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Jessica Beckett-McWalter

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Notes

The Definition of “Serious Health Condition” Under the Family Medical Leave Act

JESSICA BECKETT-MCWALTER*

INTRODUCTION

Congress intended the Family Medical Leave Act of 1993 (the “Act” or “FMLA”) to provide “a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered [by] the act.” The FMLA allows an eligible employee to take up to a total of twelve work weeks of leave during a twelve-month period because of the employee’s serious health condition or in order to care for a child, spouse, or parent with a serious health condition. Legislative history indicates that Congress intended for the definition of “serious health condition” to be broad, but did not intend for it to cover short-term illnesses covered by other sick leave policies. Congress also wanted to protect employers from unforeseen costs associated with unexpected employee absences and employee abuse of leave provisions. The Department of Labor’s final regulations, promulgated to carry out the Act, contain an objective test to determine whether an illness constitutes a “serious health condition.”

Congress gave the Department of Labor the task of prescribing regulations to carry out the FMLA. The Act and these regulations, however, have proven difficult for courts, employers, and employees to in-

* J.D. Candidate, University of California, Hastings College of the Law, 2004; B.A., Brown University, 1998. I would like to thank Professor Reuel Schiller for his guidance and support and helpful comments on drafts of this Note. I would also like to thank Claire Hamady for her insightful comments and edits to earlier drafts of this paper.

5. 29 C.F.R. § 825.114(a) (2003).

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terpret and apply. The final regulations contain an objective "bright-line" test to determine whether an illness constitutes a "serious health condition." Case law reveals that this bright-line test is simultaneously over-inclusive and under-inclusive. An alternative to the Department of Labor's bright-line test is a subjective "balancing test" which would incorporate the factors found in the Department of Labor's test as well as two other factors that address Congress's concern that employees may abuse the Act's leave provisions. These two factors are (1) evidence of prior unexplained absences and (2) whether the employer received notice as required by the statute. A balancing test would lead the courts to look at the entire context of an employee's need for medical treatment and leave, which will result in more equitable and accurate determinations.

This Note argues that, contrary to the Department of Labor's desire to establish an objective test that would allow courts to reach accurate and predictable decisions, judicial outcomes under the Department of Labor's test are neither accurate nor predictable. Parts I and II consider the statute's language and Congress's intent in enacting the Act. Part III describes the Department of Labor's regulations. Part IV considers how the regulations apply to leave "in order to care for" family members with "serious health conditions." Part V examines how the Supreme Court has interpreted the Department of Labor's definition of "serious health condition" as a bright-line test. Finally, Part VI argues that the Department of Labor should replace its bright-line test.

I. THE STATUTORY LANGUAGE

In the forty years preceding the passage of the FMLA, "the United States experienced a dramatic revolution in the composition of the workforce," which had "a profound effect on the lives of working men and women." As of January 27, 1993, ninety-six percent of fathers and sixty-five percent of American mothers worked outside the home. The Senate found that families were struggling to perform an essential function of caring for themselves and their family members who required psychological or physical medical treatment. The goal of the FMLA was to provide basic leave for employees in a cost-effective manner for employers.

7. See infra Part IV.
10. Id. at 5-6, reprinted in 1993 U.S.C.C.A.N. at 7-8.
The FLMA states:
An eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

A. Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

B. Because of the placement of a son or daughter with the employee for adoption or foster care.

C. In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

D. Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.\(^\text{13}\)

The statute 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 facility; or (B) continuing treatment by a health care provider."\(^\text{14}\) The Act also requires the employee to give notice of intended leave:

The employee...shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave...except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide notice as is practicable.\(^\text{15}\)

The Senate Report states that an employee must provide the employer with at least thirty days' notice of the need for leave when that need is foreseeable.\(^\text{16}\) This thirty days' notice requirement does not apply in cases of medical emergency or other unforeseen events.\(^\text{17}\) An employer may additionally require an employee to support his request for leave with a certification of the condition issued by the health care provider.\(^\text{18}\) A sufficient certification includes the date the condition began, the likely duration of the condition, and appropriate medical facts regarding the condition.\(^\text{19}\) This certification is intended as "a check against employee abuse of leave."\(^\text{20}\) Both of these provisions were intended to reduce the

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\(^{14}\) Id. § 2611(11).

\(^{15}\) Id. § 2612(e)(2)(B).


\(^{17}\) Id.


\(^{19}\) Id. § 2613(b).

cost to employers by allowing them to anticipate a shortage in workforce and to control potential employee abuse of the leave provisions.21

II. THE SENATE’S DEFINITION OF “SERIOUS HEALTH CONDITION”

The major sticking point in enforcing the Act has been determining whether an employee has a “serious health condition” affording him the Act’s protection. The Senate Report explains that Congress intended the definition of “serious health condition” to be broad and cover various types of physical and mental conditions . . . [that] affect an employee’s health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery. . . . With respect to a child, spouse or parent, the term “serious health condition” [was] intended to cover conditions or illnesses that affect the health of the child, spouse or parent such that he or she is similarly unable to participate in school or in his or her regular daily activities.22

The Senate Report states that the FMLA was not intended to cover “short-term conditions for which treatment and recovery are very brief,” because the Senate assumed that such conditions would fall within even the most modest sick leave policies.23 Minor illnesses that last only a few days and surgical procedures that do not involve hospitalization and require only a brief recovery period were therefore not intended to be “serious health conditions” under the FMLA.24

The Senate Report provides a non-exhaustive list of serious health conditions that includes heart attacks, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, and spinal injuries.25 The list also includes “severe nervous disorders” and “ongoing pregnancy, miscarriages, complications or illnesses relating to pregnancy, severe morning sickness, the need for prenatal care, childbirth, and recovery from childbirth.”26 All of these conditions require absence from work for either the condition itself or continual medical treatment or supervision.27

21. Id.
23. Id.
24. Id.
26. Id.
27. Id.
III. THE DEPARTMENT OF LABOR'S REGULATIONS

Congress directed the Department of Labor to prescribe regulations as necessary to carry out the FMLA. On March 10, 1993, the Department of Labor published a notice of proposed rulemaking in the Federal Register and received a total of 393 comments before issuing the interim rules. In addition, the Department met with congressional staff and outside parties to provide background information and raise questions to be considered in preparation of the notice of proposed rulemaking. The Department also worked with the U.S. Office of Personnel Management (OPM) to coordinate their respective rulemaking efforts under the Act.

