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The FMLA and Psychological Support: Courts Care About "Care" (and Employees Should, Too)

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NOTE

THE FMLA AND PSYCHOLOGICAL SUPPORT: COURTS CARE ABOUT “CARE” (AND EMPLOYERS SHOULD, TOO)

Katherine Stallings Bailey*

The Family and Medical Leave Act (“FMLA”) recognizes an employee’s right to take leave to care for a qualifying family member. In light of the Act’s remedial nature, the intended scope of the care provision is broad, but its definitional details are sparse. As a result of the attendant interpretive discretion afforded to courts, the Seventh Circuit announced its rejection of the requirement—first articulated by the Ninth Circuit—that care provided during travel be related to continuing medical treatment. A facial analysis of the resulting circuit split fails to appreciate the fundamental difference between the Seventh and Ninth Circuits’ considerations: the distinction between physical and psychological care. Whereas physical care is readily measurable, psychological care is less defined and, consequently, ripe to facilitate FMLA abuse. Efforts to combat this potential lead courts to impose judicially devised limitations on psychological care, but judicial discretion still infuses some uncertainty into proceedings. For employers, the best remedy lies in the FMLA’s optional certification provision, which requires medical validation of an employee’s need for leave. In requiring certification, employers should distinguish between physical and psychological care, maximize the FMLA’s informational requirements, and implement complete and consistent request and approval procedures.

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INTRODUCTION

“What happens here, stays here.” The official slogan of Las Vegas¹ proved false for Beverly Ballard, whose trip there caused her to lose her full-time employment with the City of Chicago.² The twenty-five-year employee of the Chicago Park District accompanied her terminally ill mother on a charity-funded trip to Las Vegas.³ Prior to their departure, she submitted a request for leave under the Family and Medical Leave Act (“FMLA”), which the Park District formally denied.⁴ Despite Ballard’s failure to receive approval, she still proceeded with the trip,⁵ expecting that her leave would be retroactively authorized.⁶

As her mother’s primary caregiver, Ballard administered the necessary medication and looked after her mother throughout the trip.⁷ However, both primarily engaged in typical tourist activities: “[P]laying slots, shopping on the Strip, people-watching, and dining at restaurants.”⁸ At no point did Ballard or her mother intend to seek professional care during the trip—the purpose was purely recreational.⁹ Shortly after Ballard’s return, the Park District fired her for the unauthorized absences.¹⁰ Ballard subsequently filed

1. Samantha Shankman, *A Brief History of ‘What Happens in Vegas Stays in Vegas’*, WEEK (Oct. 1, 2013), <http://theweek.com/articles/459434/brief-history-what-happens-vegas-stays-vegas> [<https://perma.cc/7VCT-Z3BL>].

2. *Ballard v. Chi. Park Dist.*, 900 F. Supp. 2d 804, 807 (N.D. Ill. 2012), *aff’d*, 741 F.3d 838 (7th Cir. 2014).

3. *Id.* at 806.

4. *Id.* at 807.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

suit against the Park District,¹¹ alleging that it violated the FMLA by denying her request for leave and then firing her.¹²

The FMLA permits employees to receive leave to care for a “spouse . . . son, daughter, or parent” facing “a serious health condition.”¹³ Congress intended for the FMLA to provide a work–life balance for employees,¹⁴ but it did not expressly define the scope of care or specific means protected.¹⁵ Accordingly, judges retain discretion as to whether specific forms of care qualify for protection, and the attendant assessment is consequently fact intensive.¹⁶

The First and Ninth Circuits have cabined the FMLA’s care provision: through a series of decisions from 1999 to 2011, they adopted the condition that any care-related travel must be tied to the ill family member’s continuing medical treatment.¹⁷ In *Marchisheck v. San Mateo County*, the Ninth Circuit reasoned that a mother’s relocation of her son for non-treatment reasons did not constitute care,¹⁸ and, in *Tellis v. Alaska Airlines, Inc.*, it dismissed a husband’s claims of care through automobile retrieval and phone calls as nonsensical.¹⁹ In *Tayag v. Lahey Clinic Hospital, Inc.*, the First Circuit invoked the Ninth Circuit’s rationale and determined that a wife who accompanied her ill husband on a faith-based healing trip had not provided FMLA-protected care.²⁰

Ballard’s trip to Las Vegas, however, prompted conflict: the Seventh Circuit adopted a broader understanding of care, which it considered irreconcilable with that of the First and Ninth Circuits.²¹ In *Ballard v. Chicago Park District*, the court read the FMLA to protect physical care not tied to the

11. *Id.*

12. *Id.*

13. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612(a)(1)(C) (2012).

14. 29 U.S.C. § 2601(b)(1); Family and Medical Leave Act (FMLA) of 1993, 29 C.F.R. § 825.101(a) (2016).

15. 29 U.S.C. § 2612(a)(1)(C).

16. *See, e.g.*, *Ballard v. Chi. Park Dist.*, 741 F.3d 838 (7th Cir. 2014); *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788 (1st Cir. 2011); *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005); *Marchisheck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999); *see also* 29 C.F.R. § 825.124(a) (providing a general framework for qualifying circumstances with a non-exhaustive list of examples); Maegan Lindsey, Comment, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. TEX. L. REV. 559, 560 (2009) (noting that “courts throughout the country vary in their approaches to determine what constitutes caring for a family member”).

17. *See Tayag*, 632 F.3d 788; *Tellis*, 414 F.3d 1045; *Marchisheck*, 199 F.3d 1068.

18. 199 F.3d 1068. The court observed that “[t]he relevant administrative rule . . . suggests that ‘caring for’ a child with a ‘serious health condition’ involves some level of participation in ongoing treatment of that condition.” *Marchisheck*, 199 F.3d at 1076.

19. 414 F.3d 1045. The court cited *Marchisheck* for the requirement that care “involve[] some level of participation in ongoing treatment of [the family member’s serious health] condition.” *Tellis*, 414 F.3d at 1047 (quoting *Marchisheck*, 199 F.3d at 1076).

20. 632 F.3d at 791 n.2 (“The inclusion of ‘psychological comfort and reassurance’ in the definition of care cannot extend to accompaniment of an ill spouse on lengthy trips unrelated to medical care.” (citation omitted)).

21. *See Ballard*, 741 F.3d 838.

continuation of current medical treatment.²² As a result, the basic medical care in question, provided during travel unrelated to treatment, qualified as “protected” under the FMLA.²³ The Seventh Circuit explicitly differentiated its decision from those of the First and Ninth Circuits, which both determined that care provided during travel needed to be tied to continuing medical treatment.²⁴

Despite the *Ballard* court’s recognition of a circuit split,²⁵ its decision may not be entirely at odds with *Marchisheck* and *Tellis*. While *Ballard*’s analysis focused almost exclusively on physical care,²⁶ the courts in *Marchisheck* and *Tellis* were forced to consider what was primarily, if not entirely, psychological care.²⁷ This distinction is crucial—while physical care is readily measurable, psychological care is more difficult to assess.²⁸ Given shared concerns about abuse of the FMLA’s provisions, the difference in perceptibility explains the stricter locational requirement first articulated by the Ninth Circuit with respect to psychological care. For the same reason, courts throughout the country impose judicially created limitations on psychological care, both with respect to nonmedical travel and general claims of care under the FMLA.

For employers and their advisors alike, there exists a clear response: make substantive use of the FMLA’s optional certification provision. Through optional certifications, employers can require doctors to confirm the necessity of FMLA leave requests prior to approval.²⁹ With logic supporting judicial deference to medical professionals in an ambiguous area of assessment,³⁰ employers should use certification as an opportunity to solicit and record, to the fullest extent allowed, potential bases for leave. To avoid falling prey to unexpected outcomes during litigation, employers should preemptively take the time to ensure that their own certification documents distinguish between physical and psychological care, require the information permitted by the FMLA for “sufficient” certification,³¹ and proactively ensure consistent compliance with application and approval procedures. The administrative work on the front end will mitigate the inherent unpredictability of any discretionary, fact-specific assessments during litigation.

Accordingly, this Note argues that employers should seize the opportunity to exercise the optional certification provision as described. Part I contends that attempts to interpret the FMLA’s broad scope of care contributed

22. *Id.* at 842.

23. *Id.*

24. *Id.*

25. *Id.* at 842 n.2.

