COMMENT

A CARING DEFINITION OF "CARE": WHY COURTS SHOULD INTERPRET THE FMLA TO COVER UNCONVENTIONAL TREATMENT OF SERIOUSLY ILL FAMILY MEMBERS

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ABSTRACT

The Family and Medical Leave Act (FMLA or the Act) allows eligible employees to take unpaid leave to care for a spouse, child, or parent with a serious health condition. When it was passed in 1993, the Act was heralded as groundbreaking legislation to help Americans balance employment obligations and family needs. But courts had difficulty implementing the Act. Courts are particularly troubled when employees take leave to provide unconventional care—activities other than the medical treatment of family members. In these situations, courts frequently interpret FMLA-authorized care narrowly and deprive employees of FMLA coverage. These narrow interpretations of FMLA care disregard the intent of the Act: to help working caregivers find balance between employment and family obligations.

This Comment endorses a broad interpretation and proposes a three-part test for courts to apply when analyzing FMLA care. This newly crafted test requires an employee to prove that the family member in question had a time-sensitive medical need, that the employee's activity was performed with intent to serve that medical need, and that the employee did confer a likely benefit to the family member related to that need. This innovative approach evaluates FMLA care more thoroughly, yielding more consistent results in courts' decisions. The test also generates more comprehensive coverage for employees, thereby better effectuating FMLA policy goals.

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INTRODUCTION

An employee with a hospitalized daughter was fired after leaving work to mow the lawn and clean the house in preparation for his daughter's return.[1] A court held that the Family and Medical Leave Act (FMLA or the Act) did not protect the employee because he was not "caring for" his daughter.[2] At first glance, this decision seems appropriate because the employee's activities appeared unrelated to his daughter's care. But seemingly unrelated activities could turn into

1. Baham v. McLane Foodservice, Inc., 431 F. App'x 345, 346 (5th Cir. 2011).
2. *Id.* at 348.

legitimate—yet unconventional—care, depending on the circumstances. What if the unclean house would have exacerbated the daughter's physical condition? What if preparing the house significantly improved the daughter's psychological health upon her return? Courts across the country are confronting increasing instances of unconventional care, which pose a dilemma because the FMLA's definition of "care" is unclear. As a result, courts produce conflicting interpretations of care and thus deliver vastly inconsistent results in FMLA disputes.

Recognizing that "[p]rivate sector practices and government policies . . . failed to adequately respond to recent economic and social changes that . . . intensified the tensions between work and family,"[3] Congress passed the FMLA in 1993.[4] "Since the enactment of the FMLA, more than 35,000,000 Americans have used the Act to take leave for family or medical reasons."[5] When President Clinton signed the FMLA into law in 1993, he stated, "It is neither fair nor necessary to ask working Americans to choose between their jobs and their families—between continuing their employment and tending to . . . vital needs at home."[6] Congress passed the FMLA to alleviate this very problem— balancing employment obligations and crucial family needs.[7] The FMLA sought to resolve this conflict by giving working caregivers the opportunity to take time off work when needed by their family members.[8] The FMLA was groundbreaking legislation because it was "the first and only piece of federal legislation specifically aimed at helping families balance" these competing demands.[9]

Under the Act, eligible employees may take a total of 12 workweeks per year of unpaid leave to care for a spouse, child, or parent with a serious health condition.[10] At the conclusion of the

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

4. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C.A. §§ 2601–2654 (Westlaw 2015)).

5. Kimberly Menashe Glassman, Note, *Balancing the Demands of the Workplace with the Needs of the Modern Family: Expanding Family and Medical Leave to Protect Domestic Partners*, 37 U. MICH. J.L. REFORM 837, 852 (2004).

6. *Id.* at 843 (quoting Statement on Signing the Family and Medical Leave Act of 1993, 29 WEEKLY COMP. PRES. DOC. 144, 145 (Feb. 5, 1993)).

7. *Id.* at 842.

8. *See* Glassman, *supra* note 5, at 842.