The Department received over 900 comments before issuing the final rules. The Department of Labor received eighty-eight comments on the definition of serious health condition alone. On January 6, 1995, the Department issued the final regulations to accompany the FMLA.

The final rules define “serious health condition” as an “illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment.” Inpatient care” is defined as an “overnight stay, including any period of incapacity or any subsequent treatment connected to such inpatient care.” “Incapacity” is defined as the “inability to work, attend school or perform other regular daily activities due to a serious health condition.”

In defining “continuing treatment,” the Department borrowed from the Office of Workers’ Compensation Programs. “Continuing treatment” by a health care provider includes one of five things. First, continuing treatment includes a period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that involves either two visits to health care provider, or one visit with a followed regimen of continual treatment. “Continual treatment” includes prescription drugs and/or therapy, and continued supervision. Some commentators were con-

30. See id.
31. Id. OPM administers the FMLA provisions that apply to Federal civil service employees.
32. Id.
33. Id. at 2192.
34. Id.
35. 29 C.F.R. § 825.114 (2003).
36. Id.
37. Id. § 825.114(a)(2)(i).
40. Id. § 825.114(b).
cerned that the "more than three days" requirement encouraged employees to stay home longer than needed. Others were concerned that the three-day requirement was contrary to the statute and argued that seriousness and duration do not necessarily correlate. Still others thought that the number of days should be extended. The final rules, however, require a period of incapacity of more than three consecutive calendar days.

The second form of continuing treatment is any period of incapacity due to pregnancy or prenatal care. The Department stated that it was clear from the Act's legislative history that pregnancy was intended to be treated as a serious health condition. It explained that "pregnancy was similar to a chronic condition in that the patient is periodically visiting a health care provider for prenatal care, but may be subject to episodes of severe morning sickness . . . which may not require an absence from work of more than three days." The third form of continuing treatment is any period of incapacity due to a chronic serious health condition. "Chronic serious health condition" is defined as one which:

A. Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

B. Continues over an extended period of time (including recurring episodes of a single underlying condition; and

C. May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

The fourth form of continuing treatment is a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The Department's final rules eliminated "incurable" as a requisite quality of a chronic or long-term health condition. The rules require instead that the condition involve a period of incapacity that is permanent or long-term and for which treatment may not be effective. The Department agreed with comments that argued that chronic illnesses should be covered by the Act even if incapacity did not

41. FMLA, 60 Fed Reg. at 2192.
42. See id.
43. See id.
44. Id. at 2195.
45. 29 C.F.R. § 825.114(a)(2)(ii).
46. FMLA, 60 Fed. Reg. at 2195.
47. Id.
48. 29 C.F.R. § 825.114(a)(2)(iii).
49. Id. § 825.114(a)(2)(iv).
50. FMLA, 60 Fed. Reg. at 2195.
last for three consecutive days, as long as the individual was under the supervision of a health care provider.\textsuperscript{51}

The fifth form of serious health condition involving continuing treatment is:

- Any period of absence to receive multiple treatments, (including any period of recovery therefrom), by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).\textsuperscript{52}

Although the final rules recognize chronic serious health conditions they do not require that the condition be chronic or long-term to qualify as a serious health condition because some conditions like cancer might not meet the test if immediate intervention occurs.\textsuperscript{53}

Many comments recommended including a list of illnesses as found in the legislative history.\textsuperscript{54} The Department declined to include such a list because its inclusion might lead employers to recognize only conditions on the list or to second-guess whether a condition is equally serious rather than apply the regulatory standard.\textsuperscript{55} The Department explained, however, that the common cold, flu, minor ulcer, headaches, upset stomach, routine dental or orthodontia problems, and periodontal diseases are not ordinarily serious health conditions.\textsuperscript{56}

In response to confusion in the courts regarding the applicability of the Act to minor illnesses, the Department of Labor issued two opinion letters.\textsuperscript{57} The first opinion letter, issued on April 7, 1995, stated that the flu, absent complications, did not meet the definition of serious health condition simply because an employee met the regulation’s bright-line test of three days of incapacity and treatment.\textsuperscript{58} On December 12, 1996, the Department of Labor issued an opinion letter retracting the April 7, 1995 opinion.\textsuperscript{59} This opinion letter clarified that minor conditions are not ordinarily serious medical conditions under the FMLA because they do

\begin{footnotesize}
\begin{enumerate}
  \item Id.
  \item 29 C.F.R. § 825.114(a)(2)(v).
  \item See FMLA, 60 Fed. Reg. at 2195.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Paula J. Dehan, Has the FMLA Been Stretched Beyond Its Intended Scope?, 29 N. Ky. L. Rev. 629, 632 (2002).
  \item Id.
  \item Id.
\end{enumerate}
\end{footnotesize}
not meet the regulatory definition of a serious health condition as outlined in 29 C.F.R. § 825.114(c). The letter states, however, that although minor illnesses would not usually meet the regulatory requirements, complications were not required in order for a minor illness to meet the requirements. The letter explains that the condition in question would be a serious health condition if it caused the employee to be incapacitated for three consecutive days and required a regimen of continuing treatment by a health care provider.