26. *Id.* at 841. See *infra* Section II.A for a description of the court’s considerations.

27. See *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005); *Marchisheck v. San Mateo County*, 199 F.3d 1068 (9th Cir. 1999).

28. See *infra* Part II for a discussion of the difference between these two types of care.

29. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2613 (2012).

30. See *infra* Section III.A.

31. See *infra* Section III.B.

to a circuit split less deep than it may initially appear. Part II argues that the split masks the material difference between physical and psychological care, and it maintains that judicially imposed limitations on psychological care—exercised across the nation—reflect a shared concern of potential FMLA abuse. Part III argues that a general judicial deference to medical assessments, while an administrable solution to concerns of abuse, may prove unpredictable for employers forced to litigate FMLA claims. Therefore, it advocates for employers to proactively use the FMLA’s optional certification provision, coupled with consistent compliance procedures, to maximize control over the inherent risks of litigation.

I. THE SOURCE: WHEN CARE CREATES CONFLICT

The judicial discretion afforded by the flexibility of the FMLA fosters apparent tension between circuits in interpreting the broadly defined scope of “care.” In a large sense, the FMLA provides protection for employees struggling to both maintain employment and tend to immediate family needs.³² However, with respect to the care provision, its lack of definitional boundaries³³ permits judges to make case-by-case assessments of what constitutes care, which causes friction when circuits perceive conflict between approaches.³⁴ In this vein, in *Ballard*, the Seventh Circuit interpreted its approach to care as divisive and the cause of a split with the First and Ninth Circuits.³⁵

This Part maintains that the FMLA’s broad definition of care afforded the *Ballard* court the discretion to frame its analysis as conflicting with the First and Ninth Circuits’ approach. Section I.A discusses the remedial nature of the FMLA, the contours of its provisions and regulations regarding care, and the attendant concerns regarding abuse. Section I.B describes the *Ballard* court’s purported split from the First and Ninth Circuits’ approach to the scope of care.

A. *The FMLA: A Remedial Recognition of Employee Rights*

The FMLA provides that, subject to potential certification requirements, an employee has an annual entitlement to twelve weeks of leave to “care for [a] spouse, or a son, daughter, or parent . . . if such spouse, son, daughter, or parent has a serious health condition.”³⁶ Passed in 1993,³⁷ the FMLA was

32. 29 U.S.C. § 2601(b)(1); Family and Medical Leave Act (FMLA) of 1993, 29 C.F.R. § 825.101(a) (2016).

33. See 29 U.S.C. § 2612(a)(1)(C).

34. See *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 842 (7th Cir. 2014) (“We respectfully part ways with the First and Ninth Circuits . . .”).

35. *Id.* at 842 n.2.

36. 29 U.S.C. § 2612(a)(1)(C).

37. Family and Medical Leave Act (FMLA) of 1993, Pub. L. No. 103-3, 107 Stat. 6.

meant to “balance the demands of the workplace with the needs of families”³⁸ by affording employees time to “attend to pressing family health obligations.”³⁹ Congress recognized the modern tension between work and family life, and it characterized the resulting burden on both employees and employers—as well as families and society—as heavy.⁴⁰ The rationale behind the FMLA was rooted in the identified connection between family stability and workplace productivity.⁴¹ By recognizing a right to unpaid leave for qualifying family members’ medical care, Congress intended for the FMLA to ameliorate the conflict between work and family obligations.⁴²

The FMLA does not expressly define permissible forms of care,⁴³ but official interpretations provide guidance. The term “care” receives a broad reading⁴⁴ that includes both physical and psychological forms of assistance.⁴⁵ This expansive interpretation recognizes the significant benefit of psychological care provided by the close family members identified in the FMLA, as opposed to that provided by caregivers with weaker or nonexistent familial connections.⁴⁶ As a result, employees may qualify for FMLA leave based on the “serious health condition” of “[a] spouse, or a son, daughter, or parent, of the employee.”⁴⁷ Sufficient circumstances include those in which, “because of [the] serious health condition,” the family member is unable to independently attend to “basic medical, hygienic, or nutritional needs or safety” or travel to a doctor.⁴⁸ Permissible psychological care includes “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.”⁴⁹ These examples are not exhaustive—other means of physical or psychological care may still qualify for leave under the FMLA.⁵⁰ In addition, employees

38. 29 U.S.C. § 2601(b)(1); Family and Medical Leave Act (FMLA) of 1993, 29 C.F.R. § 825.101(a) (2016).

39. 29 C.F.R. § 825.101(c).

40. S. REP. NO. 103-3, at 4 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 6 (“Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. [The bill] provides 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 under the act.”).

41. 29 C.F.R. § 825.101(c).

42. S. REP. NO. 103-3, at 4, *as reprinted in* 1993 U.S.C.C.A.N. 3, 6.

43. 29 U.S.C. § 2612(a)(1)(C).

44. S. REP. NO. 103-3, at 24, *as reprinted in* 1993 U.S.C.C.A.N. 3, 26.

45. *Id.*; 29 C.F.R. § 825.124(a).

46. S. REP. NO. 103-3, at 24, *as reprinted in* 1993 U.S.C.C.A.N. 3, 26.

47. 29 U.S.C. § 2612(a)(1)(C).

48. 29 C.F.R. § 825.124(a).

49. *Id.*

50. *See id.* (explaining that the enumerated situations were only examples of some of the qualifying circumstances).

are still entitled to FMLA leave when they fill in for usual caregivers or adjust arrangements for care, and the availability of other potential caregivers is not dispositive.⁵¹

While the FMLA affords employees greater accommodations to attend to familial obligations, its flexibility presents the opportunity for abuse of its terms.⁵² To protect against potential instances of abuse, the FMLA includes a provision by which employers can require advance certification of leave by a medical professional.⁵³ If requested, the certification must be issued by the family member's health care provider and provided to the employer "in a timely manner."⁵⁴ In the case of doubt or conflicting opinions, employers are also permitted to require second and third opinions at their own expense.⁵⁵ Nevertheless, in the end, the right to twelve annual weeks of qualifying leave remains with the employee.⁵⁶

B. *Care While Away and the Reason for Travel: Does It Matter?*

The FMLA's broad definition of "care" has created friction between judicial interpretations of its actual scope. In *Marchisheck v. San Mateo County*, the Ninth Circuit read the Department of Labor ("DOL") regulations to "suggest [] that 'caring for' a child with a 'serious health condition' involves some level of participation in ongoing treatment of that condition."⁵⁷ Following an assault on her teenage son, who had been attending psychological counseling, Marchisheck decided to relocate him to live with family in the Philippines, based on "her fear for [his] safety."⁵⁸ After her employer denied her request for leave, Marchisheck reached out to a psychiatrist—whom she had never met—to "kind of help [her] out because [she was] having a hard time getting time off" for the relocation.⁵⁹ The psychiatrist issued a three-sentence letter in her support, but Marchisheck's employer still denied her request for leave.⁶⁰ Undeterred, Marchisheck proceeded with the trip, and she was subsequently terminated.⁶¹ The court

51. *Id.* § 825.124(b).

52. *See* S. REP. NO. 103-3, at 25–26 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 27–28 (recognizing the potential for employee abuse of the FMLA).

53. *Id.*

54. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2613(a) (2012).

55. *Id.* § 2613(c)–(d).

56. *Id.* § 2612(a)(1).

57. 199 F.3d 1068, 1076 (9th Cir. 1999).

58. *Marchisheck*, 199 F.3d at 1071. Marchisheck "feared that if she left [her son] alone, he would be beaten or killed, and she believed that he would be safe from 'getting beaten up again' if he moved to her brother's house in the Philippines." *Id.*

59. *Id.* at 1071–72.

