NOTES & COMMENTS

MORE THAN THE MINIMUM: WHY STATES SHOULD ENACT BETTER FMLA EQUIVALENTS

by
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For many workers, taking time off from work for a serious health condition or to care for a family member's serious health condition is complicated. Since 1993, the Family Medical Leave Act (FMLA) has provided job protection for workers who take leave. However, not all workers are covered. This Comment looks at where the FMLA comes up short, how some states are providing broader coverage and more robust benefits, and advocates for states to continue improving upon the FMLA baseline.

* J.D., Lewis & Clark Law School, 2023, Lead Article Editor 2022–23, Lewis & Clark Law Review. I would like to thank the editors who worked on this Comment and made it better than I could have alone. I would also like to thank Professor Henry Drummonds, for his guidance in writing this Comment, and Professor Sandy Patrick, for being a source of encouragement throughout law school. Lastly, I would like to thank my creators: mom and dad.

INTRODUCTION

Over 150 million people work in the United States.[1] This year, some of them will inevitably need to take time off work because they get sick, injured, or must care for a family member. Some workers will miss days of work, but others will need to miss weeks or months of work. Many employees facing these situations risk losing wages—or even their job—if they decide to take leave from work, with the only alternative being to stay at work despite their own serious health condition or that of a family member who is left alone and in need of care.[2] The Family Medical Leave Act (FMLA)[3] was designed by Congress to address these problems; however, it does not solve them.[4] Many state legislatures have enacted local equivalents to the FMLA that, although not perfect, provide additional support for workers.[5]

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[1] Aaron O'Neill, *Employment in the United States from 2013 to 2023*, STATISTA (June 14, 2022) https://www.statista.com/statistics/269959/employment-in-the-united-states/.

[2] Elise Gould & Jessica Schieder, *Work Sick or Lose Pay?*, ECON. POL'Y INST. (June 28, 2017) https://www.epi.org/publication/work-sick-or-lose-pay-the-high-cost-of-being-sick-when-you-dont-get-paid-sick-days/.

[3] Family and Medical Leave Act (FMLA) of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 & 29 U.S.C.).

[4] *See infra* Section II.A.

[5] *See infra* Section III.A.

This Comment advocates for states to increase coverage beyond the FMLA baseline, provide paid family medical leave, and clarify the analytical framework for interference claims[6] in the statutory text to ensure more predictability with state law claims in federal courts.[7] In Part I, this Comment highlights the major flaws of the FMLA and the *McDonnell Douglas* test, which is imported to the FMLA from Title VII and has created serious inconsistencies in FMLA litigation. Part II then looks at how state equivalents to the FMLA address aspects of the FMLA's coverage and paid leave problems, also highlighting the importance of statutory text. Part III advocates for states to broaden coverage for family and medical leave, enact paid leave statutes, and use statutory language to guide courts in analyzing leave interference claims.

I. THE FMLA: A GOOD START, BUT WITH SIGNIFICANT FLAWS

A. The FMLA Provides Only Basic Protection to a Limited Number of Employees

In 1993, Congress enacted the FMLA in part to "balance the demands of the workplace with the needs of families," and "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."[8] The FMLA provides "eligible employee[s]" up to 12 weeks of unpaid leave in a 12-month period for the birth or foster placement of a new child; to care for a family member[9] with a serious health condition; the employee's own serious health condition; or because of a "qualifying exigency" arising from an employee's family member's active duty in the armed forces.[10] Although unpaid, FMLA leave is job-protected, meaning that upon returning from FMLA leave, employees are entitled to the same or an equivalent position with equivalent "employment benefits, pay, and other terms and conditions of employment," including any benefits accrued before the employee took leave.[11]

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[6] This Comment uses the term "interference" to reference circumstances where an employee was subject to an adverse employment action because the employee inquired about family medical leave, invoked their rights under a family medical leave statute, or took family medical leave; although the exact word used by different jurisdictions' statutes varies. *See, e.g.*, OR. REV. STAT. § 659.492(2) (2022) (using the term "retaliate"); WIS. STAT. § 103.10(11)(a) (2016) (using the term "interfere").

[7] Because state equivalents cover the same factual scenarios as the FMLA, employee-plaintiffs can find themselves in federal court pleading concurrent federal and state causes of action. U.S. DEP'T OF LAB., THE EMPLOYER'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 6 (2016), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf.

[8] Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(b).

[9] Family member includes the spouse, son, daughter, or parent of the employee. *Id.* § 2611(7), (12), (13).

[10] *Id.* § 2612(a)(1).

[11] *Id.* § 2614(a)(1)–(2); NAT'L P'SHIP FOR WOMEN & FAMS., KEY FACTS: THE FAMILY AND MEDICAL LEAVE ACT 1 (2021), https://www.nationalpartnership.org/our-work/resources/

Since its enactment, the FMLA has been used by working people more than 300 million times to take leave for their own serious health condition or to care for a family member with a serious health condition.[12] Despite the FMLA appearing to provide broad coverage allowing workers to take leave when most necessary, in the decades following the FMLA's enactment, it has come under criticism for its lack of coverage in practice.[13]

First, the FMLA only applies to employers with 50 or more employees for a period of 20 or more work weeks in a year.[14] Thus, any employer that employs 49 or fewer employees, or more than 49 employees for less than 20 weeks in a year—other than government employers and public schools, which are covered under the FMLA regardless of how many employees they have[15]—is free to fire employees who take leave from work unless a state law otherwise covers them.[16] The 50-employee threshold is a significant obstacle for employees who need to take leave; in 2018, only 63% of employees who otherwise met the FMLA's eligibility requirements worked for a covered employer.[17] However, the FMLA was not designed to cover all employers. Some of the enumerated FMLA purposes are "to *balance* the demands of the workplace with the needs of families,"[18] but in a way that "accommodates the legitimate interests of employers."[19] Unpaid leave may be considered a burden for small companies,[20] but state equivalents to the FMLA have drawn the line at a

economic-justice/paid-leave/key-facts-the-family-and-medical-leave-act.pdf.

[12] NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 11, at 1.

[13] *See id.* at 2; Jennifer Ludden, *FMLA Not Really Working for Many Employees*, NPR (Feb. 5, 2013, 3:24 AM), https://www.npr.org/2013/02/05/171078451/fmla-not-really-working-for-many-employees; Press Release, Nat'l P'ship for Women & Fams., New Department of Labor Family and Medical Leave Data Illustrates Gaps in Coverage, Threatening the Financial Security of American Workers (Aug. 10, 2020), https://www.nationalpartnership.org/our-impact/news-room/press-statements/new-department-of-labor-data-shows-gap-in-coverage.html.

[14] U.S. DEP'T OF LAB., *supra* note 7, at 8.

[15] *Id.* at 10.

[16] Employers not covered by the FMLA or a state equivalent must still follow other applicable state law and company policies when terminating employment. *See, e.g.*, MONT. CODE ANN. § 39-2-904 (2021); *Labor Laws and Issues*, USA GOV, https://www.usa.gov/labor-laws (Jan. 18, 2023).

[17] SCOTT BROWN, JANE HERR, RADHA ROY & JACOB ALEX KLERMAN, ABT ASSOCIATES, EMPLOYEE AND WORKSITE PERSPECTIVES OF THE FAMILY AND MEDICAL LEAVE ACT: SUPPLEMENTAL RESULTS FROM THE 2018 SURVEYS 7 (July 2018), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf (worksite survey conducted for the U.S. Department of Labor).

[18] 29 U.S.C. § 2601(b)(1) (emphasis added).

[19] *Id.* § 2601(b)(3).