A. SUMMARY OF THE DEPARTMENT OF LABOR’S RULES FOR DETERMINING WHETHER AN EMPLOYEE HAS A “SERIOUS HEALTH CONDITION”

According to the Department of Labor’s regulations, a “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves:

1. **Inpatient Care** (i.e., an overnight stay) including any period of incapacity or any subsequent treatment therefore, or any subsequent treatment in connection with such inpatient care; or

2. **Continuous Treatment** by a health care provider, which includes any one or more of the following:
   a. Period of incapacity that involves either
      i. Treatment of two or more times by health care provider, or
      ii. Treatment on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care provider.
   b. A period of incapacity due to either
      i. Pregnancy; or
      ii. Prenatal care.
   c. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition which:
      i. Requires periodic visits for treatment by a health care provider, and

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61. Id.
62. Id.
ii. Continues over an extended period of time, and

iii. May cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc.)

d. A period of incapacity, which is permanent or long-term due to a condition for which treatment may not be effective.

e. Any period of absence to receive multiple treatments by a health care provider either for

   i. Restorative surgery after an accident or injury; or

   ii. A condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). 63

IV. THE COURTS’ INTERPRETATION OF “SERIOUS HEALTH CONDITION”

Although the Department of Labor’s test appears to allow flexibility, the test has proven difficult for employers and courts to implement. Defining “serious health condition” is difficult because the Department of Labor’s test, implemented by the federal courts, has not yielded consistent or predictable results. Rather, the case law indicates that the current definition of “serious health condition” is simultaneously under-inclusive and over-inclusive. The only way an employee can take a leave of absence from his job, attend to his or a family member’s medical condition, and be secure that his job will be waiting when he returns is if the condition meets the definition of a “serious health condition.” One employment attorney stated: “I sometimes tell clients that Department of Labor regulations on the FMLA have two booby traps a page. If you sat down to write something that would frustrate employers and make their lives difficult and absorb administrative attention of human resources people, you could not come up with anything that would do that much more than what we have.” 64 Many employers have problems “maneuver-
ing through the gray areas of defining which serious medical conditions and child care are covered under FMLA."

A. **Chevron Deference**

In *Chevron v. National Resources Defense Council*, the Supreme Court held that, when determining whether or not to defer to a Federal agency's interpretation of a statute, a court should ask two questions: (1) Has Congress spoken directly to the precise question at issue? And, if not, (2) Is the agency's answer based on a reasonable construction of the statute? If the statute is ambiguous and the agency's interpretation is reasonable, then the court should grant the agency "Chevron deference," which means that the court will defer to the agency's interpretation and not engage in its own analysis of the statute. When faced with interpreting the FMLA, courts have granted the Department of Labor's regulations *Chevron* deference.

Consistent with statutory language, the definition of "serious health condition" focuses on the effect of an illness on the employee and the extent of treatment, rather than on the particular diagnosis. Although this focus allows more flexibility than a list of covered illnesses would, in practice, courts appear to need even greater flexibility when assessing whether or not an illness qualifies as a serious health condition.

B. **Under-inclusiveness**

*Roberts v. Human Development Association* provides a good example of the under-inclusiveness of the bright-line test. The plaintiff was a home health care provider employed by Human Development Association (HDA) for approximately seven years prior to her termination. While working at the home of a patient on a Thursday, the then-sixty-four-year-old plaintiff began to experience extensive vaginal bleeding. She called her employer and told him to send a replacement so she could go to the emergency room. After she called several times, her employer told her a replacement would be sent. The replacement had not yet ar-

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67. Id.
69. Miller, 250 F.3d at 835.
70. 4 F. Supp. 2d 154 (E.D.N.Y. 1998).
71. Id. at 155.
72. Id. at 155–56.
73. Id. at 156.
rived when the plaintiff left.\textsuperscript{74} However, the plaintiff's daughter was there and said she would stay with her mother until the replacement arrived.\textsuperscript{75} The plaintiff went directly to the hospital and eventually underwent a dilation and curettage.\textsuperscript{76} A dilation and curettage requires a general anesthetic and involves opening the cervix and emptying the uterus by suction.\textsuperscript{77} The following day, the plaintiff called her employer to tell him that she would not be at work but instead received word that she had been terminated for leaving her job the previous day before a replacement had arrived.\textsuperscript{78}

The court granted summary judgment for the defendant because it concluded that plaintiff's condition did not constitute a serious health condition under the FMLA, which is a prerequisite for a FMLA wrongful termination claim.\textsuperscript{79} The court stated that since the plaintiff's time at the emergency room did not constitute "inpatient care" because she had not stayed overnight, the plaintiff therefore had to meet one of the definitions of "continuous treatment" to be covered by the Act.\textsuperscript{80}

The court applied the Department of Labor's test, which the court interpreted as requiring the plaintiff to show that she (1) was incapacitated, (2) had been seen once by a doctor, and (3) received a prescription for a course of medication such as antibiotics.\textsuperscript{81} The court held that the plaintiff failed to meet the threshold requirement of incapacity because she failed to show that she was incapacitated for more than three days.\textsuperscript{82} Although her doctor did not explicitly tell her to stay home on Friday, the court assumed that a patient would take a reasonable period of time to recuperate after undergoing a surgical procedure, which involved general anesthesia.\textsuperscript{83} The court stated that, even assuming that the plaintiff was incapacitated on Friday, she failed to show that she was incapacitated over the weekend.\textsuperscript{84} The plaintiff tried to argue that she had properly responded to an emergency situation by notifying her employer and that the ultimate duration of her condition should not preclude the Act's coverage.\textsuperscript{85} The court recognized the plaintiff's argument but stated that

\begin{itemize}
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} Id. at 163.
\item \textsuperscript{80} Id. at 158.
\item \textsuperscript{81} Id. at 158 (citing Brannon v. OshKosh B'Gosh, Inc., 897 F. Supp. 1028, 1036 (M.D. Tenn. 1995)).
\item \textsuperscript{82} Id. at 158.
\item \textsuperscript{83} Id. at 160.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id. at 162.
\end{itemize}
this "subjective approach to [determine] whether plaintiff had a serious health condition has no support in either the Act or its implementing regulations." 86