9. Rona Kaufman Kitchen, *Off-Balance: Obama and the Work-Family Agenda*, 16 EMP. RTS. & EMP. POL'Y J. 211, 221 (2012).

10. 29 U.S.C.A. § 2612(a)(1) (Westlaw 2015).

leave, the employee is then entitled to reinstatement to the same position previously held or to an equivalent position with the same terms and benefits.[11]

At first glance, the FMLA seems to help employees tremendously when their family members become seriously ill. But because of its numerous eligibility and qualification requirements, the Act fails to provide the protection that workers need and fails to fulfill its policy goals.[12] Moreover, the FMLA provision authorizing leave to care for an ill family member[13] is "deceptively simplistic" and difficult for courts to implement.[14] Even for eligible employees, taking leave to care for family members can be difficult. Because many types of care do not involve active medical treatment, courts may refuse FMLA protection even for legitimate, yet unconventional, care. Despite the protections of the FMLA, many working Americans are "one sick child away from being fired."[15]

Although the FMLA provides little guidance on the meaning of "care," the relevant Department of Labor regulations do provide a loose definition. Congress expressly delegated the authority to promulgate regulations "necessary to carry out" the FMLA to the Department of Labor.[16] Under these regulations, FMLA care "encompasses both physical and psychological care" that includes "providing psychological comfort and reassurance which would be beneficial" to an ill family member and making "arrangements for changes in care."[17] Even with this guidance, however, courts vary in

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11. 29 U.S.C.A. § 2614(a).

12. *See* Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65 (2004); *see also Bargaining Fact Sheet, Family Leave and Expanding the Family and Medical Leave Act*, AFL-CIO (2001), http://www.aflcio.org/content/download/7172/77083/family-1.pdf (stating that forty-one million Americans, or 40% of private-sector workers, were not covered by the FMLA as of Spring 2001); *Facts About the FMLA: What Does It Do, Who Uses It, and How*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, http://www.nationalpartnership.org/site/DocServer/FMLAWhatWhoHow.pdf?docID=965 (last visited June 13, 2015) (stating that 60% of workers have FMLA coverage).

13. 29 U.S.C.A. § 2612(a)(1)(C).

14. Maegan Lindsey, Comment, *The Family and Medical Leave Act: Who Really Cares?* 50 S. TEX. L. REV. 559, 560 (2009).

15. JOAN C. WILLIAMS, UC HASTINGS COLLEGE OF LAW, CTR. FOR WORKLIFE LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION (2006), *available at* http://www.worklifelaw.org/pubs/onesickchild.pdf.

16. *See* 29 U.S.C.A. § 2654.

17. 29 C.F.R. § 825.124(a)–(b) (2014).

their application of the term. The resulting inconsistency "creates tension not only in the court system but also in companies across the United States."[18] A sharper definition of FMLA care is imperative to allow the FMLA to fulfill its policy objectives.

Moreover, in analyzing FMLA coverage of psychological care, Congress explained:

> Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one other than the child's parents to care for the child. The same is often true for adults caring for a seriously ill parent or spouse.[19]

Also, including psychological care in the definition introduces a host of activities that could technically be classified as care. While conventional methods of care may be easily classified under the regulations, unconventional methods are more troublesome. A recent emergence of FMLA-care cases demonstrates courts' varying interpretations of FMLA care and illustrate the problematically unclear definition of "care."

Instead of waiting for a legislative change to the FMLA, courts should adopt a test to make FMLA-care determinations. This test consists of three factors: (1) medical need, (2) intent to serve the medical need, and (3) likely conferral of a benefit on the ill family member.

The definition of "care" has begun to emerge as a legal issue because current FMLA disputes commonly involve unconventional care. This Comment collects and analyzes the most recent cases from federal courts analyzing unconventional care under the FMLA and is the first to propose a test for evaluating care in FMLA disputes. Courts have yet to apply such a test, instead relying on their own statutory interpretations; as a result, decisions are inconsistent and unfair for both employers and employees. Commentators on the issue have failed to propose clear solutions other than suggestions to amend the legislation and to provide an unambiguous definition of "care."[20] But even without amending the Act, the test proposed in this Comment will ease judicial burdens, produce uniform results, and effectuate the results that Congress intended.

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18. Lindsey, *supra* note 14.
19. S. REP. NO. 103-3, at 24 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 26.
20. Lindsey, *supra* note 14, at 561.