[20] Ludden, *supra* note 13.

smaller employee threshold without creating an excessive burden on employers who are not covered by the FMLA.[21]

Second, the FMLA provides a narrow definition of family members that an employee may take leave to care for. Employees are entitled to take FMLA to care for a spouse, son, daughter, or parent with a serious health condition.[22] Son or daughter has the broadest definition of the bunch: it includes "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis" that is under 18 years old, or a person over 18 years old and "incapable of self-care because of a . . . disability."[23] Spouse is more narrow. Defined as "husband or wife,"[24] a spouse under the FMLA does not include domestic partners. Also, before the U.S. Supreme Court upheld same-sex marriage as a constitutional right in *Obergefell v. Hodges*,[25] same-sex couples in states that did not recognize same-sex marriage were not eligible to care for one another under the FMLA because they were not legally a husband or wife.[26] Parent has an even more narrow definition than spouse. The FMLA defines parent as "the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter."[27] A parent under the FMLA does not include in-laws or any stepparent who became a stepparent after the employee was at least 18 years old.[28]

The parent definition creates serious dilemmas for employees. For example, when a married employee's parent is sick, whether the employee can take FMLA leave to care for the parent depends on whether the sick parent is an in-law. Moreover, where Spouse One works for a covered employer and Spouse Two does not, and Spouse Two's parent is sick, neither spouse has protected leave available to them

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[21] *See, e.g.*, OR. REV. STAT. § 659A.153(1) (2022) (covers employers with 25 or more employees); MINN. STAT. § 181.940(3) (2022) (covers employers with 21 or more employees); *see also* Danielle Corley, *Paid Leave Is Good for Small Business*, CTR. FOR AM. PROGRESS (Oct. 19, 2016), https://www.americanprogress.org/article/paid-leave-is-good-for-small-business/.

[22] § 2612(a)(1)(C).

[23] § 2611(12).

[24] *Id.* § 2611(13).

[25] Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see also* U.S. v. Windsor, 570 U.S. 744 (2013) (striking down the Defense of Marriage Act for violating same-sex couples' guarantee of equal protection under the Fifth Amendment).

[26] Jean L. Schmidt, *Same-Sex Married Couples Now Have Equal Rights to FMLA Leave Regardless of Their Residence*, LITTLER (Mar. 3, 2015), https://www.littler.com/same-sex-married-couples-now-have-equal-rights-fmla-leave-regardless-their-residence-0; 29 C.F.R. § 825.102.

[27] § 2611(7).

[28] To qualify as a parent, an individual must be *in loco parentis* "when the employee was a son or daughter." *Id.* Son or daughter is limited to when the person is under 18 or disabled to the point where they are incapable of self care. *Id.* § 2611(12). Thus, unless the person was a "parent" while the employee was a "son or daughter," they will not fit the definition even if they are otherwise the employee's legal parent.

and they must decide between caring for a parent (or parent-in-law) and job security.[29] In instances like the one just outlined, the narrow definitions of the FMLA may be the only thing preventing an otherwise eligible employee from taking needed leave while also keeping their job.

Although criticized, the FMLA still drastically changed the employment landscape without creating an excessive burden on small employers, who would experience the most significant hardship if unable to replace an employee who cannot work.[30] The FMLA also left plenty of room for states to experiment with their own family and medical leave laws, allowing states to supplement the FMLA with laws that reach more employees[31] and provide greater leave benefits.[32] However, simply because the FMLA provides protected leave for eligible employees does not mean that employers will adhere to the FMLA.[33] Courts play a vital role in preserving employees' rights and enforcing FMLA job protection.

B. The McDonnell Douglas *Test: A High Burden that Protects Employers at the Expense of Employees' Rights*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[34]

Today, the test used in most circumstances to determine discrimination under Title VII comes from *McDonnell Douglas Corp. v. Green*,[35] which utilizes a three-

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[29] *See* U.S. DEPT OF LAB., *supra* note 7, at 24. This scenario assumes neither spouse is otherwise covered by a state FMLA equivalent or employer plan.

[30] SOC. FOR HUM. RES. MGMT., FMLA AND ITS IMPACT ON ORGANIZATIONS 26–27 (2007).

[31] *See, e.g.*, OR. REV. STAT. § 659A.153(1) (2022).

[32] *See, e.g.*, D.C. CODE § 32-502–503 (2022).

[33] *See* Ludden, *supra* note 13.

[34] 42 U.S.C. § 2000e-2(a).

[35] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Some courts do not apply *McDonnell Douglas* when the plaintiff employee has "direct or circumstantial evidence that supports an inference of intentional discrimination." *See, e.g.*, Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 563 (7th Cir. 2009).

part burden-shifting framework.[36] The first part of the *McDonnell Douglas* test gives the plaintiff the initial burden of establishing the prima facie case by:

> showing (i) that [the plaintiff] belongs to a racial minority; (ii) that [the plaintiff] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [the plaintiff's] qualifications, [the plaintiff] was rejected; and (iv) that, after . . . rejection, the position remained open and the employer continued to seek applicants from persons of [plaintiff's] qualifications.[37]

Establishing the prima facie case depends heavily on the facts because facts will vary from case to case: "[T]he specification above of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect . . . ."[38] After the plaintiff proves the prima facie case, the burden then shifts to the defendant employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[39] If the employer can do so, the burden then shifts back to the plaintiff to "show that [plaintiff's] stated reason for [defendant's] rejection was in fact pretext."[40]

The immediate aftermath of *McDonnell Douglas* was marked by confusion over how the test was to be applied in different factual circumstances, and specifically the effect of a showing under the second and third parts of the test.[41] Two subsequent Supreme Court cases provided some clarity:

> In *Texas Department of Community Affairs v. Burdine*, the Court explained that the defendant's burden at the second step in the *McDonnell Douglas* framework is a burden of production only. The . . . "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." In *Saint Mary's Honor Center v. Hicks*, the Court . . . held that while the fact-finder's rejection of the employer's proffered reason permits the fact-finder to infer discrimination, it does not compel such a finding.[42]

In 1991, Congress amended Title VII so that a plaintiff could establish an unlawful employment practice by demonstrating that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though

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[36] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

[37] *Id.* at 802.

[38] *Id.* at 802 n.13.

[39] *Id.* at 802.

[40] *Id.* at 804.

[41] Sandra F. Sperino, *Litigating the FMLA in the Shadow of Title VII*, 8 FIU L. REV. 501, 503 (2013).

[42] *Id.* (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255–56 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 502–07 (1993)).

other factors also motivated the practice."[43] Under this "mixed-motive" test, once the employee proves a violation, the employer cannot absolve itself of liability completely;[44] however, the employer may limit available remedies if it shows that it would have made the same decision even without considering the impermissible motivating factor: "[T]he court . . . shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."[45] The mixed-motive test provides an alternative to *McDonnell Douglas*, but only if the plaintiff is arguing that an employer had mixed motives and not a single, impermissible motive. Additionally, plaintiffs using mixed-motive claims under Title VII risk their remedy being limited to "declaratory relief, injunctive relief . . . and attorney's fees and costs" if the employer can show they would have made the same decision without the impermissible motivating factor.[46] Plaintiffs suing under Title VII for unlawful discrimination are put in a difficult position: risk low damages under the mixed-motive test, or face a high burden under *McDonnell Douglas*.

In the Title VII context, the *McDonnell Douglas* framework has been criticized for many reasons. The distinction between single-motive and mixed-motive claims is often blurred; after all, part two of the *McDonnell Douglas* framework essentially involves employers offering other *legitimate* reasons than the plaintiff's claimed discrimination.[47] Katie Eyer, a professor at Rutgers Law School, describes the application of the *McDonnell Douglas* framework in the lower courts as "a quiet revolution in anti-discrimination law, rendering it very difficult for victims of discrimination to seek relief."[48] Eyer argues that *McDonnell Douglas* is a procedural device for answering the ultimate factual question of whether there was discrimination, but in practice, *McDonnell Douglas* has led to "an immense number of discrimination cases [that] are dismissed . . . at summary judgment based on the application of technical rules associated with [*McDonnell Douglas*]."[49] Indeed, scholars and judges alike have called for courts to move away from *McDonnell Douglas*.[50]

However, not all scholars agree that *McDonnell Douglas* is the problem with Title VII discrimination claims. Chuck Henson, a professor at the University of

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[43] 42 U.S.C. § 2000e-2(m).