C. OVER-INCLUSIVENESS

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. In Thorson v. Gemini, Inc., the Eighth Circuit held that a stress-related ulcer and stomach ache was a serious health condition because the plaintiff was able to meet each of the elements of the bright-line test. 87 The court held that the plaintiff, Thorson, met the continuing treatment test because she saw her doctor three times, satisfying the regulation requirement that an employee be treated two or more times by a health care provider. 88 Thorson was absent from work for more than three days with a note from her doctor, indicating that she should not work. Thorson, therefore, was "incapacitated" as defined by the regulations. 89 The court stated that, "[s]ubjectively, it may be that Thorson's condition was not 'serious' in the usual sense of the word"; however, her condition met the bright-line test so she qualified for leave under the FMLA. 90

D. THE DURATIONAL ELEMENT OF INCAPACITY

These two results exemplify how the Department of Labor's test is both over- and under-inclusive and not in keeping with Congressional intent. In both instances, the courts relied on the Department of Labor's rigid requirement of "incapacity" that Congress did not explicitly require. Congress gave examples of illness that are covered by the FMLA and then stated:

All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery. They also involve either inpatient care or continuing treatment or supervision by a health care provider, and frequently involve both. 91

The legislative history does not suggest that a serious health condition requires incapacity for a certain duration. It does suggest, however,

86. Id.
87. 205 F.3d 370, 382 (8th Cir. 2000).
88. Id. at 377.
89. Id. at 381.
90. Id. at 379.
that absence from work is a factor in determining whether an illness rises to the level of seriousness to warrant leave.\textsuperscript{92}

The Department of Labor's bright-line test does not allow enough flexibility and is inadequate for determining whether a condition rises to the necessary level of seriousness to warrant leave. The regulations define inpatient care as well as continuous care as involving some period of incapacity.\textsuperscript{93} In order for a condition to qualify as an illness involving continuous treatment, the period of incapacity must be more than three consecutive days.\textsuperscript{94} During the notice and comment period, some contended that "seriousness and duration do not necessarily correlate."\textsuperscript{95} They argued that "a fixed time limit fails to recognize that some illnesses and conditions are episodic or acute emergencies which may require only brief but essential health care to prevent aggravation into a longer term illness or injury, and thus do not easily fit into a specified linear time requirement."\textsuperscript{96} The Women's Legal Defense Fund argued that Congress intended the severity and normal length of disabling conditions to be used as a general test and not a bright-line rule and suggested that if a condition is sufficiently severe or threatening, duration is irrelevant.\textsuperscript{97}

The requirement of incapacity creates rigidity and precludes coverage of serious conditions because courts use it as a threshold inquiry. The regulations define incapacity as "inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom."\textsuperscript{98} In \textit{Brannon v. Oshkosh B'Gosh, Inc.}, the court held that although the plaintiff saw a doctor and was given prescriptive drugs in addition to being absent from work for more than three days, she did not meet the definition of serious health condition because she could not show that she was "unable to work" or that her absence was "due to" her illness.\textsuperscript{99} Plaintiff's doctor testified that it was reasonable for a person to miss three or four days for plaintiff's type of illness, but the court found his testimony insufficient to prove that her absence was "necessary."\textsuperscript{100} Other courts have strictly read the regulations and have required that the plaintiff provide evidence not only

\textsuperscript{92} Id.
\textsuperscript{93} FMLA, 29 C.F.R. § 825.114(a)(1)–(2) (2003).
\textsuperscript{94} Id. § 825.114(a)(2)(i).
\textsuperscript{95} FMLA, 60 Fed. Reg. 2180, 2192 (Jan. 6, 1995) (codified at 29 C.F.R. § 825.114).
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} 29 C.F.R. § 825.114(a)(2)(i).
\textsuperscript{99} 897 F. Supp. 1028, 1037 (M.D. Tenn. 1995).
\textsuperscript{100} Id.
that the alleged condition caused the absence, but also that the plaintiff was not able to work during that absence. 101

The Sixth Circuit held that a plaintiff who suffered from rectal bleeding did not have a serious health condition under the FMLA because he was only absent from work for one and a half days for his illnesses and therefore did not meet the duration requirement found in the Department of Labor's regulations. 102 Other courts across the circuits have followed the Sixth Circuit's approach and have held that an illness did not qualify as a serious health condition when the period of incapacity was shorter than three days. 103

This strict reading of the regulatory language is insufficient when understood in the context of legislative intent. Consequently, some courts look to the legislative history to find more flexibility in the regulations. The First Circuit held that the FMLA covers intermittent absences as long as the plaintiff satisfied the more-than-three-consecutive-day requirement at some point. 104 The court concluded that intermittent leave was covered by the FMLA because Congress intended to include visits to

101. See Dey v. L. Marshall Roofing and Sheet Metal, Inc., No. 01-C-9810, 2002 WL 773989, at *4 (N.D. Ill. Apr. 29, 2002) (dismissing plaintiff’s claim on another basis but instructing plaintiff if she replead to describe her serious health condition and its effect on her job directly); Murray v. Red Kap Indus., Inc., 124 F.3d 695, 698 (5th Cir. 1997) (citing Brannon to support holding that plaintiff’s testimony failed to show that her absence from work was necessary). See also Barnhill v. Farmland Foods, Inc., No. Civ. A. 98-4152-CM, 2001 WL 487939, at *6 (D. Kan. Apr. 19, 2001) (holding that to survive summary judgment, “plaintiff must set forth evidence to establish that she was ‘unable to work at all’ or was ‘unable to perform any of the essential functions’ of her position within the meaning of the ADA”); Frazier v. Iowa Beef Processors, Inc., 200 F.3d 1190, 1192 (8th Cir. 2000) (stating that inability to perform one’s job is a requisite element of an FMLA claim); Burnette v. Vanguard Plastics, Inc., No. 95-1489-JTR, 1996 WL 749548, at *2 (D. Kan. Nov. 13, 1996) (holding plaintiff’s opinion testimony was insufficient to base a finding that her pregnancy and related conditions kept her from performing the functions of her job).