Part I of this Comment collects recent caselaw involving unconventional care under the FMLA and explains the various approaches that courts employ to define FMLA care. Part II argues that typical American employers are extremely inflexible and impose work-family conflicts on employee caregivers. Part II also examines the emerging trend towards alleviating the burdens of working caregivers, arguing that this trend supports a broad definition of FMLA care. Part III explains why a judicially created test is needed in FMLA-care disputes, details the components of the test, and explains why each component of the test is necessary for FMLA-care interpretations. Part III then applies the test to the FMLA cases discussed in this Comment.

I. RECENT FMLA-CARE CASES

Because of the unclear statutory definition of "care" in the FMLA, courts struggle to identify valid care-giving circumstances when employees seek FMLA protection for providing unconventional care. With no definitive test, courts must develop their own guidelines for these situations. Some courts use a bright-line rule that narrowly defines FMLA care as requiring proximity to the family member; others simply rely on their own intuitions to make determinations on a case-by-case basis. These varying methods produce vastly inconsistent results.

A. The Proximity Test

The proximity test for determining FMLA protection strictly analyzes an employee's activities based on their location, requiring the employee's "close and continuing proximity" to the family member in question.[21] This test often excludes unconventional care from FMLA protection because such care frequently occurs in the family member's absence.

1. Cases Refusing FMLA Protection

a. *Baham v. McLane Foodservice, Inc.*

When Girard Baham's daughter fell and suffered serious head trauma, Baham took time off from work to care for his daughter; however, he left the state where his daughter was hospitalized to

21. Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1047 (9th Cir. 2005).

return home after receiving complaints about his untended yard.[22] In addition to mowing the yard, Baham testified that his "house needed to be cleaned, and that he needed to add padding to the sharp edges in the home to protect his daughter upon her return."[23] Baham was alone without his wife or his injured daughter for several days; however, he remained in constant telephone contact with them during that time.[24]

The court held that Baham did not qualify for FMLA protection because he was in another state and was not in his daughter's presence for two weeks while he was taking care of the home—mowing the lawn, cleaning the house, and padding the furniture.[25] The court reasoned that "merely remaining in frequent telephone contact with a relative while in another state" was insufficient to constitute FMLA "care."[26]

b. *Tellis v. Alaska Airlines, Inc.*

Charles Tellis requested leave to care for his wife, who was having difficulties with her pregnancy.[27] Tellis's vehicle later broke down, so he flew to Atlanta to retrieve another vehicle he owned and drove it back to his home in Seattle.[28] Tellis called his wife regularly during the trip.[29] His sister-in-law stayed with his wife, who gave birth while Tellis was away.[30]

The court concluded that Tellis was not "caring for" his wife because he was not participating in her ongoing treatment; in fact, he left her for four days.[31] He was therefore not in "close and continuing proximity" to his wife.[32] Tellis argued that his trip provided psychological reassurance to his wife, but the court reasoned that while retrieving a working vehicle may provide such reassurance, Tellis failed to participate in his wife's medical care.[33] Moreover, the

22. Baham v. McLane Foodservice, Inc., 431 F. App'x 345, 346 (5th Cir. 2011).
23. *Id.*
24. *Id.*
25. *Id.* at 349.
26. *Id.*
27. Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1046 (9th Cir. 2005).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1048.
32. *Id.* at 1047.
33. *Id.* at 1048.

court refused to consider the phone calls as participation in ongoing treatment.[34]

c. *Alsoofi v. Thyssenkrupp Materials NA, Inc.*

Fathi Alsoofi requested FMLA leave when his sister, who usually cared for their seriously ill mother, was unable to provide care due to her wedding in Yemen.[35] But days before the trip to Yemen, Alsoofi's brother, who was scheduled to accompany his sister, had emergency surgery.[36] The family's customs required Alsoofi's sister to travel with a male family member.[37] Therefore, instead of caring for his mother, Alsoofi took over his disabled brother's role and traveled to Yemen.[38] He spent most of his time in Yemen attending to his sister's wedding and visiting family and friends.[39] He communicated with his mother while away, but did not speak to any doctors or help make any medical decisions.[40]