[44] Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003).

[45] 42 U.S.C. § 2000e-5(g)(2)(B).

[46] § 2000e-5(g)(2)(B)(i); *id.* § 2000e-2(m).

[47] *See* Sperino, *supra* note 41, at 505–06 ("[I]n many circumstances it is difficult to determine whether the evidence supports single- or mixed-motive claims.").

[48] Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967, 970 (2019).

[49] *Id.* at 972.

[50] For a more in-depth discussion on the problems of *McDonnell Douglas*, see Sperino, *supra* note 41, at 505–07.

Missouri School of Law, argues that the overall framing of Title VII and discrimination cases is the problem.[51] Henson argues that Title VII is not a drastic equality reform in employment law, rather, "Title VII is most accurately seen as a limited incursion on employer's discretion" meant to prohibit only "the most serious discrimination."[52] Looking at *McDonnell Douglas* through Henson's view, dismissing some viable claims in order to preserve employer latitude is acceptable when compared to the alternative of letting frivolous claims proceed to a jury. However, Henson's view still does not cure the problems laid out by Sandra Sperino.[53]

C. The McDonnell Douglas *Test Was Wrongly Imported to the FMLA*

The tests that courts use in FMLA cases vary. However, the most common test is the *McDonnell Douglas* test imported from Title VII discrimination claims.[54] The FMLA's prohibited acts (§ 2615) provide for two categories of unlawful acts: (a) interference with rights, and (b) interference with proceedings or inquiries.[55] Interference with rights (subsection (a)) is broken up into two subcategories:

> (1) Exercise of rights
>
> It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
>
> (2) Discrimination
>
> It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.[56]

Subsection (a) provides the two causes of action available to employees who sue their employer under the FMLA. Subsection (a)(1) provides an "interference" claim while subsection (a)(2) provides a "discrimination" or "retaliation" claim.[57] "Courts routinely apply the *McDonnell Douglas* test to retaliation cases . . . and some circuits apply the test to FMLA interference claims."[58] The U.S. Supreme Court has issued three decisions involving the FMLA: *Ragsdale v. Wolverine World Wide, Inc.*, *Nevada*

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[51] *See generally* Chuck Henson, *In Defense of* McDonnell Douglas*: The Domination of Title VII by the At-Will Employment Doctrine*, 89 ST. JOHN'S L. REV. 551 (2015).

[52] *Id.* at 563, 566.

[53] Sperino, *supra* note 41, at 505–07.

[54] *Id.* at 508 ("Courts routinely apply the *McDonnell Douglas* test to . . . cases brought under the FMLA . . . .").

[55] 29 U.S.C. § 2615.

[56] *Id.* § 2615(a)(1)–(2).

[57] *Id.*; Sperino, *supra* note 41, at 507–08.

[58] Sperino, *supra* note 41, at 508.

Department of Human Resources v. Hibbs, and *Coleman v. Court of Appeals of Maryland*.[59] None of those three cases considered the appropriate test for unlawful employer acts in violation of § 2615.[60]

Section 2615 of the FMLA addresses what constitutes an unlawful act by an employer in two subsections.[61] The first subsection is titled "Interference with rights" and contains two separate causes of action.[62] Subsection (a)(1) states it "shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]"; subsection (a)(2) states "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]."[63] The different claims are apparent from the statutory wording: (a)(1) applies where an employer interfered with the employee's FMLA rights generally, whereas (a)(2) applies where the employee *opposed* an employer's violation of the statute.[64] However, as pointed out by Stacy A. Manning, the line between the two provisions has been blurred because "courts have failed to establish a clear standard for determining which provision is implicated when an individual is subjected to an adverse employment action for taking FMLA-protected leave."[65]

As Manning has observed, having two different standards of analysis has created problems in and of itself: "Because each Prohibited Acts provision prompts a different standard of analysis, FMLA claims with similar fact patterns often have conflicting results depending on which provision the court chose to apply."[66] The resulting litigation landscape varies widely.

With no Supreme Court precedent to guide the circuit courts, circuit and district courts alike vary significantly with the use of *McDonnell Douglas*, both in why it applies in the FMLA context, and which claims the test may be properly used to analyze.[67] The resulting FMLA landscape for interference and discrimination/retaliation claims is complex:

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[59] Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002); Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721 (2003); Coleman v. Ct. App. of Maryland, 566 U.S. 30 (2012).

[60] RODNEY M. PERRY, CONG. RSCH. SERV., R44289, THE FAMILY AND MEDICAL LEAVE ACT (FMLA): BACKGROUND AND SUPREME COURT CASES 3–7 (2015); Stacy A. Manning, *Application of the Interference and Discrimination Provisions of the FMLA Pursuant to Employment Termination Claims*, 81 CHI.-KENT L. REV. 741, 742 (2006).

[61] 29 U.S.C. § 2615.

[62] *Id.* § 2615(a).

[63] *Id.* § 2615(a)(1)–(2).

[64] *Id.*; Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 359 (2003).

[65] Manning, *supra* note 60, at 742.

[66] *Id.* at 747.

[67] Sperino, *supra* note 41, at 508; Manning, *supra* note 60, at 747.

> [T]he First and Tenth Circuits decide FMLA claims under the discrimination provision [applying *McDonnell Douglas*] whereas the Eighth and Ninth Circuits rely on the interference provision. The Fifth and the D.C. Circuits take an altogether different approach by invoking the interference provision while applying the *McDonnell Douglas* framework in its analysis of FMLA claims.[68]

This three-way circuit split is ripe to be resolved by the Supreme Court. While *McDonnell Douglas* has been widely adopted as the FMLA's discrimination test,[69] courts that analyze interference claims use a preponderance of evidence test that does not impose the hurdle of passing a burden-shifting framework. A plaintiff alleging FMLA interference need only prove that use of the FMLA "constituted a negative factor in the [employer's] decision . . . ."[70]

Not only are the varying analyses of different circuit courts confusing, there is also serious pushback from legal scholars as to why the *McDonnell Douglas* test was and continues to be used in the FMLA context in the first place.[71] Bringing *McDonnell Douglas* from Title VII into the FMLA context has also brought the problems with *McDonnell Douglas* to the FMLA context.[72] *McDonnell Douglas* is still a high burden for plaintiff–employees that results in courts dismissing potentially meritorious claims; of the 23 FMLA claims in 2015 where a court applied "a version of *McDonnell Douglas*[,] . . . plaintiff succeeded on the merits in only one case."[73]

Beyond the problems firstborn in the Title VII context, adoption of *McDonnell Douglas* also created problems specific to the FMLA context. "Because each Prohibited Acts provision prompts a different standard of analysis, FMLA claims with similar fact patterns often have conflicting results depending on which provision the court chose to apply."[74] Additionally, the employer's intent is irrelevant for an inquiry under the FMLA's interference and discrimination provisions: "Liability hinges simply on whether the employer did not provide the plaintiff with leave or other entitlements under the FMLA."[75] The intent requirement created by *McDonnell Douglas* is especially problematic because multiple circuit courts apply the test to claims that should focus on the factual question of whether the employer took an adverse action against an employee who is either on FMLA leave or has inquired

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[68] Manning, *supra* note 60, at 753–54.

[69] Sperino, *supra* note 41, at 505.

[70] *See, e.g.*, Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1125 (9th Cir. 2001).

[71] *See* Sperino, *supra* note 41, at 506–07; Malin, *supra* note 64, at 358–61; Manning, *supra* note 60, at 747; Chelsey Jonason, Note, *Keeping Mothers in the Workplace: Shifting from* McDonnell Douglas *to Protect Employees Who Use FMLA Leave*, 32 A.B.A. J. LAB. & EMP. L. 437, 439 (2017).

[72] *See infra* Section II.B.

[73] Jonason, *supra* note 71, at 442.

[74] Manning, *supra* note 60, at 747.