103. See Peterson v. Exide Corp., 123 F. Supp. 2d 1265, 1270 (D. Kan. 2000); Levine v. The Children’s Museum of Indianapolis, Inc., No. 1P00-0715-C-H/G, 2002 WL 1800254, at *7 (S.D. Ind. July 1, 2002); Ahern v. Dept. of Treasury, No. 99-3262, 1999 WL 1211868, at *1 (Fed. Cir. Dec. 13, 1999); see also Barnhill, 2001 WL 487939, at *6 (holding plaintiff’s absence for two and a half days was insufficient to meet the regulatory definition of serious health condition); Roberts v. Human Dev. Ass’n, 4 F. Supp. 2d 154, 160-61 (E.D.N.Y. 1998) (holding that plaintiff’s failure to show she was incapacitated over the weekend, even though recovering from a dilation and curettage operation, is not a serious health condition under the FMLA); Price v. Marathon Cheese Corp., 119 F.3d 330, 334 (5th Cir. 1997) (holding that because plaintiff left work early on Friday due to her condition and returned to work the following Monday, she did not satisfy the required period of incapacity); Cole v. Sisters of Charity of the Incarnate Word, 79 F. Supp. 2d 668, 672 (E.D. Tex. 1999) (holding plaintiff failed to prove she suffered from a serious health condition because there was no evidence that she was unable to perform functions of her job); Joslin v. Rockwell Int’l Corp., 8 F. Supp. 2d 1158, 1160 (N.D. Iowa 1998) (holding plaintiff failed to demonstrate that her allergic reaction to an allergy shot resulted in incapacity, and therefore her condition was not a serious health condition).

a doctor when the employee had symptoms that were eventually diagnosed as constituting a serious health condition, even if at the time of the initial medical appointments, the degree of seriousness was not yet determined. The court concluded that the regulations supported this interpretation of the statute because the definition of treatment included "examinations to determine if a serious health condition exists and evaluations of the condition." The First Circuit looked to legislative intent, noting that the regulations were broad agency interpretations of restrictive statutory language.

Congress stated that "[t]he term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief," because Congress expected that such illnesses would fall under company sick leave policies. The Department of Labor's regulations do not explicitly exclude coverage of minor illnesses. A Department opinion letter stated: "The regulations reflect the view that, ordinarily, conditions like the common cold and flu... would not [routinely] be expected to meet the regulatory tests, [but] not that such conditions could not routinely qualify under FMLA where the tests are, in fact, met in particular cases."

Many courts have struggled to apply the regulations to minor illnesses because the text of the Department of Labor's regulations allows any illness, regardless of severity, to warrant protection if the employee is absent from work for the requisite amount of time and receives some medical treatment. In assessing whether a stress-related ulcer constituted a serious health condition, the Eighth Circuit stated that "[s]ubjectively, it may be that the plaintiff's condition was not 'serious' in the usual sense of the word," but that her illness was a serious health condition because she was incapacitated for more than three days during which time she saw a physician two times, which constituted "continuing treatment" under the regulations. The court justified its decision by stating that the regulations were entitled to Chevron deference because the Department of Labor "reasonably decided" that allowing some minor illnesses to qualify for FMLA protection was "a 'legitimate trade-off' for having an objective test that all employers can apply uniformly." Unfortunately, the case law shows that neither employers nor courts are applying this

105. Id.
106. Id. (emphasis omitted).
107. Id. at 164-65.
109. See supra notes 57-62 and accompanying text.
112. Id. at 380.
objective test uniformly." In addition, Congress did not intend for the Department to create the rigid requirement of incapacity or the continuous treatment categories that allow minor illnesses to warrant FMLA leave.

E. PREGNANCY

Case law indicates that the regulations do not actually pose such a bright-line test when it comes to conditions relating to pregnancy. Congress included "ongoing pregnancy" in its list of examples of serious health conditions. In addition, Congress included "miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, [and] the need for prenatal care" in the list of examples of serious health conditions. The regulations state: "[A]n expectant mother may take FMLA leave... before the birth of the child for prenatal care or if her condition makes her unable to work." Courts have held that pregnancy per se does not constitute a serious health condition and therefore an expectant mother must show that she meets the test for continuous treatment or has, at a minimum, suffered a period of incapacity due to her pregnancy. Sections 825.112(c) and 825.114 of the Department of Labor Regulations seem to be inconsistent because section 825.112(c)

113. See Rankin v. Seagate Tech., Inc., 246 F.3d 1145, 1148-49 (8th Cir. 2001) (relying on Thorson, holding genuine issue of material fact existed as to whether flu meets the Department of Labor regulations which precluded summary judgment); Price v. City of Fort Wayne, 117 F.3d 1022, 1024-25 (7th Cir. 1997) (holding several diagnoses, no one of which rises alone to level of serious health condition, if taken together and temporally linked, can constitute serious health condition); Victorelli v. Shady-side Hosp., 128 F.3d 184, 190 (3d Cir. 1997) (correcting the district court for relying on legislative history for the proposition that a minor ulcer did not constitute a serious health condition and remanding the case to allow a jury to find whether the plaintiff has met the "regulatory standard"); Miller v. AT&T, 250 F.3d 820, 835 (4th Cir. 2001) (stating definition adopted by the Department of Labor whereby FMLA coverage may include illnesses that Congress never envisioned would be protected; however, the regulations are not "so manifestly contrary to congressional intent as to be considered arbitrary"); Stüb v. T.A. Sys., Inc., 984 F. Supp. 1075, 1088-89 (E.D. Mich. 1997) (holding two doctors' visits after plaintiff's son's death constituted continuous treatment, therefore plaintiff's leave falls under the FMLA).


115. See infra note 119.


117. Id.

118. 29 C.F.R. § 825.112(c) (2003).

119. See Gudenkauf v. Stauffer Communications, Inc., 922 F. Supp. 465, 476 (D. Kan. 1996) (holding plaintiff failed to show that her pregnancy and related conditions kept her from performing the function of her job for more than three days); Dormeyer v. Comerica Bank, No. 96-C-4805, 1997 WL 403597, at *2 (N.D. Ill. July 11, 1997) (holding that pregnancy per se is not a serious health condition and plaintiff must show she was incapacitated and therefore unable to work in order to qualify for FMLA leave); Whitaker v. Bosch Braking Sys. Div. of Robert Bosch Corp., 180 F. Supp. 2d 922, 929 (W.D. Mich. 2001) ("Plaintiff can succeed in establishing her claim only if she can establish a period of incapacity due to her pregnancy.")
appears to set out a separate requirement for pregnancy but does not explain how long a pregnant women needs to be unable to work to qualify for FMLA leave.\textsuperscript{120} Courts have made sense of this discrepancy by creating a slightly less stringent incapacity requirement for pregnancy.\textsuperscript{121} However, it is not clear that this is what Congress or even the Department of Labor intended.