60. *Id.* at 1072. The doctor had no information about the son's future treatment—which Marchisheck had no plans to secure—and admitted "that he was not sure what he was referring to when he described a 'family medical crisis' and that he did not recall whether he actually had drafted the letter himself." *Id.*

61. *Id.*

determined that Marchisheck failed to create a factual dispute as to whether her son had a “serious health condition”—it recognized that, alone, this would be sufficient to destroy her FMLA claim.⁶² Yet the court went further and reiterated that Marchisheck had not provided FMLA-protected care through the trip.⁶³ It emphasized that she had no plans to arrange for medical care for her son, and there was no psychological treatment even available within three hours of the son’s location.⁶⁴ The court concluded that Marchisheck “could not ‘care for’ [her son] under the FMLA by removing him to a place where he would receive *no* treatment.”⁶⁵

The Ninth Circuit doubled down on its logic in *Tellis v. Alaska Airlines, Inc.*: it quoted *Marchisheck* to reiterate that “caring for a family member with a serious health condition ‘involves some level of participation in ongoing treatment of that condition.’”⁶⁶ *Tellis*’s wife had been experiencing difficulties with her late-stage pregnancy, which prompted *Tellis* to take leave without officially securing approval.⁶⁷ While *Tellis* was away, his car broke down, and he took a flight across the country to retrieve the family’s secondary vehicle.⁶⁸ *Tellis* claimed that this trip provided his wife with “psychological reassurance . . . that she would soon have reliable transportation,” and he maintained that his calls to his wife over the course of the three-and-a-half-day trip “provided moral support and psychological comfort.”⁶⁹ As in *Marchisheck*,⁷⁰ the court relied on the DOL regulations for its inference of the continuing-treatment requirement.⁷¹ Ultimately, it rejected *Tellis*’s claims as beyond the scope of the FMLA’s care provision.⁷²

In *Tayag v. Lahey Clinic Hospital, Inc.*, the First Circuit subsequently adopted the Ninth Circuit’s rationale to suggest that, if an employee travels to care for a family member pursuant to FMLA leave, the trip needs to be related to medical treatment of the family member’s relevant condition.⁷³ *Tayag* took unapproved leave to accompany her husband on a spiritual pilgrimage abroad.⁷⁴ Although she provided basic physical care on the trip,⁷⁵

62. *Id.* at 1074–76.

63. *Id.* at 1076.

64. *Id.*

65. *Id.*

66. 414 F.3d 1045, 1047 (9th Cir. 2005) (quoting *Marchisheck*, 199 F.3d at 1076).

67. *Tellis*, 414 F.3d at 1046.

68. *Id.*

69. *Id.* at 1046–47.

70. *Marchisheck*, 199 F.3d at 1076.

71. *Tellis*, 414 F.3d at 1047.

72. *Id.* at 1048.

73. 632 F.3d 788 (1st Cir. 2011).

74. *Tayag*, 632 F.3d at 790.

75. *Id.* (“*Tayag* assisted [her husband] by administering medications, helping him walk, carrying his luggage, and being present in case his illnesses incapacitated him.”).

the court only considered “whether a ‘healing pilgrimage’ comprise[d] medical care within the meaning of the FMLA.”⁷⁶ Tayag described the healing pilgrimage as “aimed at treating the illness and providing psychological comfort.”⁷⁷ The court cited to the DOL regulations, *Tellis*, and *Marchisheck* to reason that “[t]he inclusion of ‘psychological comfort and reassurance[]’ . . . in the definition of care cannot extend to accompaniment of an ill spouse on lengthy trips unrelated to medical care.”⁷⁸ The court ultimately determined that Tayag’s trip did not constitute FMLA-protected care.⁷⁹

In *Ballard v. Chicago Park District*, the Seventh Circuit announced its split from the First and Ninth Circuits with respect to the scope of “care.”⁸⁰ The Park District argued that the assistance Ballard provided did not fall within the scope of the FMLA because she already provided consistent home care to her mother, and the trip to Las Vegas was not “related to a continuing course of medical treatment.”⁸¹ The *Ballard* court disagreed, holding that assistance qualifies for leave independent of current medical treatment, as long as an employee tends to a family member’s basic needs.⁸² The court considered the location of care irrelevant—if attendance to basic needs at home would qualify as care, then so too should the same assistance provided away from home.⁸³

The court concluded that this determination created a circuit split with the approach of the First and Ninth Circuits.⁸⁴ In its view, the *Marchisheck*, *Tellis*, and *Tayag* courts’ use of the word “treatment” was more restrictive than the statutory term—“care”—which included the provision of basic assistance unrelated to medical treatment.⁸⁵ Whereas the inference of an ongoing-treatment requirement would cabin an employee’s travel to that which related to the family member’s current medical treatment, the *Ballard* court’s reading would permit any travel during which “basic” care was provided, making the destination and location of care irrelevant. This difference in interpretation prompted the *Ballard* court’s recognition of a split.

II. THE SPLIT: WHAT IT MASKS, AND WHAT IT REVEALS

Part II argues that the split caused by *Ballard* may be softened by the recognition of the differences between physical and psychological care. The *Ballard* court took care to note that it would “respectfully part ways” with

76. *Id.* at 791.

77. *Id.* at 792.

78. *Id.* at 791 n.2.

79. *Id.* at 793.

80. 741 F.3d 838, 842 n.2 (7th Cir. 2014).

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

82. *Id.* at 842.

83. *Id.*

84. *Id.* at 842 n.2.

85. *Id.* at 842.

the *Marchisheck*, *Tellis*, and *Tayag* courts,⁸⁶ and it made explicit that its opinion “create[d] a split between circuits.”⁸⁷ Section II.A contends that, in reality, the *Marchisheck* and *Tellis* courts faced different factual circumstances with respect to the types of care provided,⁸⁸ and the perceived disagreement was inflated by different approaches to statutory interpretation. Section II.B maintains that attempts to constrain potential FMLA abuse have resulted in courts across the nation devising limitations on what qualifies as psychological care. Such judicial initiative with respect to psychological care—which is already amorphous—strengthens the need for employers to use the optional certification provision to minimize unpredictability in litigation.

A. *Statutory Interpretation: Distracting from the Facts*

An analysis of the development behind *Ballard*'s split helps to demonstrate the difference between judicial analyses of physical care—capable of tangible measurement—and psychological care—a more amorphous construct, susceptible to manipulation. The different approaches to statutory interpretation represent a means of reaching a result that makes sense for the facts of the case at hand: In *Ballard*, where the daughter provided measurable physical care, the court determined that a textual reading of the care provision did not imply a locational requirement.⁸⁹ In *Marchisheck*⁹⁰ and *Tellis*,⁹¹ however, where the care was less easily identifiable, courts adopted a functionalist approach to reach a result rooted in “[c]ommon sense.”⁹²

Unlike the *Ballard* court, the *Marchisheck* and *Tellis* courts never faced facts in which basic physical care was provided. *Marchisheck* contended that the one-time relocation of her son to avoid physical abuse and psychological pressures constituted sufficient care—nothing involved the provision of

86. *Id.*

87. *Id.* at 842 n.2.

88. For a discussion of the split with respect to the First Circuit's decision in *Tayag*, see *infra* notes 115–124 and accompanying text.

89. *Ballard*, 741 F.3d at 842–43.

90. *Marchisheck* alleged that her one-time relocation of her son to live with family in the Philippines and remain “safe from further beatings” constituted care. See *Marchisheck v. San Mateo County*, 199 F.3d 1068, 1076 (9th Cir. 1999). For a discussion of why this is best considered psychological care, see *infra* note 93.

91. *Tellis* claimed that his cross-country trip to retrieve the family's automobile and calls to his pregnant wife constituted care. *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1046 (9th Cir. 2005).

92. *Id.* at 1048.

physical, day-to-day assistance.⁹³ The court dismissed Marchisheck's individual instance of assistance as outside the bounds of the care provision.⁹⁴ Similarly, in *Tellis*, the court assessed the care provision solely with respect to psychological care. Tellingly, the *Tellis* court rationalized its continuing-treatment requirement by reference to another judicial limitation regularly imposed on psychological care.⁹⁵ Indeed, every case on which the *Tellis* court relied in describing this "instructive" requirement involved primarily—if not solely—psychological care.⁹⁶ *Tellis* alleged that his retrieval of the family automobile provided "psychological reassurance" to his wife and that his phone calls to his wife provided "moral support and comfort."⁹⁷ The court rejected *Tellis*'s interpretation of the FMLA on the basis of a "[c]ommon sense" notion of the care provision's scope.⁹⁸

In *Ballard*, the court assessed the care provision with a sole focus on day-to-day physical assistance. Ballard acted as her mother's "primary caregiver" and provided care that ranged from meal preparation to basic medical treatment.⁹⁹ When she accompanied her mother on the trip to Las Vegas, Ballard continued to provide the same physical care that she did at home; the only material change was in location.¹⁰⁰ While the court initially observed that the issue presented would involve questions of "physical and psychological care," the only aspect of Ballard's care that the court assessed was the physical care she provided.¹⁰¹ The court discussed the mother's "basic medical, hygienic, and nutritional needs," and, with respect to the relevant DOL regulations, it sought guidance for physical care, not

93. *Marchisheck*, 199 F.3d at 1076. While Marchisheck did not explicitly characterize the care she provided as "psychological," at least one other commentator has done so. See Kelsey A. Jonas, Note, *Fixing the FMLA's Flaws: A Fight for Care, Adult Children, and Tax Incentives*, 118 W. VA. L. REV. 1313, 1338 (2016) ("[B]oth the majority of the son's ailments and the mother's support were psychologically-based. The son did not need medications administered nor his food prepared; he was capable of providing his own basic care." (footnote omitted)). In deciding whether to characterize Marchisheck's alleged care as physical or psychological, it is important to note that, on the trip, the son required no physical care, and Marchisheck had no plans to arrange for later medical treatment. *Marchisheck*, 199 F.3d at 1076. She sought to assuage her own fear for his safety, *id.* at 1071—in this sense, the nature of the alleged care appears to be best characterized as psychological.