[75] Sperino, *supra* note 41, at 510.

about FMLA leave, or has opposed an employer's unlawful practice under FMLA (and does not otherwise fall into § 2615(b)).[76]

Use of *McDonnell Douglas* is not bad for all parties involved. The three-part framework is helpful to defendant–employers because it creates a high burden for plaintiff–employees at the summary judgement stage, potentially saving costs and time.[77] Additionally, in jurisdictions that use a version of *McDonnell Douglas*, employers can proactively avoid liability:

> [I]f an employer can demonstrate that its decision is based on a legitimate business reason, and the leave itself is not the motivating factor in the termination decision, the termination of an employee on FMLA leave should be lawful whether the employee couches the claim as one of interference or retaliation.[78]

This view, however, directly contradicts the FMLA interference language, which prohibits an employer from "interfer[ing] with . . . the exercise of . . . any [FMLA] right . . . ."[79] Even for employers, though, the variance among different circuits is less than ideal. Small businesses located in one state or region may be less likely to meet the 50-employee threshold, and even if they do, they would not be defending multiple suits with essentially the same set of facts across multiple circuit jurisdictions, thus using different tests. Large corporations operating in multiple circuit jurisdictions, however, are almost certainly going to be covered by the FMLA because they likely meet the 50-employee threshold. Thus, unlike small businesses, they must be prepared to defend suits for all possible FMLA tests they could face; creating uncertainty as to the costs of litigation.[80] Whether one is a plaintiff–employee or a defendant–employer, moving away from the current uncertain and complex landscape toward more clarity will help create more consistency for parties litigating over FMLA issues.

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[76] *See* 29 U.S.C. § 2615.

[77] *See* Manning, *supra* note 60, at 748–50, 771.

[78] Kelly Collins Woodford & Marjorie L. Icenogle, *Terminations While on Family and Medical Leave: Risky But Potentially Defensible*, 65 LAB. L.J. 20, 24 (2014).

[79] § 2615(a)(1).

[80] Manning, *supra* note 60, at 746–47 (discussing different standards of analysis applied by different circuit courts). Employers who know they will be solely in a *McDonnell Douglas* jurisdiction can rely on the test's heavy burden for plaintiff–employees as helping prevent suits from reaching the trial stage, whereas a negative factor test will make it easier for plaintiff–employees to survive summary judgment. *See, e.g.*, *id.*

II. DIFFERENT STATE LAWS CURRENTLY ADDRESS SOME, BUT NOT ALL, OF THE FMLA'S PROBLEMS

Currently, 34 states do not have family medical leave laws independent of the federal statute.[81] The state equivalents to the FMLA vary widely.[82] Ten states cover medical leave for pregnancy.[83] In June 2020, Georgia enacted a statute stating, "[a]n employer that provides sick leave shall allow an employee to use such sick leave for the care of an immediate family member."[84] The Georgia statute provides very little protection: the statute automatically repeals on July 1, 2023, unless extended by the legislature, and employees in Georgia are only covered if they operate within their employer's sick leave policy.[85] The remaining states generally add some protection beyond the federal statute, some much more than others.[86] States that add protection do so in numerous ways, including lowering the threshold number of employees needed for an employer to be covered, increasing the amount of leave that employees may take, expanding covered reasons for taking leave, and mandating paid leave.[87]

A. State Laws Can Provide More Protection for Workers with Longer Leave Periods, Lower Employee Thresholds, and Broader Definitions of Family

Without state FMLA equivalents providing broader coverage for family and medical leave, employees who work for employers not covered by the FMLA may not have access to leave, even for the employee's own serious health condition.[88] As noted by Berkowitz, Downes, and Patullo, "[t]he District of Columbia has one of the most generous family and medical leave laws in the country."[89] The D.C. family

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[81] *State Family and Medical Leave Laws*, NAT'L CONF. STATE LEGISLATURES (Sept. 9, 2022), https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx.

[82] *See id.*

[83] *Id.*

[84] GA. CODE ANN. § 34-1-10(b) (2022).

[85] *Id.* § 34-1-10(c), (f).

[86] *See generally* NAT'L CONF. STATE LEGISLATURES, *supra* note 81; Alan D. Berkowitz, J. Ian Downes & Jane E. Patullo, *Navigating the Maze of State and Local Employment Laws Concerning Sick Time and Family Leave, Criminal and Salary History Checks, Pregnancy and Lactation Accommodation, and Anti-Discrimination Protection for Medical Marijuana Users*, 43 EMP. RELS. L.J. 3, 4 (2018); Lisa Nagele-Piazza, *Consider State Laws When Measuring FMLA Eligibility*, SOC'Y HUM. RES. MGMT. (July 6, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/consider-state-laws-when-measuring-fmla-eligibility.aspx.

[87] *See* Berkowitz et al., *supra* note 86, at 4; *see, e.g.*, OR. REV. STAT. § 659A.153(1) (2022); VT. STAT. ANN. tit. 21 (2022), §§ 470–74; CAL. GOV'T CODE § 12945.2 (West 2022); D.C. CODE § 32-502 to -503 (2022).

[88] *See* BROWN ET AL., *supra* note 17, at 16–17.

[89] Berkowitz et al., *supra* note 86, at 13.

and medical leave statute applies to private employers with 20 or more employees, far below the FMLA's 50 employee threshold.[90] Additionally, the D.C. statute provides 16 weeks of job-protected leave, both for a serious medical condition and to care for a new child or a serious health condition of a family member.[91] Lastly, and perhaps the most robust aspect of the D.C. statute, medical leave and family leave are tracked independently of each other, meaning that eligible D.C. employees are given up to 24 weeks of leave in a 52-work-week period.[92]

In contrast to the robust protection provided by the D.C. family and medical leave statute, the Oregon Family Leave Act (OFLA) offers less, comparatively, in additional protection, but still expands beyond the baseline of the FMLA. Like the FMLA, the OFLA provides up to 12 weeks of unpaid,[93] job-protected leave for an employee's serious health condition, to care for a new child (foster or birth), to care for a child or family member with a serious health condition, or for bereavement leave.[94] Unlike the FMLA, however, the OFLA adds protection by applying "to employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks" in the same or preceding year of the when the leave is to be taken.[95] By reducing the employee threshold to half that of the FMLA, the OFLA provides broader protection by giving more employees access to family and medical leave than the FMLA.[96] Considering that the FMLA covers just over half of all U.S. employees,[97] a lower employee threshold immediately increases coverage. Also, one area where OFLA protection is broader than the D.C. family and medical leave statute is when an employee first becomes eligible, with the OFLA only requiring an employee to be employed at least 180 days at 25 hours per week, as opposed to the D.C. statute, which requires at least 12 total months of employment within 7 years at one employer.[98]

Broader definitions also effectively increase coverage. As previously mentioned, the FMLA provides a narrow definition of family.[99] "Parent" does not include in-laws or stepparents who became a stepparent after the employee was at least 18 years

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[90] D.C. CODE § 32-516 (2022).

[91] §§ 32-502 to -503.

[92] § 32-541.04(e-1)(3).

[93] Starting January 1, 2023, Oregon will begin implementing paid family medical leave, and employees can apply for benefits starting on September 3, 2023. PAID LEAVE OREGON, https://paidleave.oregon.gov/Pages/default.aspx (last visited Apr. 20, 2023). For more on paid family medical leave generally, see *infra* Section II.B.

[94] OR. REV. STAT. § 659A.159(1)(a)–(e) (2022).

[95] *Id.* § 659A.153(1).

[96] *Id.*

[97] Nat'l P'ship for Women & Fams., *supra* note 13 ("Just 56 percent of workers in the U.S. are covered by and eligible for leave under the FMLA.").

[98] § 659A.156(1)(a)–(b); D.C. CODE § 32-501 (2022).