The court found that because Alsoofi "was, almost literally, half a world away," his activities did not constitute FMLA-covered care.[41] While traveling with his sister could have provided his mother with "some degree of psychological comfort," this comfort was not a direct benefit of his activities.[42] Therefore, Alsoofi's travel lacked FMLA protection.[43]

d. *Shulman v. Amazon.com, Inc.*

Julian Ari Shulman filed suit after being denied FMLA leave for researching "possible care options for [his] ill family member."[44] When filing for FMLA leave, Shulman was advised that "until . . . he

34. *Id.*
35. Alsoofi v. Thyssenkrupp Materials NA, Inc., No. 09-CV-12869, 2010 WL 973456, at *1 (E.D. Mich. Mar. 15, 2010).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at *5–6.
42. *Id.* at *6.
43. *Id.*
44. Shulman v. Amazon.com, Inc., No. C13-247RSM, 2013 WL 2403256, at *1 (W.D. Wash. May 30, 2013).

would be traveling to *physically be* with his family member, the leave would not be approved.[45] Still, Shulman took off work.[46]

Opposing Amazon's motion to dismiss, Shulman argued that his research was a permissible basis for FMLA leave under the FMLA's make-arrangements-for-changes-in-care provision.[47] But the court found that there was "a substantive difference between researching possible care options from afar, and actually carrying out the changes, including transfer of the ill family member from one place to another. The latter . . . requires the physical presence of the family member."[48] Therefore, Shulman's research was not protected FMLA care.[49]

e. *Boecken v. Gallo Glass Co.*

Larry Boecken was granted FMLA leave to care for his 90-year-old grandmother, who suffered from chronic heart disease.[50] But after leaving work, he did not go directly home to care for his grandmother; instead, he drove to a public park to take walks.[51]

At trial, Boecken asserted that he took his walks "to relieve his own stress and admitted that he [did not provide care] to his grandmother while in the park."[52] The court held that because Boecken's walks did not involve "close proximity" to his grandmother, he had not provided FMLA care.[53] On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's holding regarding Boecken's misuse of FMLA leave.[54]

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45. *Id.* at *2 (emphasis added).
46. *Id.* at *1.
47. *Id.* at *3.
48. *Id.*
49. *Id.*
50. Boecken v. Gallo Glass Co., No. 1:05-cv-00090-OWW-DLB, 2008 WL 4470759, at *2 (E.D. Cal. Sept. 30, 2008) *aff'd in part, rev'd in part, and remanded*, 412 F. App'x 985 (9th Cir. 2011).
51. *Id.* at *3.
52. *Id.*
53. *Id.* at *8.
54. *Boecken*, 412 F. App'x at 987.

2. Cases Affording FMLA Protection

a. *Scamihorn v. General Truck Drivers*

Joseph Scamihorn took time off work for several months to care for his father, who had fallen into a deep depression.[55] While residing in his father's hometown, Scamihorn spoke with his father daily "and he performed various chores around the house, including shoveling snow, chopping firewood used to heat the house, clearing the backyard and cleaning the garage. Additionally, Scamihorn drove his father to counseling sessions on four or five occasions."[56] Although Scamihorn's father was "still able to shower, dress, eat, drive, take care of medical and safety needs and engage in various daily activities without assistance from others, he later declared, 'I felt I needed [Scamihorn] by me full time.'"[57] A doctor further testified that the father specifically needed Scamihorn's presence to aid in his recovery.[58]

The court reasoned that although Scamihorn did not personally attend any of his father's counseling sessions, "he participated in [his father's] treatment through both his daily conversations . . . and his constant presence in his father's life."[59] The court also found that Scamihorn's household chores qualified as psychological care because they contributed to his constant physical presence in his father's life.[60] Therefore, the court found that Scamihorn raised a genuine issue of material fact regarding whether his activities were necessary to his father's recovery.[61]

B. Other Interpretations of FMLA Care

Even without applying the proximity test, many courts employ various approaches to narrowly interpret the FMLA. These courts regularly deny FMLA protection for employees providing unconventional care, sometimes even while maintaining close physical proximity.