\section*{F. Care for a Family Member with a “Serious Health Condition”}

The case law regarding leave to care for a family member with a “serious health condition” does not clarify the general definition of “serious health condition” under the Act. The FMLA allows an employee to take leave “to care for” his or her spouse, son, daughter, or parent with a serious health condition.\textsuperscript{122} The Department of Labor regulations state that “needed to care for” encompasses both physical and psychological care.\textsuperscript{123} This type of care includes “situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor.”\textsuperscript{124} The term also allows for “providing psychological comfort and reassurance which would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.”\textsuperscript{125}

Despite the broad regulatory language, courts have taken a very strict textual approach to interpreting the language of the statute. A district court in Illinois held that the leave provision envisioned by Congress was leave that was necessary to provide care to a family member who could not care for him or herself.\textsuperscript{126} Although the right to visit one’s aging parent may be within the FMLA’s overall statutory objective, the court held that it does not appear within the literal coverage allowed by the language of the statute because the plaintiff did not establish that her mother required her care.\textsuperscript{127} The court did not consider the Department of Labor’s regulations in its decision.\textsuperscript{128} A district court in Louisiana took a similar approach when it stated that “[t]he plain language of the FMLA requires that [plaintiff’s] leave request be for the purpose of caring for an

\begin{thebibliography}{99}

\bibitem{120} 29 C.F.R. § 825.112(c).
\bibitem{122} 29 C.F.R. § 825.116.
\bibitem{123} Id.
\bibitem{124} Id.
\bibitem{125} Id.
\bibitem{126} Cianci v. Pettibone Corp., No. 95 C 4906, 1997 WL 182279, at *7 (N.D. Ill. Apr. 8, 1997).
\bibitem{127} Id.
\bibitem{128} Id.
\end{thebibliography}
ill parent, nothing more." The court did not look to the Department of Labor's regulations in determining what care entailed, but did find that the plaintiff provided ample evidence of the "need to care" to survive summary judgment.

Many courts have followed the bright-line test for serious health conditions in determining whether a family member's condition constitutes a serious health condition. In a parental leave case, the Ninth Circuit held that neither the physical injuries nor the emotional trauma associated with a beating constituted a serious health condition under the FMLA. The physical injuries did not rise to the level of a serious health condition because the plaintiff's son did not receive treatment two or more times. The psychological trauma did not constitute a serious health condition because the plaintiff's son's drug counselor did not evaluate or examine the son specifically for the emotional trauma caused by this beating. In addition, neither injury resulted in an incapacitation for the requisite amount of time. The Ninth Circuit did refer to the regulatory definition of "to care for" but concluded that the plaintiff failed to show that moving her son to the Philippines to keep him safe constituted caring for her son. The Eighth Circuit held that the emotional trauma of sexual abuse of an employee's son did not constitute a serious health condition because there was no evidence that the condition incapacitated the son for the requisite amount of time. These cases further demonstrate the Department of Labor's test, as implemented by

130. Id. at *2.
132. Marchisheek v. San Mateo County, 199 F.3d 1068, 1075 (9th Cir. 1999).
133. Id. at 1074.
134. Id. at 1075.
135. Id. at 1076.
136. In a more recent case, the Ninth Circuit reversed a summary judgment motion, however the court held that the plaintiff must show that his father's depression resulted in an incapacity in addition to the fact that he received continuous treatment pursuant to the Department of Labor regulations. Scamihorn v. Gen. Truck Drivers, 282 F.3d 1078, 1086–87 (9th Cir. 2002).
137. Martyszzenko v. Safeway, Inc., 120 F.3d 120, 123 (8th Cir. 1997). In a more recent case, the Eight Circuit used the same bright-line regulatory test for serious health condition, but reversed a summary judgment order and held that a three year old's ear infection might be a serious health condition if the plaintiff could show that the child was incapacitated and received the requisite treatment from a health care provider. Caldwell v. Holland of Tex. Inc., 208 F.3d 671, 676–77 (8th Cir. 2000).
the courts, does not take into account the effect of the illness on the individual, but merely focuses on whether the individual is incapacitated and made the requisite number of visits to the doctor.\textsuperscript{138}

V. \textbf{POSSIBLE SOLUTIONS}

The case law indicates that the Department of Labor's bright-line test for determining whether an employee has a serious health condition produces results that are both under-inclusive and over-inclusive and inconsistent depending on the type of condition the court is considering.\textsuperscript{139} In the FMLA, Congress charged the Commission on Leave to study the existing and proposed mandatory and voluntary family and medical leave policies of both covered and non-covered employees, as well as their costs, benefits, and impact on productivity.\textsuperscript{140} The Commission failed to study the judiciary's enforcement of the Act.\textsuperscript{141} The Commission on Leave Report and several proposed bills have addressed the shortcomings of the Act. However, none of these efforts have resulted in a better test. The proposed bills would simply serve to make the current test more rigid.\textsuperscript{142} The Department of Labor should replace its bright-line test with a balancing approach: one that would allow courts to consider all of the factors found in the regulations equally in addition to other factors in line with congressional intent.