94. *Marchisheck*, 199 F.3d at 1076.

95. *Tellis*, 414 F.3d at 1047 ("Courts in this Circuit and other jurisdictions that have concluded a particular activity has constituted 'caring for' a family member under the FMLA have done so only when the employee has been in close and continuing proximity to the ill family member."). See *infra* Section II.B.2 for a discussion of this particular requirement.

96. See *Tellis*, 414 F.3d at 1047 (first citing *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1087–88 (9th Cir. 2002)); then citing *Brunelle v. Cytec Plastics, Inc.*, 225 F. Supp. 2d 67, 77 & n.13 (D. Me. 2002); then citing *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711, 715–16 (E.D. La. 2002); and then citing *Pang v. Beverly Hosp., Inc.*, 94 Cal. Rptr. 2d 643, 648–49 (Ct. App. 2000)).

97. *Id.* at 1048.

98. *Id.*

99. *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 839 (7th Cir. 2014).

100. *Id.* at 839–40.

101. See *id.* at 839, 841–42.

psychological care.¹⁰² It determined that, “at the very least, Ballard requested leave in order to provide physical care,” which it reasoned was “enough to satisfy [the FMLA’s requirements].”¹⁰³ Thus, by the court’s own admission, the pertinent care in *Ballard* was physical, not psychological.

The *Ballard* court relied on statutory interpretation to emphasize its disagreement with the *Marchisheck*, *Tellis*, and *Tayag* courts.¹⁰⁴ It adopted a formalist, text-based approach to the interpretation of “care” under the FMLA. The court began its analysis by observing that the relevant texts impose no express geographic limit on physical care.¹⁰⁵ Its assessment also included the significance of specific word selection¹⁰⁶ and the conflicting results that emerge with other terms in the statute under a narrow approach to “care.”¹⁰⁷ The court concluded that nothing in the text prohibits basic assistance away from home that is not part of the ill relative’s current medical care.¹⁰⁸ It observed that, of the three cases from the First and Ninth Circuits, “[t]he only one . . . that purports to ground its conclusion in the text of the statute or regulations is *Marchisheck*.”¹⁰⁹ However, it then explained that the conclusion reached in *Marchisheck* did not actually follow from any text.¹¹⁰

The *Marchisheck* and *Tellis* courts took a more functionalist, effects-based approach to the scope of “care.” The *Marchisheck* court recited the DOL regulations, considered the facts of the case, and simply concluded that “[t]he relevant administrative rule . . . suggests that ‘caring for’ a child with a ‘serious health condition’ involves some level of participation in ongoing treatment of that condition.”¹¹¹ In *Tellis*, the court relied on “[c]ommon sense” with respect to the range of acts covered under the care provision.¹¹² The courts rationalized the scope of “care” without engaging in the same in-depth, textual analysis undertaken by the *Ballard* court. As a result, the *Ballard* court concluded that its textual approach provided the correct reading of the scope of the care provision.

Despite the *Ballard* court’s discussion of statutory interpretation and ultimate split, it still recognized that the DOL regulations regarding care could suggest a locational requirement for psychological care.¹¹³ Rather than

102. *Id.* at 841–42. The court conceded that the DOL regulations may contain a locational requirement, but summarily dismissed it as “only concern[ing] psychological care.” *Id.* at 841.

103. *Id.* at 842.

104. *Id.* at 840–43.

105. *Id.* at 840–41 (considering the text of the statute and the relevant DOL regulations).

106. *Id.* at 840 (noting that the legislature chose to use “care” instead of “treatment”).

107. *Id.* at 842 (observing that “serious health condition” expressly rejects active treatment as a prerequisite for its qualifications).

108. *Id.* at 842–43.

109. *Id.* at 842.

110. *Id.* at 842–43.

111. *Marchisheck v. San Mateo County*, 199 F.3d 1068, 1076 (9th Cir. 1999).

112. *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1048 (9th Cir. 2005).

113. *Ballard*, 741 F.3d at 841. The court explained:

addressing the issue, the court simply determined that the physical care Ballard provided was sufficient to satisfy the FMLA's requirements and then proceeded with its analysis. Tellingly, following *Ballard*, in *Gienapp v. Harbor Crest*, the Seventh Circuit directly referenced the amorphous nature of psychological care.¹¹⁴

It is worth noting that, in *Tayag*, the court faced circumstances that included both physical and psychological care¹¹⁵—the same combination initially described, albeit not ultimately considered, in *Ballard*.¹¹⁶ Notably, however, the *Tayag* court limited its consideration to “whether a ‘healing pilgrimage’ comprises medical care within the meaning of the FMLA,” explicitly disregarding the basic physical care that Tayag provided during the trip.¹¹⁷ In its analysis, the *Tayag* court adopted the Ninth Circuit’s continuing-treatment requirement, which—despite its foundation solely in considerations of psychological care—did not expressly identify any limitation in its application regarding the type of care.¹¹⁸ As a result, the *Tayag* court suggested that physical care provided on a nonmedical trip would not be protected by the FMLA,¹¹⁹ which contributed to the *Ballard* court’s recognition of a split. Also worth noting, however, are the unique circumstances in *Tayag*: Tayag had already used the FMLA’s care provision to provide traditional medical care to her husband, but she then attempted to advance a constitutional argument alleging religious discrimination against the “religiously affiliated healing program [] . . . aimed at treating the illness and

The only part of the regulations suggesting that the location of care might make a difference is the statement that psychological care “includes providing psychological comfort and reassurance to [a family member] . . . who is receiving inpatient or home care.” 29 C.F.R. § 825.116(a) (2008) (emphasis added). Even so, as the district court correctly observed, this example of what constitutes psychological care does not purport to be exclusive. Moreover, this example only concerns psychological care. The examples of what constitutes physical care use no location-specific language whatsoever.

Id. (alteration in original).

114. See *Gienapp v. Harbor Crest*, 756 F.3d 527, 532 (7th Cir. 2014) (noting that “some forms of familial assistance are too tangential to hold out a prospect of psychological benefits to a covered relative”).

115. *Tayag v. Lahey Clinic Hosp. Inc.*, 632 F.3d 788, 790 (1st Cir. 2011) (noting that Tayag “administer[ed] medications, help[ed] [her husband] walk, carr[ied] his luggage, and [was] present in case his illnesses incapacitated him”).

116. See *Ballard*, 741 F.3d at 839, 842 (“[A]t the very least, Ballard requested leave in order to provide physical care. That, in turn, is enough to satisfy [the FMLA’s requirements].”).

117. *Tayag*, 632 F.3d at 791. The court seemed to suggest that, had Tayag *only* provided the basic care on a trip similar to that in *Ballard*, it would not have been sufficient. *Id.* (“Tayag properly does not claim that caring for her husband would itself be protected leave under the FMLA if the seven-week trip was for reasons unrelated to medical treatment of [her husband’s] illnesses.”).

118. See, e.g., *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1047 (9th Cir. 2005) (“[W]e have previously stated that caring for a family member with a serious health condition ‘involves some level of participation in ongoing treatment of that condition.’” (quoting *Marchisheck v. San Mateo County*, 199 F.3d 1068, 1076 (9th Cir. 1999))).