[99] *See supra* Section II.A.

old,[100] while "spouse" is defined as "husband or wife."[101] The OFLA goes beyond the FMLA and includes "the grandparent or grandchild of the employee" and a "parent-in-law" in the definition of "family member."[102] Expressly including step-parents solves the problem that arises when a spouse's parent gets sick and the spouse does not work for a covered employer. Additionally, by adding grandparents and grandchildren, the OFLA spans far greater within an eligible employee's family, offering protection to grandparents where the FMLA unfortunately falls short.[103]

B. State Laws Can Mandate Paid Leave to Eliminate One of the Main Barriers to Eligible Employees Taking Leave

Additional protection is one way that states have supplemented the FMLA; however, state FMLA equivalents that do not require paid leave may prevent otherwise eligible employees from taking leave.[104] A 2018 study by Abt Associates for the U.S Department of Labor analyzed results from surveys of employees and found that two-thirds of employees who chose not to take needed leave did so because they could not afford it.[105] Employers may elect to pay employees on FMLA or other unpaid medical leave and employees may choose to use other benefits while on leave, such as vacation; however, more than one-third of employees receive no pay while on leave, whether the duration is one week, or the full 12 weeks.[106] Moreover, "[w]orkers with low wages . . . were least likely to receive pay while on FMLA leave, with more than six in ten (61 percent) receiving no pay. And two-thirds of workers (67 percent) who did not receive full pay reported difficulty 'making ends meet.'"[107]

The difference between low- and high-wage employees with respect to paid family leave is drastic. The Bureau of Labor Statistics found that among private industry workers, just "12 percent of workers in the lowest 25th percent wage category" had access to paid family leave, compared to "37 percent of workers in the highest 25th percent wage category."[108] This means that the lower a worker's wages,

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[100] *See supra* notes 22–27 and accompanying text.

[101] 29 U.S.C. § 2611(13).

[102] § 659A.150(4).

[103] Keep in mind that due to age, grandparents are more likely to have chronic health conditions. *Percent of U.S. Adults 55 and Over with Chronic Conditions*, CTR. FOR DISEASE CONTROL & PREVENTION (Nov. 6, 2015), https://www.cdc.gov/nchs/data/health_policy/adult_chronic_conditions.pdf.

[104] *See* NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 11, at 2.

[105] BROWN ET AL., *supra* note 17, at 43.

[106] Nat'l P'ship for Women & Fams., *supra* note 13; *see* U.S. DEP'T OF LAB., *supra* note 7, at 57–58.

[107] Nat'l P'ship for Women & Fams., *supra* note 13.

[108] News Release, U.S. Bureau of Labor Statistics, Employee Benefits in the United States (Sept. 23, 2021), https://www.bls.gov/news.release/archives/ebs2_09232021.htm#.

the less likely they are to have access to paid leave, despite likely needing paid leave more than workers in the highest category.[109] The financial burden of taking unpaid leave not only prevents employees from taking leave, it also incentivizes employees to return to work as soon as possible. Nearly two-thirds (60%) of employees who used FMLA leave without receiving their full normal wages would have taken longer leave with full pay.[110] In light of the correlation between paid leave access and income, low-wage workers are most likely to be under pressure to return to work as soon as possible, or risk financial consequences. With the FMLA only covering just over half of U.S. employees,[111] state equivalents with a lower employee threshold certainly increase protected family and medical leave coverage; but without providing paid leave, many employees will still face significant financial hurdles when they need to take leave.

Although the need for paid leave is largely unmet,[112] some states have enacted mandated paid leave laws that address the need. Examples include the New York Family Leave Law,[113] the California Unemployment Insurance Code,[114] and the District of Columbia's Universal Paid Leave Law.[115] The New York law is funded by deductions from employee paychecks and was implemented in phases over four years; in 2018, an eligible employee could receive up to eight weeks of paid leave at 50% of the state weekly wage to supplement their lack of salary.[116] As of 2021, now that the program is fully phased in, an eligible employee can get up to 12 weeks of job-protected paid leave.[117] New York paid leave is calculated based on the individual employee's salary, but the maximum weekly amount is capped at 67% of the statewide average weekly wage for that year.[118] For 2022, the cap in New York is set at $1,068.36 per week.[119]

California's Unemployment Insurance Code is slightly different. Like New York, California funds the program by deducting from employee paychecks and

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[109] SCOTT BROWN, RADHA ROY & JACOB ALEX KLERMAN, LEAVE EXPERIENCES OF LOW-WAGE WORKERS 1 (2020).

[110] *See* BROWN ET AL., *supra* note 17, at 40.

[111] Nat'l P'ship for Women & Fams., *supra* note 13 ("Just 56 percent of workers in the U.S. are covered by and eligible for leave under the FMLA.").

[112] *See* Berkowitz et al., *supra* note 86, at 4 (noting that as of 2018, only eight states, D.C., and Puerto Rico had passed paid sick leave laws).

[113] N.Y. WORKERS' COMP. LAW §§ 200–242 (McKinney 2022).

[114] CAL. UNEMP. INS. CODE §§ 3300–3308 (West 2022).

[115] D.C. CODE § 32-502 to -503 (2022).

[116] *Paid Family Leave: Benefits Schedule*, N.Y. STATE, https://paidfamilyleave.ny.gov/benefits (last visited Apr. 20, 2023).

[117] *Id.*

[118] *Id.*

[119] *Id.*

calculating the amount of paid leave based on each individual employee's prior earnings.[120] However, California bases the payment cap on total payment over the year, with 52 times the employee's highest weekly wage from the previous year as the maximum.[121] California's paid leave is not job protected;[122] however, California also has a separate FMLA equivalent, the California Family Rights Act (CFRA), which applies to employers of five or more and guarantees unpaid, job-protected leave for up to 12 weeks.[123] Although paid leave is not protected, only the smallest employers (four or fewer employees) are exempt from CFRA, which runs concurrently with paid family leave.[124] Thus most employees who take paid leave will also receive job protection through the CFRA.

The D.C. Universal Paid Leave Amendment Act of 2016 (UPLA) provides paid leave that varies depending on the employee's reason for taking leave.[125] UPLA provides eight work weeks for parental leave, six work weeks for family leave and medical leave, and two work weeks for qualifying prenatal leave.[126] Any leave taken under the UPLA also runs concurrently with leave under the D.C. family and medical leave statute and FMLA.[127] The UPLA handles funding in a slightly different way than California and New York; in D.C., covered employers are taxed "an amount equal to 0.62% . . . of the wages of each of its covered employees to the Universal Paid Leave Fund . . . ."[128] Like New York, D.C. paid leave is calculated based on the employee's previous wages but is capped, with the cap resetting each year.[129] The D.C. cap as of 2023 is $1,049 per week.[130] The three state paid leave laws outlined are not identical, but each one effectively addresses the financial burden of employees who are eligible to take medical or family leave by removing a substantial barrier to employees exercising their rights under FMLA and state equivalent laws.

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[120] CAL UNEMP. INS. CODE §§ 2655(e)(1), 3004, 3301(b)(1) (West 2022).

[121] *Id.* § 2653.

[122] JENYA CASSIDY & SHARON TERMAN, CAL. WORK & FAM. COAL., CALIFORNIA FAMILY LEAVE LAWS: KNOW YOUR RIGHTS! 9 (2013), https://womenspolicy.sccgov.org/sites/g/files/exjcpb1076/files/SCC%20Know%20Your%20Rights.pdf.

[123] CAL GOV'T CODE § 12945.2(a), (k), (o), (p) (West 2022).

[124] *Id.* § 12945.2(o).

[125] D.C. CODE § 32-541.04(e-1) (2022).

[126] § 32-541.04(e-1)(3). Paid leave durations by condition is subject to change as updated each year. *Id.* § 32-541.04(e-1), 04a.

[127] *Id.* § 32-541.07(b). Universal paid leave is set to expand pursuant to § 32-541.04a, which sets out the guidelines for yearly expansions of the program and order of expansion based on medical condition. § 32-541.04a.

[128] *Id.* § 32-541.03(a).

[129] *Id.* § 32-541.04a(c)(2), (d)(1).

[130] *Paid Family Leave: Information for Workers*, D.C. PAID FAM. LEAVE, https://dcpaidfamilyleave.dc.gov/workers/ (last visited Apr. 20, 2023).