\textsuperscript{138} When an employee wants to take leave to care for an adult family member, the condition of that family member must rise to an even higher level than that of a child. See 29 U.S.C. § 2611(12) (2006). The FMLA defines the term "son or daughter" as: "[a] biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is: (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." \textit{Id.} The Department of Labor's regulations state that "incapable of self-care" means the individual "requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs)." 29 C.F.R. § 825.113(c)(1) (2003). In defining physical or mental disability, the regulations reference the definition found in the Equal Employment Opportunity Commission's regulations under the ADA. \textit{Id.} § 825.113(c)(2). The \textit{Navarro} court held that 29 U.S.C. § 2611(12)(B) may be satisfied by various combinations of factors which were used for ADA purposes to determine whether an individual was substantially limited in a major life activity. \textit{Navarro v. Pfizer Corp.}, 261 F.3d 90, 97 (1st Cir. 2001). Other circuits have not yet commented on what the test should be. This case indicates that the regulations are far from clear.

\textsuperscript{139} \textit{See supra} Part IV.

\textsuperscript{140} DEP'T OF LABOR & COMM'N ON LEAVE, \textit{A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES xiv–xv} (1996).

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{See infra} notes 162–73.
A. The Commission on Leave’s Report

The Commission on Leave began its research in November 1993. The Commission was composed of congressional leaders, representatives of women and families, labor and business communities, and ex-officio cabinet members from federal agencies with direct interest in family and medical leave issues. The Commission coordinated a variety of research and information gathering efforts. The data was collected in 1995 after an eighteen-month period beginning in January of 1994.

The Commission’s report was very favorable and indicated that there were very few problems with administering the FMLA. According to the report, two-thirds of the U.S. labor force, including private and public sector employees, work for employers covered by the FMLA. Two-thirds of covered worksites have changed some aspect of their policies to comply with the Act. The most common change has been to expand the range of reasons for which employees can take leave. For example, 69.3% of covered worksites have changed their policies to provide leave for fathers to care for seriously ill or newborn children. The report stated that very few employers have found that compliance entails additional costs. It also stated that most employers have found it “relatively easy to administer the FMLA.” Between 86.4% and 95.8% of employers report that FMLA has had no noticeable effect on business performance. The employee survey results show that 16.8% of employees have taken leave for a reason covered by the FMLA and 3.4% of employees have needed to but did not take leave. The reason most frequently cited for future leave was care for a seriously ill parent. About a quarter of leave was taken by relatively young parents to care for their children at birth, adoption or during a serious illness. Ten percent of

143. DEP’T OF LABOR & COMM’N ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES xiv (1996).
144. Id.
145. Id.
146. See id. at xv.
147. Id.
148. Id. at xvi.
149. Id.
150. Id.
151. Id.
152. Id. at xvii.
153. Id.
154. Id. at xviii.
155. Id. at xix.
156. Id.
157. Id. at xx.
leave was taken by older employees to care for ill parents or spouses. The serious health problems in general, men took more leave for their own serious health conditions than women.

While the Commission's report focused on a cost-benefit analysis of the FMLA, it did not look at judicial enforcement of the Act, nor did it assess whether the bright-line test resulted in consistency and predictability as the Department of Labor intended. Consequently, several Congressional representatives have addressed the lack of judicial uniformity and predictability.

B. PROPOSED AMENDMENTS TO THE FMLA

In response to the difficulty in judicial application of the regulations, several senators introduced legislation to clarify the FMLA. On August 5, 1999, Senator Gregg of New Hampshire introduced Senate Bill 1530 to the Senate, which proposed to clarify the FMLA. The bill stated that the FMLA "is not working as Congress intended when Congress passed the Act in 1993." It went on to state that the Department of Labor regulations are overbroad and have caused many problems by expanding the Act's coverage to apply to many non-serious health conditions. The bill also stated that the Commission on Leave failed to identify many problems with compliance because the studies were done too soon after the enactment of the FMLA, and that this problem arose only when employers tried to comply with the Department of Labor's final regulations. The bill proposed two changes to the definition of "serious health condition." First, the bill provided an exclusion clause which stated that, "the term ['serious health condition'] does not include a short-term illness, injury, impairment, or condition for which treatment and recovery are very brief." Second, the bill provided a list of examples of what the term "serious health condition" includes, which mirrored the list found in the Senate and House Reports that accompanied the FMLA. On May 19, 2000, Congressman Goodling of Pennsylvania introduced House Bill
4499 to amend the Family Medical Leave Act.168 This bill was similar to S. 1530, but provided a slightly different proposed amendment. The bill began with the same findings stated in S. 1530.169 The bill specifically excluded short-term conditions for which treatment and recovery were very brief, and provided a list of conditions included in the term "serious health condition."170 This list was the same list found in the Senate and House Reports that accompanied the FMLA.171

Although these bills would enact Congressional intent, the problem with both of these proposals is that they would have served only to further restrict the application of the regulations by moving the focus away from the effects of the condition on the employee to the actual diagnosis of the condition. The Department of Labor rejected suggestions similar to those found in these bills during the notice and comment period.172 The Department explained that it did not consider it appropriate to include in the regulation a "laundry list of serious health conditions listed in the legislative history because their inclusion may lead employers to recognize only conditions on the list or to second-guess whether a condition is equally serious, rather than apply the regulatory standard."173

C. A PROPOSED BALANCING TEST

The Department of Labor should abandon the current test and replace it with a balancing test, which would include all of the factors found in the so-called "objective test." Courts should consider the following factors as they assess whether or not an employee is entitled to FMLA leave: (1) whether the employee received inpatient care; (2) whether the employee was incapacitated by the alleged condition; (3) the extent, nature and duration of incapacity; (4) whether the employee received treatment for the alleged condition; (5) the frequency, extent, and nature of the treatment; (6) evidence of prior unexplained absences; and (7) whether the employer received notice as required by the statute.174

This balancing test would allow the courts to determine in a more realistic manner whether a condition rises to the level of seriousness that warrants leave. For example, in Roberts v. Human Development Association, the court would have had more flexibility in determining whether or