119. *Tayag*, 632 F.3d at 791.

providing psychological comfort”—an argument the court denounced as “hardly a serious treatment of a complex issue.”¹²⁰ The length of her leave was extremely atypical, the initial medical certification she obtained was questionable, and the second medical certification—requested by her employer—“disavowed the need for any leave.”¹²¹ Tayag had also previously used vacation time for what appeared to be a similar pilgrimage-type trip without attempting to claim FMLA leave.¹²² It is plausible that the combination of these factors may have heightened the court’s sensitivity to potential FMLA abuse, although this proposition is speculative.

Tayag illustrates that the judicial discretion afforded by the FMLA leads courts to inevitably deviate, to some degree, in their approaches to the scope of care. While it is crucial for employers to anticipate and plan for potential deviations, it is also prudent to look for common threads within the discord. One relative constant across courts is the concern regarding abuse when employees claim more amorphous, harder-to-measure forms of care.¹²³ Physical care does not implicate this concern as readily because, by its nature, it can be measured. Psychological care, however, is where this concern abounds, given the difficulty of identification and measurement. This potential for abuse, in turn, prompts the inference of additional requirements.¹²⁴

B. *Opposition to Abuse: The Common Approach to FMLA Interpretation*

1. Efforts to Constrain Psychological Care Provided During Nonmedical Travel

A wider lens for *Ballard*’s comparative framework should reveal to employers that a number of circuits are motivated by the same concerns regarding the care provision—primarily, the potential for abuse of the FMLA. This consistency supports the possibility that, had the circuits explicitly considered the differences between physical and psychological care, their results may have appeared less discordant. Indeed, *Ballard* explicitly noted the potential for abuse, even though it did not directly address whether *Ballard*’s trip constituted abuse.¹²⁵ The *Tayag* court also alluded to the potential for abuse with Tayag’s faith-healing trip. The court highlighted the fact that

120. *Id.* at 791–92.

121. *Id.* at 792–93.

122. *Id.* at 790 (“In May 2006, without claiming FMLA leave, Tayag used vacation time to travel with [her husband] to Lourdes, France—a major site for Roman Catholic pilgrimage and reputed miraculous healings.”).

123. See *infra* Section II.B.

124. Some courts purport to adopt a “loose” standard for psychological care. *E.g.*, *Fioto v. Manhattan Woods Golf Enters.*, 270 F. Supp. 2d 401, 405 (S.D.N.Y. 2003), *aff’d*, 123 F. App’x 26 (2d Cir. 2005). However, a loose standard in terms of the acts considered does not bar back-end restrictions: courts can still—and do—impose certain conditions that psychological care must meet to satisfy the FMLA’s requirements. See *infra* Section II.B. The requirements discussed in Section II.B serve to cabin the potentially expansive scope of psychological care through judicial construction.

125. *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 843 (7th Cir. 2014).

Tayag had already taken full advantage of the FMLA for her husband's ordinary medical treatment, yet still tried to loop in an additional faith-healing trip as care.¹²⁶ It also discussed the difference in medical certifications and concluded that, "[s]ince nothing in [the initial] certificate provided a basis for a seven-week leave and the [second certificate] had disavowed the need for any leave, [Tayag's employer] was justified in denying FMLA leave."¹²⁷ In *Tellis*, the court suggested the same potential for abuse—it reiterated that *Tellis* "left" his wife "for almost four days," and it dismissed *Tellis*' purported care as contrary to "[c]ommon sense."¹²⁸

Courts across the country echo these same concerns. In *Alsoofi v. Thyssenkrupp Materials NA, Inc.*, a district court determined that a son's alleged provision of psychological comfort to his mother from afar was nothing more than a "collateral benefit" of non-FMLA care.¹²⁹ It concluded that, if the FMLA did not support travel with the family member for non-medical reasons, travel without the family member would almost certainly fall short of protected care.¹³⁰ Similarly, in *Isaacowitz v. Dialysis Clinic Inc.*, a district court concluded that an employee could not claim FMLA protection to accompany his ill mother on a cruise.¹³¹ The court made a concerted distinction between care "incidental" to a leave request and care essential to a leave request.¹³² It determined that, when the main purpose of the leave is vacation, the time off is not protected by the FMLA.¹³³

126. *Tayag*, 632 F.3d at 790–91.

127. *Id.* at 793. In discussing the questionable validity of the first certification, which Tayag procured, the court explained:

[T]he requested seven-week leave was different from the brief leaves taken by Tayag over the previous four years and suggested by earlier certifications. When [her husband's doctor] provided a new certificate in August 2006, he included "coronary artery disease" for the first time as a listed condition, but said only that [her husband's] incapacity would occur "intermittently" and for his "lifetime" and provided no explanation as to why a seven-week leave would be needed.

Id. at 792.

128. *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1048 (9th Cir. 2005).

129. No. 09-CV-12869, 2010 WL 973456, at *6 (E.D. Mich. Mar. 15, 2010). Alsoofi claimed that, by stepping in to accompany his younger sister to a wedding abroad, he provided psychological comfort to his mother. *Alsoofi*, 2010 WL 973456, at *4. In its analysis, the court took care to note that Alsoofi was, "almost literally, half a world away from his mother" and that he did not stay in constant contact. *Id.* at *5.

130. *Id.* at *6.

131. No. CIV-09-638 JCH/RHS, 2010 WL 8913513 (D.N.M. Feb. 22, 2010). Isaacowitz's mother was diagnosed with "wet macular degeneration," and Isaacowitz explained that the cruise "may be the last time [his mother] will get to enjoy scenery with her family with her eyesight." *Isaacowitz*, 2010 WL 8913513, at *1–2. He also told his employer that the cruise, organized and sponsored by a Jewish synagogue, was "a religious outing." *Id.* at *2.

132. *Id.* at *6.

133. *Id.* The court focused on its understanding of the FMLA's purpose, which it found did not include "a means for allowing an employee who lacks the necessary vacation time to take time of [sic] from work without permission." *Id.* It then reiterated that "going on a cruise" was not integral to the mother's medical care. *Id.*

2. General Efforts to Constrain the Concept of Psychological Care

Courts struggle to reconcile the intended interpretation of the FMLA¹³⁴ with their desire to prevent abuse of its terms. For this reason, concerns regarding general abuse also take shape in FMLA-related contexts apart from the issue of care provided during nonmedical travel. The similar restrictions different courts have constructed to constrain potential abuse—often implicated with the amorphous nature of psychological care—illustrate their underlying concerns and objectives regarding the FMLA.

One judicially enforced limitation imposed upon FMLA leave requires that the employee provide actual care as opposed to just visiting an ill relative. In *Fioto v. Manhattan Woods Enterprises LLC*, the Second Circuit determined that, because Fioto could not provide evidence suggesting that he planned to provide actual care or identifiable support during the visit, the visit did not rise to the requisite level of care under the FMLA.¹³⁵ Similarly, in *Overley v. Covenant Transport, Inc.*, the Sixth Circuit determined that a mother's visit to her daughter's assisted-living home did not constitute FMLA-protected care.¹³⁶ The court gave weight to the "routine" nature of the visit, which involved Overley merely checking up on her daughter.¹³⁷ In the absence of identifiable care provided, courts often dismiss visits as outside of the scope of the care provision.¹³⁸

An additional restriction used by courts requires the employee to be in close physical proximity to the ill relative. In *Tellis*, the court explicitly relied upon the "close and continuing proximity" requirement for FMLA-protected care.¹³⁹ Similarly, in *Baham v. McLane Foodservice, Inc.*, the Fifth Circuit found that Baham's telephone conversations with his ill daughter and

134. See *supra* Section I.A (explaining that the scope of the FMLA's care provision is expansive).

135. 123 F. App'x 26, 28 (2d Cir. 2005).

136. 178 F. App'x 488, 495 (6th Cir. 2006).

137. *Overley*, 178 F. App'x at 495.

138. See, e.g., *Taylor v. Odom's Tenn. Pride Sausage, Inc.*, No. 4:08CV02833, 2010 WL 892075 SWW (E.D. Ark. Mar. 8, 2010); *Brehmer v. Xcel Energy, Inc.*, No. 06-3294 (JNE/JJG), 2008 WL 3166265 (D. Minn. Aug. 4, 2008), *aff'd*, 356 F. App'x 890 (8th Cir. 2009); *Schoonover v. ADM Corn Processing*, No. 06-CV-133-LRR, 2008 WL 282343 (N.D. Iowa Jan. 31, 2008); *Roff v. Low Surgical & Med. Supply, Inc.*, No. CV-03-3655(SJF)(JMA), 2004 WL 5544995 (E.D.N.Y. May 11, 2004).

