgment.[238] For example, the Seventh Circuit in *Haefling v. United Parcel Service, Inc.*[239] found that an employee's testimony regarding his chronic neck injury was inadequate to prove that a serious health condition existed.[240] The Seventh Circuit determined that the employee's "own self-serving assertions regarding the severity of his medical condition and the treatment it required" were insufficient to raise an issue of fact in the absence of an affidavit from medical personnel.[241] Similarly, in *Gudenkauf v. Stauffer Communications, Inc.*,[242] the plaintiff requested part-time leave due to back pain, nausea, headaches, and swelling as a result of her pregnancy.[243] The U.S. District Court for the District of Kansas concluded that the plaintiff's testimony as to her condition was insufficient evidence upon which to base a finding that the condition prevented her from performing her job.[244]

Meanwhile, the Third and Eighth Circuits permit lay testimony to supplement medical testimony.[245] In *Schaar v. Lehigh Valley Health Services, Inc.*,[246] the plaintiff's lay testimony about her lower back pain, fever, and nausea, which lasted longer than three days, in combination with her doctor's deposition that it was "possible, although very unlikely" that the plaintiff would not be able to work after three days, was found to create a genuine issue of material fact.[247] The Third Circuit allowed the lay testimony to prove the length of the plaintiff's illness,

237. *See infra* notes 245–49 and accompanying text.

238. Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156, 161 (3d Cir. 2010); Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148–49 (8th Cir. 2001); Haefling v. United Parcel Serv., Inc., 169 F.3d 494, 500–01 (7th Cir. 1999); Gudenkauf v. Stauffer Commc'ns, Inc., 922 F. Supp. 465, 475–76 (D. Kan. 1996); Lubke v. City of Arlington, 455 F.3d 489, 496–98 (5th Cir. 2006); Marchisheck v. San Mateo County, 199 F.3d 1068, 1074 (9th Cir. 1999); *see also* Kalich, *supra* note 11, at 619–20.

239. Haefling v. United Parcel Serv., Inc., 169 F.3d 494 (7th Cir. 1999).

240. *Id.* at 500–01.

241. *Id.* at 500.

242. Gudenkauf v. Stauffer Commc'ns, Inc., 922 F. Supp. 465 (D. Kan. 1996).

243. *Id.* at 469.

244. *Id.* at 475–76.

245. *See* Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156, 157, 161 (3d Cir. 2010); Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148–49 (8th Cir. 2001); *see also* Kalich, *supra* note 11, at 614–15.

246. Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156 (3d Cir. 2010).

247. *Id.* at 157, 161.

while still requiring medical testimony to prove that the incapacity was due to a serious health condition.[248] The court ultimately found "no support in the regulations to exclude categorically all lay testimony regarding the length of an employee's incapacitation."[249]

While lay testimony should be used to supplement medical testimony, it should not alone be considered sufficient, especially if an employee seeks FMLA leave for stress. Under the FMLA currently, an employee must show that work-related stress prevented the employee from performing the essential functions of the job.[250] In order to avoid conjecture, the FMLA should require medical testimony to be the primary source of information on the condition. Like in *Schaar*, lay testimony may be beneficial to demonstrate the duration or particular facts of the incapacity, but lay testimony should not be the sole source of evidence upon which courts rely.[251]

Some scholars have suggested that doctors spend too little time with patients to provide comprehensive and accurate testimony regarding the plaintiff's condition.[252] However, expert testimony is more likely to be accurate and objective than lay testimony, especially if lay testimony comes from the plaintiff or another individual lacking medical knowledge.[253] Additionally, in the case of chronic conditions such as stress, which often result in persisting mental and health disorders, a doctor is likely to have established and maintained a relationship with his or her patient and would thus have the capacity to speak to the patient's needs and condition.[254] On the other hand, medical diagnoses may be inaccurate.[255] Thus, allowing lay testimony from the plaintiff or a close