C. State Laws Provide Statutory Language that Adds Confusion in Courts or Simply Mirrors the Language of the FMLA

Over one-third of FMLA-eligible employees who did not take leave in 2018 did so because they thought they would lose their job or be treated differently because of the reason they needed to take leave.[131] Fear of being fired for taking leave may seem unwarranted for employees who are eligible for protected leave under the FMLA or a state equivalent, but only when assuming employees know they are eligible for leave and that their employer cannot fire them for taking leave. An NPR *Morning Edition* segment by Jennifer Ludden detailed what the reality can be like for employees whose employers do not inform them of their leave rights:

> [Mo Kessler] told her bosses she had endometriosis and suffered excruciating pain a few days each month. But no one ever mentioned that she could use FMLA leave, and, at the time, she didn't know better. Kessler says she was told to push through the pain, or be written up.
>
> "I would try to hide in the back because my face was so pale," she recalls. "I was so visibly sick that I needed to hide away from the customers, not to scare them off!"[132]

Kessler's experience is not uncommon. Among FMLA-eligible employees who chose not to take leave in 2018, nearly a quarter (27%) did not take leave because they believed they were ineligible,[133] despite the FMLA mandate that employers maintain posted notices with summaries or excerpts of relevant FMLA sections.[134] Even when employees know their employer is covered under the FMLA or a state equivalent, employers might still take adverse action against employees for going on leave, or deny leave after it is requested.[135] Like the FMLA, state equivalents may proscribe certain types of conduct by employers. Moreover, states can provide better statutory language and protection for employees than the FMLA.

The OFLA is an example of how the statutory language of state equivalents can add confusion, rather than clarity. Like the FMLA, the OFLA prohibits specific acts by an employer, but with some minor differences.[136] OFLA § 659A.183 makes it unlawful for an employer to (1) "[d]eny family leave to which an eligible employee is entitled" and (2) "[r]etaliate or in any way discriminate against an individual . . . because the individual has inquired about the provisions of [the OFLA], submitted

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[131] BROWN ET AL., *supra* note 17, at 43.

[132] Ludden, *supra* note 13.

[133] BROWN ET AL., *supra* note 17, at 44.

[134] 29 U.S.C. § 2619(a).

[135] *See, e.g.*, Centennial Sch. Dist. No. 28J v. Or. Bureau of Lab. & Indus., 10 P.3d 945, 947–48 (Or. Ct. App. 2000) (A school employee was denied leave under the OFLA.).

[136] *See* OR. REV. STAT. § 659A.183 (2022); 29 U.S.C. § 2615.

a request for family leave or invoked any provision of [the OFLA]."[137] Compared to the FMLA, the OFLA does not have a provision expressly prohibiting employers from interfering with employees' exercise of rights; however, the Oregon legislature included an interpretive provision requiring the OFLA to be "construed to the extent possible in a manner that is consistent with any similar provisions of the federal [FMLA]."[138] In practice, OFLA's interpretive provision should lead to the same outcomes under OFLA and FMLA when a plaintiff alleges a claim under "similar" OFLA and FMLA provisions.[139] Yet, the federal district of Oregon is split on whether there is indeed a claim for "interference" under OFLA.[140] Oregon's state courts do not provide controlling precedent or clear guidance on the interference claim question. The "Oregon Supreme Court has not yet addressed [the] issue . . . ."[141] The only state court of appeals case to look at OFLA remedies for the interference of OFLA rights did not address the existence of an interference claim "or how the OFLA should be interpreted relative to the FMLA with respect to an interference claim."[142]

Alexander v. Eye Health Northwest, P.C. is the starting point of the split. Although the *Alexander* court did not address whether there was an interference claim under OFLA; in a footnote the court explained that OFLA does not provide a cause of action for retaliation because retaliation "is not made an unlawful practice in the OFLA statutes themselves . . . ."[143] *Alexander* followed the reasoning of *Denny v. Union Pacific Railroad Company*, which interpreted an earlier version of the OFLA as only creating "a denial of leave cause of action."[144] Less than one year after *Alexander*, the court in *Fillman v. Officemax, Inc.* held that the OFLA does not provide a cause of action for retaliation nor interference because it "is not made an unlawful practice in the OFLA statutes themselves," citing the footnote in *Alexander*.[145] The

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[137] § 659A.183.

[138] § 659A.186(2).

[139] Benz v. West Linn Paper Co., 803 F. Supp. 2d 1231, 1250 (D. Or. 2011) ("Oregon courts look to federal law when interpreting the OFLA."); Carter v. Fred Meyer Jewelers, Inc., No. 3:16-CV-00883, 2019 WL 2744190, at *3 (D. Or. Apr. 10, 2019) ("Although often styled as 'retaliation' claims, allegations that a plaintiff was fired for taking leave are analyzed as claims for 'interference' with FMLA or OFLA rights.").

[140] Stillwell v. Old Dominion Freight Line, Inc., No. 19-CV-1789, 2021 WL 3056375, at *5–6 (D. Or. July 20, 2021).

[141] *Id.* at *5.

[142] *Id.*

[143] Alexander v. Eye Health Nw., P.C., No. CV05-1632, 2006 WL 2850469, at *5 n.3 (D. Or. Oct. 3, 2006).

[144] *Id.* at *5; Findings & Rec. at 7–9, Denny v. Union Pac. R.R. Co., No. CV-00-1301 (D. Or. Oct. 31, 2002).

[145] Fillman v. Officemax, Inc., No. 05-6346, 2007 WL 2177930, at *8 n.7 (D. Or. July 27, 2007).

court went on to hold that the "plaintiff's claim is limited to an alleged denial of leave . . . ."[146] The courts following this line are focused on OFLA's express prohibition of denial of family leave. They do not explore whether the OFLA's prohibition on retaliation or discrimination due to an employee's inquiry about, request, or invocation of rights under OFLA creates a cause of action.[147]

Fillman and its predecessors were decided before the Oregon Legislature amended the OFLA to expand prohibited employer actions.[148] The decisions before the amendment were acceptable because, at the time, the *only* practice made expressly unlawful by the OFLA was a covered employer's denial of leave to an OFLA-eligible employee.[149] However, the 2007 amendments (still current as of publication regarding unlawful employment actions) fundamentally changed the prohibitions on employers under OFLA by adding that an employer cannot "[r]etaliate or in any way discriminate . . . with respect to hire or tenure or any other term or condition of employment because the individual has inquired about the provisions of [the OFLA], submitted a request for family leave or invoked any provision of [the OFLA] . . . ."[150] Unlike the FMLA's retaliation claim, OFLA retaliation applies to any "term or condition of employment" and is not limited only to proceedings or charges.[151] Despite the added provision clearly expanding unlawful employer practices beyond just a denial of OFLA leave, the *Fillman* line continues to be cited for the proposition that OFLA does not have a cause of action for interference.[152]

Fillman citations after the 2007 OFLA amendments are problematic for two reasons. First, as seen in *Young Bolek v. City of Hillsboro*, the court cited *Fillman* but did not explain or reference the fact that the OFLA has changed significantly since *Fillman* was decided.[153] At the very least, carrying the *Fillman* reasoning today requires an acknowledgment of the 2007 amendments and warrants analysis for how the *Fillman* reasoning applies in light of the new statutory language. Second, although the OFLA still does not expressly prohibit "interference," the discrimination/retaliation provision read in light of OFLA's interpretive provision requiring harmony with the FMLA should again at least warrant further discussion by courts.

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[146] *Id.* at *8.

[147] Unlike the FMLA's discrimination provision, OFLA's discrimination and retaliation prohibition applies expressly to invocation of OFLA provisions. *See* OR. REV. STAT. § 659A.183(2) (2022).

[148] Act of July 16, 2007, ch. 777, 2007 Or. Laws 777 (adding employer prohibitions beyond denial of leave).

[149] *Compare* OR. REV. STAT. § 659A.183 (2007), *with* § 659A.183 (2005).

[150] § 659A.183(2).