139. *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1047 (9th Cir. 2005). The *Tellis* court observed that "[c]ourts in this Circuit and other jurisdictions that have concluded a particular activity has constituted 'caring for' a family member under the FMLA have done so only when the employee has been in close and continuing proximity to the ill family member." *Id.* Notably, every case on which the *Tellis* court subsequently relied involved primarily—if not solely—psychological care. *Id.* (first citing *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1087–88 (9th Cir. 2002); then citing *Brunelle v. Cytec Plastics, Inc.*, 225 F. Supp. 2d 67, 77 & n.13 (D. Me. 2002); then citing *Briones v. Genuine Parts Co.*, 225 F. Supp. 2d 711, 715–16 (E.D. La. 2002); and then citing *Pang v. Beverly Hosp., Inc.*, 94 Cal. Rptr. 2d 643, 648–49 (Ct. App. 2000)).

provision of out-of-state chores did not qualify as care under the FMLA.¹⁴⁰ The Eighth Circuit used the same approach in *Miller v. State of Nebraska Department of Economic Development* to find that Miller could not have provided psychological care to his ill father while traveling with a companion.¹⁴¹ Courts have repeatedly recognized that, to qualify for FMLA protection, psychological care cannot be provided from afar.¹⁴²

A final constraint used to contain concerns of abuse requires immediacy in the care provided by the employee. The DOL regulations describe family medical needs under the FMLA as “pressing family health obligations.”¹⁴³ In *Overley*, the court explained that “[t]he FMLA does not provide leave for every family emergency,”¹⁴⁴ and it repeatedly recognized that Overley’s care did not need to occur at the time she performed it—Overley admitted that the meetings she attended were not time sensitive.¹⁴⁵ The court also focused on the routine nature of the care, emphasizing the fact that none of the provisions carried a special sense of immediacy.¹⁴⁶ Likewise, in *Lane v. Pontiac Osteopathic Hospital*, the district court determined that a son’s leave to handle flooding in his ill mother’s home did not qualify as protected care under the FMLA.¹⁴⁷ The court reasoned that flooding did not impact the mother’s illness, so Lane did not have an immediate, pressing need for leave related to his mother’s medical care.¹⁴⁸

No statutory provision compels restrictions of these sorts¹⁴⁹—rather, they are judicially devised limitations on the ability to qualify for FMLA leave. The imposition of additional restrictions on the scope of psychological care may appear inconsistent with the expansive understanding intended by

140. 431 F. App’x 345, 348–49 (5th Cir. 2011) (citing *Tellis*, 414 F.3d at 1047). The court noted that it could not find any authority “holding that merely remaining in frequent telephone contact with a relative while in another state” falls under FMLA-protected care. *Baham*, 431 F. App’x at 349.

141. 467 F. App’x 536, 541 (8th Cir. 2012) (per curiam) (citing *Tellis*, 414 F.3d at 1047).

142. See *Tellis*, 414 F.3d at 1047 (first citing *Scamihorn*, 282 F.3d at 1087–88; then citing *Brunelle*, 225 F. Supp. 2d at 77 & n.13; then citing *Briones*, 225 F. Supp. 2d at 715–16; and then citing *Pang*, 94 Cal. Rptr. 2d at 648–49) (“Courts in this Circuit and other jurisdictions that have concluded a particular activity has constituted ‘caring for’ a family member under the FMLA have done so only when the employee has been in close and continuing proximity to the ill family member.”); see also *Alsoofi v. Thysennkrupp Materials NA, Inc.*, No. 09-CV-12869, 2010 WL 973456, at *6 (E.D. Mich. Mar. 15, 2010).

143. Family and Medical Leave Act (FMLA) of 1993, 29 C.F.R. § 825.101(c) (2016) (explaining the purpose of the FMLA).

144. *Overley v. Covenant Transp., Inc.*, 178 F. App’x 488, 494 (6th Cir. 2006).

145. *Id.* at 495.

146. *Id.*

147. No. 09-12634, 2010 WL 2558215 (E.D. Mich. June 21, 2010).

148. *Lane*, 2010 WL 2558215, at *4–5 (citing *Overley*, 178 F. App’x at 494–95).

149. See Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612 (2012).

Congress, but they are a necessity for the judges forced to consistently adjudicate the fact-specific FMLA claims brought before them.¹⁵⁰ Like the functionalist approach of the *Marchisheck* and *Tellis* courts,¹⁵¹ judicially imposed restrictions help to manage the amorphous nature of psychological care, which is inherently ripe for abuse because of the difficulty in its identification and analysis. This undercurrent of common concern regarding abuse signals a basic agreement between the courts with respect to the interpretation of the FMLA required in practice. The dichotomy between a “broad” understanding of care¹⁵² and judicially created requirements for qualification¹⁵³ suggests an intuitive conclusion: courts want to recognize legitimate needs for leave, but do not want to compromise the integrity of the FMLA by indulging manipulative requests. The problem is rooted in the nature of the care provided: while day-to-day physical care is readily identifiable, psychological care is more amorphous, and thus implicates heightened levels of concern regarding the potential for abuse. The solution to alleviating these judicial concerns must emerge from a method by which to distinguish legitimate psychological care from abuses disguised in the dressings of care.

III. THE SOLUTION: CERTIFICATION AND CONSISTENCY

Part III argues that the most effective way to curb abuse is to defer to medical expertise through evenhanded use of the FMLA’s optional certification provision.¹⁵⁴ Section III.A explains that, due to the intangible and amorphous nature of psychological treatment, some courts already defer to the judgment of doctors. Section III.B contends that, for employers, this existing—and advisable—judicial reliance on medical expertise should compel the use of the FMLA’s optional certification provision. Section III.C maintains that employers should follow three steps in crafting a certification strategy: (1) specifically identifying psychological care on certification forms;¹⁵⁵ (2) confirming that forms ask for the informational requirements permitted under FMLA provisions; and (3) monitoring requests, certifications, and approvals for compliance and consistent enforcement.

150. See *supra* Part I.

151. See *supra* Section II.A.

152. S. REP. NO. 103-3, at 24 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 26.

153. See *supra* Part I.

154. Other commentators have taken more reform-oriented approaches. See, e.g., Jonas, *supra* note 93, at 1334–36 (proposing drafting solutions that include analogies to the Internal Revenue Code and a two-pronged regulatory definition of care); Lindsey, *supra* note 16, at 584–89 (suggesting revisions to the current DOL regulations); Margaret Wright, Comment, *A Caring Definition of “Care”: Why Courts Should Interpret the FMLA to Cover Unconventional Treatment of Seriously Ill Family Members*, 32 T.M. COOLEY L. REV. 35 (2015) (advocating a three-part test for judicial assessments of “unconventional” care). This Note does not delve into reform; rather, it attempts to advise employers as to the most effective practices under the current FMLA regime.

155. But see *infra* note 174.

A. *Deference to Doctors: The Problems Posed by Psychological Care*

While the outcome of each FMLA case involving “care” proves highly fact dependent, the judiciary’s shared struggle in assessing psychological care suggests that the key to distinguishing legitimate psychological care from potential FMLA abuse comes from medical doctors, not judges and lawyers, or employers and employees. Psychological care is inherently difficult to measure.¹⁵⁶ A daughter cannot prove the comfort of her presence in the same way that she can point to the physical assistance she provides—the administration of a tangible medication is more readily identified than is the intangible benefit of a bedside companion. In this way, psychological care is subject to a greater likelihood for abuse, and courts are less equipped to recognize and remedy these manipulations by employees.¹⁵⁷ As a result, courts attempt to cabin psychological care generally by imposing various—but not universal—limitations on permissible forms of care.¹⁵⁸

This risk is compounded where the family member’s serious health condition is a matter of mental health.¹⁵⁹ In *Scamihorn v. General Truck Drivers*, the Ninth Circuit found that, viewing the evidence in the light most favorable to Scamihorn, he had provided his father with psychological care sufficient to meet the requirements of the FMLA.¹⁶⁰ The majority determined that Scamihorn’s relocation to Reno, daily conversations with his father, and constant presence represented “participation in [the] ongoing treatment of [his father’s] condition” in the form of psychological care.¹⁶¹ It also took care to reiterate that the medical opinions provided urged the legitimacy of Scamihorn’s psychological care.¹⁶² The dissent disagreed: in its view, the fact that Scamihorn’s father retained his employment and tended

156. See, e.g., Lino A. Graglia, *Lessons from the Ludicrous: How Employment Laws Are Destroying the American Workplace*, 2 TEX. REV. L. & POL. 129, 135 (1997) (book review) (noting that psychological ailments are difficult to see or measure).