248. *Id.* at 161.
249. *Id.*
250. *See* 29 U.S.C. § 2612(a)(1)(D) (2012).
251. *See Schaar*, 598 F.3d at 161.
252. Kalich*, supra* note 11, at 632–33.
253. *See* Barry, *supra* note 8, at 957 (advocating for a medical-testimony-only standard to improve certainty and protect against fraudulent leave).
254. *See* Hurley v. Kent of Naples, Inc., Nos. 2:10-cv-334-FtM-29SPC, 2:10-cv-752-FtM-29DNF, 2011 WL 2217770, at *6 (M.D. Fla. June 7, 2011) (relying in part on the testimony of the plaintiff's doctor as to the details of the plaintiff's condition and the doctor's opinion on the plaintiff's inability to perform his job to come to a determination); Pierce v. Teachers Fed. Credit Union Found., No. 09-780 (JNE/FLN), 2010 WL 550998, at *5 (D. Minn. Feb. 9, 2010) (relying in part on clinic notes submitted by a nurse practitioner on details of the plaintiff's symptoms to come to a determination, but also noting the "paucity of [other] medical records" in the case, thereby implying that perhaps additional notes from the plaintiff's own attending doctor may have provided more clearly material information). *But see* Kalich, *supra* note 11, at 632 ("Lay witnesses, such as the employee herself, her spouse, or her friend may spend many hours with the injured party. Doctors, however, spend on average less than twenty-two minutes with each patient.").
255. *See* Kalich, *supra* note 11, at 632 (discussing "the prevalence of medical misdiagnosis").

family member or friend who observed the symptoms to support or rebut expert medical testimony would be valuable in many cases.[256]

Once again, workers' compensation law provides a foundation for a proposed solution. Under the Pennsylvania workers' compensation statute, a claim for stress or stress-related conditions requires a showing of "objective evidence that [the plaintiff] has suffered a psychiatric injury."[257] Therefore, the Commonwealth Court of Pennsylvania has found that a plaintiff cannot rely only on his own account to show that an injury was not a subjective reaction to normal working conditions.[258] In order to show objective evidence of an injury, a plaintiff claiming workers' compensation benefits in Pennsylvania must rely on expert medical testimony.

Thus, if an employee bears the burden of showing above-normal levels of stress under the FMLA, as is suggested above,[259] he or she should also be required to present expert medical testimony showing that his or her symptoms exceed those of generalized stress claims. Requiring expert medical testimony will prevent a flood of litigation over fraudulent FMLA claims.[260] It will also make it easier for courts to objectively determine whether employees' stress claims are generalized, or alternatively, whether they are specific and extraordinary enough to qualify as serious health conditions under the FMLA.

## V. CONCLUSION

The proposed amendments to the FMLA and DOL regulations offer several advantages that may extend beyond the issue of employee stress claims. First, and most importantly, the proposed amendments promote consistency, which is lacking in the current statutory language of the FMLA and DOL regulations.[261] They provide straightforward, bright-line rules that: (1) medical certification is required for stress claims;[262] (2) an employer must be allowed to contact an employee's health care provider

256. *Id.* at 631–33.

257. *See* Payes v. Workers' Comp. Appeal Bd. (Pa. State Police), 79 A.3d 543, 551–52 (Pa. 2013); Russella v. Workmen's Comp. Appeal Bd. (Nat'l Foam Sys., Inc.), 497 A.2d 290, 292 (Pa. Commw. Ct. 1985); Thomas v. Workmen's Comp. Appeal Bd., 423 A.2d 784, 787 (Pa. Commw. Ct. 1980).

258. Martin v. Ketchum, Inc., 568 A.2d 159, 164–65 (Pa. 1990).

259. *See infra* Section V.B.1.

260. *See* Kalich, *supra* note 11, at 617 (arguing that solely relying on lay testimony to prove a claim introduces a risk that "some employees will . . . be able to present their case to a jury based solely on these fraudulent claims," which may cause a flood of litigation).

261. *See supra* Section II.A.

262. *See supra* Section IV.B.1.

to gain more information about an employee's stress-related condition;[263] and (3) medical testimony is required when medical certification is also required.[264]

Second, the proposed amendments prevent ambiguity, another issue with the FMLA and DOL regulations.[265] Having clear information as to medical symptoms and a concrete diagnosis of stress or related conditions from an employee's health care provider will prevent employees from asserting fraudulent claims and will enable employers to follow a clear policy without having to utilize their own judgment in interpreting employees' claims.[266] These amendments will also prevent a flood of litigation over fraudulent claims based solely on potentially vague and less thorough lay testimony, and will make these cases more efficient and consistent.[267] Although the FMLA has been viewed as being more burdensome than constructive to employers, the proposed amendments to the FMLA would help streamline its application and increase efficiency, ensuring that employers and employees alike are able to take advantage of its benefits and protections, as Congress intended.

263. *See supra* Section IV.B.2.
264. *See supra* Sections IV.B.1–.3.
265. *See supra* Sections III, IV.B.
266. *See supra* Section IV.B.1.
267. *See supra* Sections IV.B.1, IV.B.3.