[151] *Id.*; 29 U.S.C. § 2615(b).

[152] *See, e.g.*, Magee v. Trader Joe's Co., No. 18-CV-01956, 2021 WL 1550336, at *20 (D. Or. Apr. 20, 2021).

[153] Young Bolek v. City of Hillsboro, No. 14-CV-00740, 2016 WL 9455411, at *18 (D. Or. Nov. 14, 2016).

Both the FMLA interference and OFLA discrimination and retaliation provisions apply to eligible employees who request or invoke their respective rights.[154] When courts take those two considerations into account, the outcome should change from *Fillman*.

In *Rogers v. Oregon Trail Electric Consumers Cooperative, Inc.*, the court found an OFLA interference claim based on the discrimination and retaliation provision added in the 2007 amendment to the OFLA.[155]

> [T]he *Fillman* court overlooked [the discrimination and retaliation provision], which makes it unlawful for an employer to "[r]etaliate or in any way discriminate against an individual . . . because the individual . . . submitted a request for family leave or invoked any provision of [OFLA]." Despite using the terms "retaliate" and "discriminate" instead of "interfere" this provision is similar to the interference provision in the FMLA. Since provisions of the OFLA must be construed consistently with provisions of the FMLA, the court holds that [plaintiff] may pursue his OFLA claim.[156]

Rogers provides an illustration of how the OFLA's interpretive provision, when properly applied to the *current* OFLA, leads to results that are similar under both the FMLA and OFLA despite the *name* of the claims being different in the respective statutory text. *Rogers* does not stand alone. "A majority of decisions in the District of Oregon . . . have concluded that the OFLA includes a cause of action for interference."[157] Despite a majority finding a cause of action for OFLA interference, previous decisions within the same district are not mandatory authority, so courts can still come down either way going forward unless the Oregon Supreme Court or the Ninth Circuit decides the issue.[158]

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[154] OR. REV. STAT. § 659A.183(2) (2022) (applying when an individual has "submitted a request . . . or invoked any provision" of the OFLA); 29 U.S.C. § 2615(a)(1) (applying when an employee has "exercise[d] . . . or . . . attempt[ed] to exercise, any right" under the FMLA).

[155] Rogers v. Oregon Trail Elec. Consumers Coop., Inc., No. 10-CV-1337, 2012 WL 1635127, at *20–21 (D. Or. May 8, 2012).

[156] *Id.* at *20.

[157] Stillwell v. Old Dominion Freight Line, Inc., No. 19-CV-1789, 2021 WL 3056375, at *6 (D. Or. July 20, 2021).

[158] In 2004 the Oregon Court of Appeals decided *Yeager v. Providence Health System Oregon*, which held (pre-2007 OFLA amendments) that OFLA provided a cause of action for retaliation, but that case was recognized and disagreed with in *Fillman*. Yeager v. Providence Health Sys. Or., 96 P.3d 862, 865 (Or. Ct. App. 2004); Fillman v. Officemax, Inc., No. 05-6346, 2007 WL 2177930, at *8 n.7 (D. Or. July 27, 2007).

Other states have had more consistent results by mirroring FMLA language[159] instead of relying on an interpretive provision paired with language that is inconsistent with the FMLA.[160] Generally, state equivalents prohibit all or some of the same acts as the FMLA without straying significantly from the FMLA with evidentiary provisions[161] or other language to guide courts,[162] despite states being free to try more guided language to produce more predictable results independent of a federal court's FMLA analysis.

III. SUGGESTIONS FOR HOW STATES CAN BETTER SUPPLEMENT THE FMLA'S LACK OF COVERAGE AND PAID LEAVE WHILE CLARIFYING LEGAL ANALYSIS

A. States Should Use Low Employee Thresholds and Broad Definitions to Provide Better Coverage to Nontraditional Families and Multigenerational Households

Lower thresholds and broader definitions are needed in state FMLA equivalents because, without them, many employees could jeopardize their jobs when caring for themselves or a family member, especially a child or parent, who otherwise would be left on their own. Family structure is changing in the United States, and with more children raised in homes without married parents,[163] the FMLA's lack of coverage for family members puts family health at odds with job security.

State FMLA equivalents can immediately increase coverage by lowering the employee threshold that requires employers to comply. Many states, such as Oregon, California, Minnesota, and Vermont, have already done so.[164] As to what number of employees is an appropriate threshold, there is no obvious answer, and it may

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[159] *See, e.g.*, Crawford v. JP Morgan Chase NA, 983 F. Supp. 2d 1264, 1269 (W.D. Wash. 2013) (citing Washburn v. Gymboree Retail Stores, Inc., No. C11-822, 2012 WL 5360978, at *7 (W.D. Wash. 2012)) (applying FMLA analysis to WFLA analysis because the statutory texts mirror one another).

[160] Oregon's interpretive provision is ill-advised not only because the OFLA's text is inconsistent with the FMLA, but also because OFLA interpretation is subject to the Ninth Circuit or U.S. Supreme Court's FMLA interpretation, which may change and be at odds with the Oregon legislature's intent.

[161] Unless they are to be interpreted like the FMLA. *See, e.g.*, OR. REV. STAT. § 659A.186.

[162] *See, e.g.*, CAL. GOV'T CODE § 12945.2(k) (West 2022); WIS. STAT. § 103.10(11) (2022); VT. STAT. ANN. tit. 21 § 473 (2022).

[163] Gretchen Livingston, *Fewer Than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RSCH. CTR. (Dec. 22, 2014) https://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/ (46% of children live with two married parents in their first marriage, 34% of children live with a single parent, and 15% of children live with one or two remarried (step)parents).

[164] OR. REV. STAT. § 659A.153 (2022); CAL. GOV'T CODE § 12945.2 (West 2022); MINN. STAT. § 181.940 (2022); VT. STAT. ANN. tit. 21, §§ 470–74 (2022).

depend on the local economies of each state and whether leave will be paid (and how much). Regardless of those factors, employers with five or fewer employees will bear a heavier burden from an employee taking 12 weeks of job-protected medical leave than employers with more than 20 employees. Considering that less than 11% of employers have under ten employees,[165] a ten-employee threshold will make an immediate and material increase in coverage without risking an unreasonable burden on the smallest employers who need the latitude to have all their employees working.[166]

In addition to a ten-employee threshold, state equivalents should broaden the definition of family to include at least stepparents, stepchildren, grandparents, grandchildren, and spouses or domestic partners. Like the lower employee threshold, a broader definition of family will immediately increase coverage beyond the FMLA baseline for eligible employees. Additionally, the employees who benefit most from the broader definitions are those whose family structure changed after they turned 18. Examples include in-laws, stepparents, and scenarios where an employee's parents died but the grandparents are still alive and need the grandchild to care for them.

States can increase coverage further by making the employee threshold even lower or the family definitions even broader. This suggestion is meant as a baseline where all states could workably implement broader coverage than the FMLA. States who are so inclined may further extend beyond the suggested baseline. For example, California's CFRA covers all employers with five or more employees.[167] Other states may find that going as low as a five-employee threshold is unworkable, but ten employees would not pose nearly the same burden as the California law.[168]

B. States Should Provide Paid Leave to Eliminate the Most Significant Barrier Preventing Leave-Eligible Employees from Using the Leave They Are Entitled to

Without paid leave, many workers will not use leave to the extent they are eligible, or at all.[169] The main objective of paid leave should be to reduce the number of leave-eligible employees who do not take leave because they cannot afford to go without income. Thus, an effective paid leave program should have broad coverage

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[165] *Business Employment Dynamics*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/bdm/bdmfirmsize.htm (Oct. 26, 2022) (select "Table F. Distribution of Private Sector Employment by Firm Size Class, not Seasonally Adjusted" under "Supplemental Firm Size Class Tables").

[166] Or to replace the ones that cannot work.

[167] CAL. GOV'T CODE § 12945.2(b)(3) (West 2022).

[168] Employers may always hire a temporary employee to cover the absent employee's work and, if in an at-will employment state, fire the temporary employee upon the employee's return from leave. Thus, even the burden for small employers can be mitigated.