157. See Robin Stryker et al., *Employment Discrimination Law and Industrial Psychology: Social Science as Social Authority and the Co-Production of Law and Science*, 37 LAW & SOC. INQUIRY 777, 782 (2012) (noting the tension that arises between the judicial system’s need to find “particulars hiding among the universals” and social science’s pursuit of “universals hiding among the particulars” (quoting DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* 69 (1999))).

158. See *supra* Section II.B.

159. See *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1087–88 (9th Cir. 2002); see also *Stepp v. Castrucci of Alexandria, LLC*, No. 10-146-WOB-CJS, 2011 WL 7046018 (E.D. Ky. Dec. 19, 2011), *adopted by* No. 10-146-WOB-CJS, 2012 WL 124809 (E.D. Ky. Jan. 17, 2012). In *Stepp*, a Kentucky district court deferred to a medical opinion from a non-psychiatrist to support its conclusion that a father’s FMLA claim regarding psychological care for his daughter was not frivolous. *Id.* at *2 & n.6, *5.

160. 282 F.3d at 1087–88 (reviewing Scamihorn’s appeal of the motion granting summary judgment to his employer).

161. *Scamihorn*, 282 F.3d at 1087–88.

162. See *id.* at 1088. The court confirmed that two psychiatrists who had seen the father “emphasized [the] fact” that Scamihorn provided psychological care through his therapeutic conversations and constant presence. *Id.* at 1088.

to his own basic needs negated any pressing need for possible psychological comfort from Scamihorn.¹⁶³ The dissent flagged signals of potential FMLA abuse by contrasting Scamihorn's depiction of his father as "needy" with the reality in which the father, "an obviously active man," "[was] perfectly capable of caring for himself and [did] so."¹⁶⁴

Examples of dependence on medical validation suggest a means of logical recourse for courts seeking to supplement their own assessments of psychological care. However, as indicated by the dissent in *Scamihorn*, not all medical opinions are equally persuasive.¹⁶⁵ Doctors differ, as do the exacting nature and credibility of their individual questioning and assessments of patients, which leaves employers with some degree—though reducible—of inherent unpredictability.

B. Certification: The Affirmative Responsibility to Ask

The difference in quality and depth of medical opinions—combined with the varying weight they may receive from different courts—illustrates the importance of employers retaining as much front-end control as possible through comprehensive certification procedures. The optional certification provisions available under the FMLA¹⁶⁶ provide a means for employers to preemptively curb and, where necessary, control litigation. The *Ballard* court, among others, explicitly recommended the certification approach to address concerns of potential abuse of the care provision.¹⁶⁷ The certification provisions permit an employer to require that the health care provider of the employee's ill family member provide support for the employee's request for leave.¹⁶⁸

The risks posed to employers by failing to require certification are substantial. The DOL regulations instruct that, in the absence of a certification requirement, "verbal notice" may be sufficient to inform an employer of leave taken pursuant to the FMLA.¹⁶⁹ In addition, for employees seeking leave under the FMLA for the first time, they "need not expressly assert

163. *Id.* at 1089 (Fernandez, J., dissenting).

164. *Id.*

165. *See id.* The dissenting judge ignored the proffered medical assessment in favor of a judicial analysis of validity. *Id.* ("[I]t [is not] to say that Scamihorn's father did not derive some comfort . . . from his son But it is to say that I find it highly doubtful that Congress passed the FMLA for the purpose of forcing employers to accommodate workers who desire to care for a relative who is perfectly capable of caring for himself and is doing so. . . . To say that Scamihorn's father was unable to care for himself would not only insult an obviously active man, but also would twist the FMLA almost beyond recognition." (footnotes omitted)).

166. Family and Medical Leave Act (FMLA) of 1993 § 103, 29 U.S.C. § 2613 (2012).

167. *See, e.g., Ballard v. Chi. Park Dist.*, 741 F.3d 838, 843 (7th Cir. 2014); *see also* S. REP. No. 103-3, at 25–26 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 27–28 (noting that the certification provision is "a check against employee abuse of leave [to care for a family member with a serious health condition]"); *infra* note 170.

168. 29 U.S.C. § 2613.

169. *See* Family and Medical Leave Act (FMLA) of 1993, 29 C.F.R. § 825.302(c) (2016) ("An employee shall provide at least verbal notice sufficient to make the employer aware that

rights under the FMLA or *even mention* the FMLA.”¹⁷⁰ These requirements constitute a low default administrative threshold: if, in discussing leave, an employee mentions FMLA-qualifying needs to a supervisor—without reference to the FMLA itself—it may be enough to trigger obligations on the employer’s behalf.¹⁷¹ In such cases, employers would necessarily leave determinations of sufficiency to case-by-case assessments by individual supervisors—a dangerous game to play when considering legal liability, particularly for larger employers. A certification requirement shifts the effective burden, however: once an employer requires certification, “[the] employee has an obligation to respond to [the] employer’s questions designed to determine whether an absence is potentially FMLA-qualifying.”¹⁷² If an employee fails to complete the required certification, the employer may be entitled to deny leave if the legitimacy of the request is in question.¹⁷³

When an employee alleges a violation of the FMLA, the claim will necessarily be a fact-intensive assessment for the court, making the proceeding more unpredictable for employers. If that claim then involves an assessment of psychological care, the court’s judgment will require even more discretion, both with respect to its own assessment and the amount of deference it affords any medical opinion. To mitigate the ultimate unpredictability, employers should consider the following steps:

- (1) Tailor certification forms to account for the difference between physical and psychological care;¹⁷⁴
- (2) Confirm that forms solicit the informational requirements permitted under the FMLA certification provisions; and

the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave.”).

170. *Id.* (emphasis added); *see also* *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381 (8th Cir. 2000) (“An employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee’s absence from work.”). The *Thorson* court explained that, “[u]nder the FMLA, the employer’s duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave.” 205 F.3d at 381 (quoting *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999)). The court reiterated the employer’s failure to “resort to the protections for employers provided by the FMLA to address just this sort of situation.” *Id.* at 381 (describing the FMLA’s optional certification provision).

171. *See Thorson*, 205 F.3d at 381; 29 C.F.R. § 825.302(c).

172. 29 C.F.R. § 825.302(c).

173. *Id.* The DOL regulations explain:

An employee has an *obligation* to respond to an employer’s questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

Id. (emphasis added).

174. This Note does not recommend excessive modification of the sample forms provided by the U.S. Department of Labor. The sample forms are written to comply with the FMLA’s requirements. A heavy-handed or “creative” approach to modifying certification forms may venture too far afield and risk landing employers in trouble down the line.

- (3) Monitor the request and approval process for compliance and to ensure consistent enforcement.

1. Formal Distinction Between Physical and Psychological Care

Employers should require that certification forms differentiate between the anticipated psychological and physical care through the use of separate sections.¹⁷⁵ The DOL provides a default FMLA certification form for use by employers.¹⁷⁶ With respect to necessary care, the form requires only the projected duration of the family member's capacity, dates for potential follow-up treatments, and whether the follow-up might warrant additional care.¹⁷⁷ Its sole request for any open-ended elaboration of the necessary care asks that the health care provider "[e]xplain the care needed by the patient and why such care is medically necessary."¹⁷⁸ The only reference to psychological care appears in the instructions, which remind the provider to consider "assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care."¹⁷⁹

While an employer cannot require medical facts beyond those permitted by FMLA regulations,¹⁸⁰ the provider is entitled to disclose details as specific as information regarding the family member's symptoms and diagnosis.¹⁸¹ The regulations appear to permit the creation of separate questions for potential physical care and potential psychological care,¹⁸² which would force health care providers completing the forms to explicitly identify and address the possibility of psychological care.