Alternatively, some courts broadly interpret the FMLA, frequently protecting providers of unconventional care, but these

55. Scamihorn v. Gen. Truck Drivers, 282 F.3d 1078, 1080 (9th Cir. 2002).
56. *Id.* at 1087.
57. *Id.*
58. *Id.* n.8.
59. *Id.* at 1088.
60. *Id.*
61. *Id.*

courts lack specific guidelines to regulate their analyses. Instead, they determine FMLA care on a case-by-case basis, relying on their own intuitions and statutory interpretations. While these broad interpretations better effectuate FMLA's policy goals, they lack a clear test and pose a risk of inconsistent policy preferences and unfair results in FMLA disputes.

1. Cases Refusing FMLA Protection

a. *Lane v. Pontiac Osteopathic Hospital*

Joe Lane applied for FMLA leave to care for his mother, "who was suffering from diabetes, high blood pressure, weight loss, and arthritis."[62] "During this period, [Lane] regularly left work to assist his mother with meals and to take her to doctors appointments."[63] After Lane was terminated, he filed suit claiming that three of his absences "were protected by the FMLA because he took them to clean up flooding" at his mother's home.[64] Lane claimed "that his mother had hepatitis and the stagnant water was a 'breeding ground' for the disease."[65]

The court found that Lane was "required to present evidence that his mother's basement had to be immediately cleaned for her basic medical, hygienic, or safety needs and that he had to do it because she could not."[66] Because Lane failed to meet this requirement, the court denied Lane FMLA protection, as he was not needed to care for his mother.[67]

b. *Marchisheck v. San Mateo County*

Fe Marchisheck's son "was assaulted by several acquaintances. . . . [He] suffered a nasal contusion, two puncture burns on his back, abrasions, erythema on the right side of his neck, and a left lateral subconjunctival hemorrhage."[68] Concerned for her son's safety, Marchisheck planned to move him to the Philippines to live with her

62. Lane v. Pontiac Osteopathic Hosp., No. 09-12634, 2010 WL 2558215, at *1 (E.D. Mich. June 21, 2010).
63. *Id.* at *2.
64. *Id.*
65. *Id.*
66. *Id.* at *4–5.
67. *Id.*
68. Marchisheck v. San Mateo Cnty., 199 F.3d 1068, 1071 (9th Cir. 1999).

brother.[69] Marchisheck believed that if she left her son alone he would be beaten or killed, and that his safety depended on moving to the Philippines.[70]

The court reasoned that Marchisheck's "asserted purpose in moving [her son] to the Philippines was to keep him safe from further beatings; she was not moving [him] so that he could receive superior—or any—medical or psychological treatment."[71] Moreover, her son "did not see a doctor of any kind for more than five months after he moved overseas," and "there were no psychological services available within a three-hour drive of the rural area of the Philippines to which [Marchisheck] took her son."[72]

The court therefore found that Marchisheck's act of moving her son, "although motivated by an understandable concern for [his] safety," did not constitute FMLA-qualifying care.[73] The court looked to the FMLA's requirement that there be "some level of participation in ongoing treatment of [a serious health] condition."[74] Therefore, Marchisheck could not possibly care for her son "by removing him to a place where he would receive *no* treatment for either condition and leaving him there."[75]

c. *Tayag v. Lahey Clinic Hospital, Inc.*

Maria Lucia Tayag was terminated by her employer while taking an unapproved leave to accompany her husband, Rhomeo, on a spiritual healing trip.[76] Rhomeo suffered from "gout, chronic liver and heart disease, rheumatoid arthritis, and kidney problems."[77] While on the trip, Tayag and her husband "went to Mass, prayed, and spoke with [a] priest and other pilgrims."[78] They also "visited other churches, friends, and family."[79] "Rhomeo received no conventional medical treatment and saw no doctors or health care providers."[80]

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69. *Id.*
70. *Id.*
71. *Id.* at 1076.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. Tayag v. Lahey Clinic Hosp., Inc., 632 F.3d 788, 789 (1st Cir. 2011).
77. *Id.*
78. *Id.* at 790.
79. *Id.*
80. *Id.*

Tayag did, however, assist Rhomeo by administering his "medications, helping him walk, carrying his luggage, and being present in case his illnesses incapacitated him."[81]