169. Id. § 2(1).
170. Id. § 3(a).
171. Id.
173. Id.
174. See, e.g., Bailey v. Amsted Indus., Inc., 172 F.3d 1041, 1045–46 (8th Cir. 1999) (holding that plaintiff failed to give his employer adequate notice under the FMLA and that his seventy-two unexcused absences justified his termination).
not plaintiff's severe vaginal bleeding was a serious health condition. According to the first factor, the employee did not receive inpatient care as defined by the regulations because she did not spend the night in the hospital.\textsuperscript{175} The facts indicated, though, that the plaintiff was incapacitated by the condition for at least one and a half days.\textsuperscript{176} Unlike the bright-line test found in the regulations, the balancing test would have allowed the court to consider the nature and extent of an employee's incapacity in addition to its duration. In this case, during the plaintiff's incapacity, she went directly to the emergency room and underwent outpatient surgery.\textsuperscript{177} The plaintiff was sixty-four years old, and as the court recognized, it was conceivable that an older woman's healing process may be a slower.\textsuperscript{178} The following day, which was a Friday, she intended to recuperate at home, and she presumably intended to recuperate over the weekend as well.\textsuperscript{179} The plaintiff did receive treatment for her condition in the form of outpatient surgery.\textsuperscript{180} Although plaintiff's treatment did not constitute inpatient care, the fifth factor in the balancing-test would have allowed the court to consider the frequency, nature and extent of that treatment. The plaintiff's treatment consisted of undergoing a surgical procedure performed while she was under general anesthesia.\textsuperscript{181} Under a balancing test approach, the court would have also considered information regarding how long such a procedure takes, the pain and discomfort patients feel afterwards, and whether the procedure required follow-up examinations with a health care provider. There was no evidence that the plaintiff has any prior unexplained absences. The danger that the plaintiff was trying to abuse the FMLA was small because there was no indication that she was frequently absent from work. Finally, the court would have considered whether the employee gave her employer adequate notice. Although the statute requires a thirty-day notice, it also recognizes that there are instances where this is not possible and instructs employees to provide "such notice as is practicable."\textsuperscript{182} The evidence indicated that the plaintiff gave her employer notice of her condition as soon as she could.\textsuperscript{183} She called her employer and asked him to send a replacement.\textsuperscript{184} In addition, she called

\begin{itemize}
  \item \textsuperscript{175} Roberts v. Human Dev. Ass'n, 4 F. Supp. 2d 154, 158 (E.D.N.Y. 1998).
  \item \textsuperscript{176} Id. at 156.
  \item \textsuperscript{177} Id.
  \item \textsuperscript{178} Id. at 160.
  \item \textsuperscript{179} Id. at 156.
  \item \textsuperscript{180} Id.
  \item \textsuperscript{181} Id. at 160.
  \item \textsuperscript{183} Roberts, 4 F. Supp. 2d at 156.
  \item \textsuperscript{184} Id.
\end{itemize}
her employer in the morning of the following day to tell him that she would not be able to work that day.185 By considering all of the factors in the balancing test, the court could have used a subjective approach and found that the plaintiff's condition did constitute a serious health condition, and therefore her claim for wrongful termination could survive summary judgment.

Not only would this balancing test address the problem of under-inclusiveness, it would also address the problem of over-inclusiveness. Thorson v. Gemini, Inc. provides a good example.186 Thorson did not receive inpatient care and the evidence was inconclusive as to whether or not Thorson was incapacitated.187 The evidence indicated that she was absent from work for more than three days and had a note from her doctor.188 The court concluded that there was no genuine issue of fact regarding her incapacity because Thorson's employer failed to require her to provide medical certification.189 Therefore, there was no evidence regarding the third factor, the extent or nature of Thorson's alleged incapacity.

Thorson received treatment on two different occasions in a period of a few days.190 Thorson's treatment consisted of two doctor's visits regarding her diarrhea and stomach cramps.191 The first doctor did some tests for a peptic ulcer or gallbladder disease, but the test results were normal.192 Three weeks after the first doctor's visit, Thorson saw another doctor who determined that she had stress-related hiatal hernia, mild antral gastritis, which could be treated with antacid, and duodenitis.193 Thorson's condition did not require surgery or any hospitalization.194 In addition, there was no indication that Thorson needed to recuperate from either of these doctor's visits or that her subsequent treatment would be debilitating in any way.195

The court noted that Thorson was fired because she exceeded the five percent acceptable absenteeism policy at Gemini.196 This limit covered all absences regardless of cause, excluding holidays, scheduled vacations and approved leaves of absence.197 The court's observation indicates

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185. Id.
186. 205 F.3d 370 (8th Cir. 2000).
187. Id. at 381.
188. Id.
189. Id. at 382.
190. Id. at 374.
191. Id.
192. Id.
193. Id.
194. Id.
195. See id.
196. Id.
197. Id.
that there was evidence of prior unexplained absences, which suggests that Thorson may have tried to abuse the FMLA leave provisions by claiming that her condition constituted a serious health condition. Finally, it was clear that Thorson gave her employer a doctor’s note stating that she could not work the days she had been absent. The evidence indicated, however, that she left work early complaining of diarrhea and stomach cramps and there was no indication that she went through any formal process to notify her employer of her need for leave. The statute requires an employee to give such notice as is practicable. It appeared that Thorson gave notice only after she went to the doctor, rather than as soon as she was aware of her condition. On balance, Thorson’s condition might not have constituted a serious health condition because the nature and extent of her incapacity and treatment was minimal and there was some indication that she may have tried to abuse the FMLA leave provisions.

CONCLUSION

The Department of Labor’s regulations interpreting the Act have not resulted in uniformity or consistency in how employers or courts determine whether an employee qualifies for leave under the Act. Courts have not applied the regulations in a uniform and consistent manner. The Department should amend the regulations to reflect a broader definition of “serious health condition.” Defining a “serious health condition” is inherently difficult because illnesses affect individuals in different ways. Duration is not the most important criterion. A balancing test allows courts to consider how an illness affects an individual and his ability to work. Although courts will come to different conclusions under a balancing test, the results are likely to be more accurate and equitable because the court will be able to look at the context of the illness and the employee’s need for leave. The Department of Labor should amend its regulations to give the courts more flexibility in determining whether an illness is serious enough to warrant FMLA leave.

198. Id.
199. Id.
201. See Thorson, 205 F.3d at 374.
202. See supra Part VI.