2. Inclusion of the Informational Requirements Permitted by the FMLA

Employers should take care to—within the bounds dictated by the FMLA—solicit as much information as they require to make adequately informed decisions regarding leave requests. If required by an employer, the

175. But see *supra* note 174 for caution regarding modification of the DOL's sample forms.

176. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FORM WH-380-F, CERTIFICATION OF HEALTH CARE PROVIDER FOR FAMILY MEMBER'S SERIOUS HEALTH CONDITION (FAMILY AND MEDICAL LEAVE ACT) (2015), <https://www.dol.gov/whd/forms/wh-380-f.pdf> [<https://perma.cc/E6QD-XWWE>].

177. *Id.* at 3.

178. *Id.*

179. *Id.*

180. *Id.* at 1.

181. Family and Medical Leave Act (FMLA) of 1993, 29 C.F.R. § 825.306(a)(3) (2016).

182. For examples of forms that use this distinction, see CAL. DEP'T OF HUMAN RES., CERTIFICATION OF HEALTH CARE PROVIDER FOR FAMILY MEMBER'S SERIOUS HEALTH CONDITION (2016), <http://www.calhr.ca.gov/Documents/calhr-755.pdf> [<http://perma.cc/W7CH-Z5TC>]; OR. HEALTH AUTH., OR. DEP'T OF HUMAN SERVS., HEALTH CARE PROVIDER CERTIFICATION: FAMILY AND MEDICAL LEAVE 1 (2011), <http://apps.state.or.us/Forms/Served/de0113.pdf> [<http://perma.cc/Z8CP-3V96>].

provider's request for leave will generally be "sufficient" under the FMLA if it includes the following:

- (1) the date on which the serious health condition commenced;
- (2) the probable duration of the condition;
- (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;
- (4) . . . a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent.¹⁸³

The potential informational requirements listed in the certification provision provide a specific solution to courts' perceived difficulties in identifying and measuring psychological care. The provision gives deference to those medical experts who are best informed regarding the patient and who can best assess whether psychological care is actually warranted and legitimate—in this sense, the onus rests properly and proactively on medical experts. On its face, this option for employers appears to directly combat the concerns of opportunistic abuse that drive the FMLA decisions of many circuits.¹⁸⁴

Although the certification provision contains an explicit enumeration of the qualifications for sufficiency, the actual language softens its rigidity and allows doctors leeway in the specific details they must provide. The provision only states the information that will prove *sufficient* to qualify for leave—it does not affirmatively require any of that information.¹⁸⁵ Instead, the burden rests on employers to include requirements for such information in their respective FMLA forms.¹⁸⁶ In addition, while the term "probable" and the phrase "within the knowledge of the health care provider" are presumably necessary to accommodate the predictive nature of medical forecasts, they also loosen the qualification standard for the provided information. To ensure that doctors provide information sufficient to inform decisions regarding leave, an employer should ensure that its certification form at least incorporates the questions posed in the standard form provided by the DOL.¹⁸⁷

183. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2613(b) (2012).

184. See *supra* Section II.B.

185. See WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #28G: CERTIFICATION OF A SERIOUS HEALTH CONDITION UNDER THE FAMILY AND MEDICAL LEAVE ACT (2013) [hereinafter DOL FACTSHEET #28G], <http://www.dol.gov/whd/regs/compliance/whdfs28g.pdf> [<http://perma.cc/4DQC-93ML>] (listing the content that a certification form *may* include).

186. See, e.g., *Miller v. AT&T Corp.*, 250 F.3d 820, 836 (4th Cir. 2001) (explaining that the FMLA "allows" employers to require medical facts on certification forms, but noting the "salient point" that AT&T chose not to require the information it later sought).

187. Employers must take care, however, to not solicit information beyond that permitted under the specific FMLA regulations. See Family and Medical Leave Act (FMLA) of 1993, 29 C.F.R. § 825.306(a) (2016) (listing information that an employer may require of a health care provider). As noted, the greater the departure from the language of the sample forms, the

3. Complete and Consistent Request and Approval Procedures

Employers should ensure that the employees conducting the request and approval procedures are trained properly and follow employers' prescribed procedures for handling requests. Uniformity in administration is crucial to guarding against liability for claims of interference.¹⁸⁸ While the employer must conduct its own procedures consistently, it must also make sure that the employees requesting leave are complicit with the necessary requirements.¹⁸⁹ To that end, employers should make sure that forms are complete enough to confirm a statutorily sufficient basis for leave.

Employers should also use the FMLA's second-opinion provision, which allows an employer to solicit a second opinion issued by a health care provider of its own choice.¹⁹⁰ Courts may simply defer to provided medical opinions,¹⁹¹ and employees are entitled to select their issuing health care providers.¹⁹² Allowing an employee to choose the issuing provider can result in issues with doctors who are not experts in the medical field in question.¹⁹³ Despite the employer's obligation to pay the attendant costs,¹⁹⁴ obtaining a second opinion also provides an affirmative signal to courts that the employer did not acquiesce to the initial medical opinion.¹⁹⁵

The certification provisions provide only a tool by which employers can combat FMLA abuse. While an employer cannot require a *higher* standard

greater the potential risk of noncompliance faced. With respect to concerns regarding psychological care, the best course of action may be to simply use the sample certification forms with the minor adjustment suggested in Section III.B.1.

188. See 29 U.S.C. § 2615(a)(1) ("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.").

189. See 29 C.F.R. § 825.305(c) (2016). The regulations instruct:

The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. . . . The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency.

Id.

190. 29 U.S.C. § 2613(c)(1). *But see id.* § 2613(c)(2) (prohibiting the use of a health care provider "employed on a regular basis by the employer").

191. See *supra* Section III.A.

192. See 29 U.S.C. § 2613(a) (identifying the issuing health care provider as that "of the [seriously ill family member]").

193. See, e.g., *Stepp v. Castrucci of Alexandria, LLC*, No. 10-146-WOB-CJS, 2011 WL 7046018, at *2 & n.6, *5 (E.D. Ky. Dec. 19, 2011) (deferring to an oncologist for a psychological assessment), *adopted by* No. 10-146-WOB-CJS, 2012 WL 124809 (E.D. Ky. Jan. 17, 2012).

194. See DOL FACTSHEET #28G, *supra* note 185, at 2 (explaining that employers must pay for the cost of the opinion and the employee's reasonable travel expenses in procuring the opinion).

195. See *Rhoads v. FDIC*, 257 F.3d 373, 386 (4th Cir. 2001) (noting that, while an employer's failure to seek a second opinion would not technically preclude a subsequent challenge to the validity of a certification, in practice, there may still be "potential pitfalls for an employer who chooses not to pursue a second opinion").

than that prescribed by the certification provisions,¹⁹⁶ the employer should require as much information as the provisions permit for sufficiency, including the designation of separate sections for psychological and physical care. This type of specificity requires that employers make detailed assessments of the exact information their FMLA forms request and confirm employees' compliance with the informational requests upon submission of the forms. In addition, employers must confirm that supervisory and administrative employees handle requests and certifications evenhandedly.

Employers should use the opportunity afforded by the FMLA's optional certification provisions to limit and control potential litigation. An alleged violation of the FMLA will require a judge to assess the provision of care with a case-specific approach to the facts. When the analysis involves psychological care, the amorphous nature of such care will compel additional discretion with respect to its validity. To limit the inevitability of unpredictable results, employers should tailor certification forms to distinguish between physical care and psychological care, solicit information to the extent permitted by the FMLA, and ensure that processes for requests and approval operate consistently.

CONCLUSION

The Seventh Circuit's split in *Ballard* created the conflict necessary to flag the significant difference between physical and psychological care under the FMLA. While courts grapple with a variety of means by which to assess psychological care, they share universal concerns regarding the potential abuse that the amorphous nature of such care permits. To combat opportunistic abuse, courts often—and appropriately—defer to the expertise of medical professionals. Accordingly, employers should exercise the FMLA's optional certification provisions to their fullest extent by tailoring forms to specifically account for psychological care, maximizing the FMLA's permissible informational requirements, and monitoring leave procedures to ensure consistent and complete compliance and enforcement. A comprehensive certification approach will provide the best control against unpredictability in future litigation.

196. See DOL FACTSHEET #28G, *supra* note 185, at 2.