[169] Julie Ajinkya, *Who Can Afford Unpaid Leave?*, CTR. FOR AM. PROGRESS (Feb. 5, 2013), https://www.americanprogress.org/article/who-can-afford-unpaid-leave/.

while efficiently distributing compensation from the paid leave fund. Paid leave options may vary depending on the employee threshold for coverage and the reason for going on leave. Starting with funding, states have two options: fund through a tax directly on the employer, or through a tax on employee wages. First, taxing employers directly has the upside of not taking money directly from employee wages. Additionally, states may effectively incentivize employers to offer their own paid leave programs by allowing employer programs equally or more comprehensive than the state program to be exempt from the paid leave tax.

However, taxing employers directly may create a more significant financial burden for smaller employers. Thus, a direct tax on employers would be better for states choosing to provide paid leave based on employer size with an employee threshold geared towards employers large enough to absorb the cost.[170] Obviously, a direct result would be that employees of the smallest employers will not have paid leave.[171]A better option is for states to offer paid leave that applies to all employees in the state regardless of employer size. An "all-employee" policy would be funded by a tax on employee wages, effectively avoiding the potential burden on the smallest employers. An employee wage tax would still allow for a tax exemption; however, there would be less incentive for the employer to provide paid leave that is equally or more comprehensive than the state program because employers will not bear the burden of funding the program.

Where the reason for leave is concerned, states should replicate the D.C. UPLA when legislating the duration of leave.[172] By providing eight work weeks for parental leave, six for family leave, six for medical leave, and two for prenatal leave, most employees will be covered for the entirety of their respective leave. Although some employees may need a longer leave period, a state FMLA equivalent could provide 12 weeks or more of job-protected leave that runs concurrently with any paid leave and would allow an employee to stay on leave longer, just without pay. Set durations of paid leave also allow states to effectively budget limited paid leave fund resources, minimizing waste without underfunding the program.

Despite leaving employees who need more time than paid leave allows without another paid leave option (unless their employer provides it), set durations based on condition are better than a flat 12 weeks or less of paid leave, as employees who have multiple qualifying reasons may use more than 12 total weeks in a year. For example, a new mother may take two weeks of prenatal leave plus eight weeks of parental leave for a total of ten weeks. If in the same year that mother gets sick or injured

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[170] What that threshold is may vary state to state based on each state's individual economic makeup.

[171] Depending on the State's FMLA equivalent employee threshold, the same employees who are not entitled to paid leave may also be ineligible for unpaid leave, thus leaving those employees vulnerable to losing their jobs in the event of a health or family emergency.

[172] *See* D.C. CODE § 32-541.04.

and cannot work, she would still be entitled to up to six weeks of paid medical leave, or a total of 16 weeks of paid leave. Thus, by allotting duration by condition, paid leave is more cost-effective while simultaneously providing more comprehensive coverage for circumstances when multiple separate family or medical events require an employee to leave work.[173]

C. States Should Provide Clear Statutory Language that Will Expand Coverage and Guide Courts in Analyzing Medical Leave Interference Claims

State legislatures can reduce confusion in federal courts (at least when it comes to state FMLA equivalents) in multiple ways. First, like Congress amended Title VII to allow "mixed-motive" claims,[174] states can amend family and medical leave statutes to include language that guides a court presented with a state law question. Additionally, states can more clearly address an employee's participation in a proceeding against an employer or opposing an employer's unlawful practice by adding a participation and opposition clause modeled after Title VII.[175]

Second, in states like Oregon that use interpretive provisions in an effort to create consistent outcomes with concurrent state and federal claims,[176] statutory language can identify like claims with the same names. In Oregon, the OFLA creates a claim for "retaliation" that is wholly different than the FMLA claim for "retaliation," thus immediately creating confusion when the OFLA instructs courts to interpret the FMLA.[177] If the OFLA claim was instead styled as prohibiting interference and retaliation, *Fillman* likely would not have survived past the 2007 OFLA amendments.[178]

An example of possible statutory language for prohibited acts that achieves these goals could be:

1. An employer violates this Act when it:
    a. Denies or interferes with an employee's use of leave, or requires that an employee return from leave when the employee is still entitled to leave;
    b. Fires, demotes, or takes any other adverse employment action against an employee in connection with:
        i. the employee's use of leave,

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[173] Employees would not be able to take more than the maximum leave allotted for a certain condition; for example, even if an employee had two separate medical events that made them eligible for paid leave, they could not exceed the six-week allotment.

[174] *See supra* notes 43–47 and accompanying text.

[175] *See* 42 U.S.C. § 2000e-3(a).

[176] *See* OR. REV. STAT. § 659A.186(2) (2022).

[177] *See* 29 U.S.C. § 2615(a)(1); § 659A.183(2) (2022).

[178] Fillman v. Officemax, Inc., No. 05-6346, 2007 WL 2177930, at *8 n.7 (D. Or. July 27, 2007) (finding no interference claim because the OFLA does not say "interference").

ii. the employee's inquiry about leave or rights under this Act,
iii. the employee's opposition to any employer practice under this Act, or
iv. the employee's participation in a proceeding against the employer.

c. Fails to comply with any other provision of this Act.

2. Interpretation and Evidence

a. To show prima facie evidence an employer has violated this act, an employee must show by a preponderance of evidence a reasonable connection between the employee's actions in subsection (a) and the employer's subsequent action(s) against the employee.

b. If an employee proves the prima facie case, an employer cannot succeed pretrial without showing by documentation that the employer's action was wholly unrelated to the employee's conduct protected by this Act, including the effects of an employee's medical condition or medication.

The example above addresses multiple problems with FMLA and similar state-equivalent language. Section (1)(a) includes the main claims of the FMLA, but more expressly lists different sanctioned actions, including forcing an employee to return to work early and simply failing to comply with the Act (which would include notice requirements). Second, the evidentiary provision lowers the burden for employee–plaintiffs by requiring only a reasonable connection between the employee's action and the employer's subsequent action. Lastly, the evidentiary provision raises the burden on employer–defendants in pretrial stages by requiring a showing that the action was wholly unrelated to the employee's protected conduct.[179]

No statutory language is foolproof for guaranteeing a result. However, states should try to legislate independently of the FMLA given the variety of analyses in the federal landscape. Considering the federal landscape, for family and medical leave claims, it is unlikely that anything short of a U.S. Supreme Court case could cause wide-sweeping change or uniformity.[180] The suggestions here may also add more tests to what is already complex and varying amongst different courts, especially considering that a circuit court facing a different test for each state within its jurisdiction is possible. However, like Oregon, some state legislatures will seek to supplement the FMLA with a state law that has a similar analysis and outcomes,

[179] "Wholly unrelated" should pose a higher burden than even Title VII mixed-motive claims because the employee's protected acts cannot play any role in the employer's decision, whereas a mixed-motive claim can be defended by showing the impermissible motivating factor was not determinative. *See supra* notes 43–47 and accompanying text.

[180] Although an amendment to the FMLA could also have a significant impact, *McDonnell Douglas* is vibrant in the Title VII context even after Congress created a separate cause of action for mixed-motive claims.

meaning not every state will have materially different language or tests. Also, so long as state legislatures create laws with clarity, the burden imposed on courts should not be dramatically increased.[181]

CONCLUSION

The national landscape for FMLA interference and discrimination claims is complex at every level. Many states have endeavored to supplement the basic protection provided by the FMLA, generally providing more robust protection or benefits for eligible employees. However, state legislatures may create unintended consequences when state equivalents are unclear or do not pair nicely with the FMLA. State legislatures should supplement the FMLA with statutes that increase coverage, provide paid leave to eliminate financial barriers to using entitled leave, and clarify legal analyses to better achieve the legislature's intended results and avoid the high burden of *McDonnell Douglas* when not looking at discrimination.

[181] *See* Manning, *supra* note 60, at 750–53 (analyzing intra-circuit splits with FMLA interference claims).