The court analyzed the FMLA's definition of "health care provider" as "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or . . . any other person determined by the Secretary to be capable of providing health care services."[82] "Faith healing is addressed in the regulation identifying others 'capable of providing health care services,' which includes 'Christian Science practitioners.'"[83] The court noted that "Christian Scientists reject ordinary medical care . . . and so, as to a Christian Scientist patient, there is no duplication either for government insurance programs or for employers providing FMLA leave."[84] The court reasoned that Rhomeo was not a proper Christian Scientist patient because he received ordinary medical care and because Tayag took full advantage of the FMLA to provide Rhomeo assistance in connection with that care.[85] Moreover, Tayag claimed that the "religiously affiliated healing programs [were] aimed at treating the illness and providing [Rhomeo] psychological comfort;" however, the court found no merit in this claim.[86] Therefore, the court found that Tayag's seven-week leave was not protected under the FMLA.[87]

d. *Fioto v. Manhattan Woods Golf Enterprises*

Anthony Fioto "took a day off work to be present while his dying mother underwent emergency brain surgery," after which he was fired.[88] The record was devoid of any information regarding the condition of Fioto's mother prior to the surgery, or what Fioto did while at the hospital; however, Fioto did not see his mother after the

81. *Id.*
82. *Id.* at 791 (quoting 29 U.S.C. § 2611(6) (2006)).
83. *Id.* (quoting 29 C.F.R. § 825.118 (2006)).
84. *Id.*
85. *Id.*
86. *Id.* at 792.
87. *Id.* at 793.
88. Fioto v. Manhattan Woods Golf Enters., 270 F. Supp. 2d 401, 402 (S.D.N.Y. 2003), *aff'd*, 123 F. App'x 26 (2d Cir. 2005).

surgery.[89] Moreover, there was no evidence regarding whether Fioto's interacted with his mother or with her doctors.[90]

The court noted that:

> a child's offering comfort and reassurance to a bedridden parent qualifies as "caring for" the parent. Moreover . . . assisting in the making of medical decisions on behalf of that parent also qualifies as "providing physical and psychological care" within the meaning of FMLA regulations. Indeed, . . . making medical decisions on behalf of an ailing parent is far more than psychological, and qualifies as assisting in the physical care of the parent.[91]

However, "the record [was] devoid of any evidence that Fioto was needed to provide either physical or psychological care for his mother."[92] The record failed to indicate whether his mother was conscious or unconscious when Fioto arrived at the hospital.[93] Likewise, the record failed to indicate "whether [Fioto's] mother was aware that [Fioto] was on his way to the hospital, or was capable of being aware of his imminent arrival."[94] The court noted:

> Because the language of the statute does not guarantee employees FMLA leave to visit an ailing parent, it was incumbent on plaintiff to demonstrate that he was doing something—anything—to participate in his mother's care. It would not have taken much to meet the very loose "psychological care" standard.[95]

"Although one might speculate that [Fioto's] presence at the hospital was desirable" to make medical decisions for his mother, "there was no evidence that he was the person with legal authority to make such decisions for her."[96]

Aiming to avoid FMLA coverage for mere visitation, the court reasoned that the FMLA should not automatically be implicated where a plaintiff simply goes to the hospital where his mother is

89. *Id.* at 404.
90. *Id.*
91. *Id.* at 405.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 406.

having serious surgery.[97] The court reasoned that if Congress had wanted the FMLA to cover such situations, it could have easily drawn the statute that broadly; however, Congress "chose to limit the FMLA's reach to absences that were occasioned by the provision of care."[98]

e. *Overley v. Covenant Transport, Inc.*

Sharon Overley was fired after taking an absence from work to visit her daughter at an assisted living home.[99]

> Overley also met with Jack Groves, an employee at the facility, about his possible [ability] to monitor her daughter's trust. . . . [D]uring the meeting, [Overley and Groves] drove to a lot being considered for the construction of her daughter's future residence. Overley spent the remainder of the day visiting a funeral home and doing her daughter's laundry. [100]

The court found that Overley did not show either "that she was 'needed to care for' her daughter . . . or that her activities" constituted FMLA-qualifying care.[101] Overley testified that the primary purpose [for her leave] was to meet with Groves." [102] The court reasoned, "Even assuming that this meeting qualifies as providing FMLA-qualifying 'care,' there is no indication that it needed to occur on [that day]."[103] Moreover, "Groves testified that the meeting . . . was not time sensitive and could have been held later" that month.[104] Further, the record gave no indication of Overley's immediate need to look at the plot of land.[105] Therefore, this preliminary activity could not "be classified as 'making arrangements for changes in care.'"[106]

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97. *Id.*
98. *Id.*
99. *See* Overley v. Covenant Transp., Inc., 178 F. App'x 488, 490 (6th Cir. 2006).
100. *Id.*
101. *Id.* at 495.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

Overley's other activities, which included picking up her daughter's laundry, making a preliminary visit with a funeral home, and visiting her daughter, were classified as "routine activities" that did "not qualify as 'physical or psychological care' under the FMLA, even under the broadest reading of the statute."[107] Because Overley failed to show "that she was 'needed to care' for her daughter . . . or that her activities qualified as [FMLA-protected] care," she was not entitled to FMLA leave.[108]

f. *Pilger v. D.M. Bowman, Inc.*

Charles Pilger requested leave to help his wife take her mother to the doctor, claiming that he could not find anyone to help his wife.[109] Pilger's wife had arthritis, which "prevented her from driving long distances or helping her mother in and out of the car and up and down steps."[110] Pilger claimed that he was afraid that if he did not take leave to assist his wife, she might "have an auto accident or fall trying to help her mother."[111] Although Pilger's request was denied, he took time off work anyway, and he was terminated.[112]

The court reasoned that Pilger was not entitled to FMLA leave because the purpose of the trip was not for Mrs. Pilger's medical care but instead for her mother's.[113] Pilger was not entitled to FMLA leave because providing care for parents-in-law is not protected under the FMLA.[114] Pilger needed to provide ongoing care for his wife to be entitled to FMLA leave; however, his absence was "unrelated to Mrs. Pilger's medical condition or basic needs."[115] Because this type of care was not contemplated by the FMLA, Pilger was not protected by the Act.[116]

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107. *Id.*
108. *Id.*
109. Pilger v. D.M. Bowman, Inc., 833 F. Supp. 2d 489 (D. Md. 2011), *aff'd*, 521 F. App'x 307 (4th Cir. 2013).
110. *Id.* at 498.
111. *Id.*
112. *Id.* at 492.
113. *Id.* at 498.
114. *Id.*
115. *Id.*
116. *Id.*

2. Cases Affording FMLA Protection

a. *Ballard v. Chicago Park District*

Beverly Ballard took time off work to travel with her terminally ill mother, whose end-of-life goal was to take a family trip to Las Vegas.[117] While in Las Vegas, Ballard and her mother participated in typical tourist activities.[118] Ballard served as her mother's caretaker on the trip, performing activities such as administering medications and bathing and dressing her.[119] Also, in order to procure her mother's medication after a hotel fire, Ballard drove her to a hospital.[120]

The court reasoned that the FMLA's text:

> does not restrict care to a particular place or geographic location. For instance, it does not say that an employee is entitled to time off "to care *at home* for" a family member. The only limitation it places on care is that the family member must have a serious health condition.[121]

The court was thus reluctant to read in another limitation that Congress had not provided.[122] The court then noted that the mother's basic medical, hygienic, and nutritional needs did not change while she was in Las Vegas, and that Ballard continued to assist her with those needs during the trip.[123] In fact, Ballard's presence "proved quite important indeed when a fire at the hotel made it impossible to reach their room, requiring Beverly to find another source of . . . medicine."[124] Thus, at the very least, Ballard provided physical care to her mother.[125]

Ballard's employer argued that Ballard's care needed to be connected to her mother's ongoing medical treatment to qualify under the FMLA.[126] But the court rejected this argument, reasoning

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117. Ballard v. Chi. Park Dist., 741 F.3d 838, 839 (7th Cir. 2014), *aff'g* 900 F. Supp. 2d 804 (N.D. Ill. 2012).
118. *Id*. at 840.
119. *Id.* at 839–40.
120. *Id.* at 840.
121. *Id.*
122. *Id.*
123. *Id.* at 841.
124. *Id.* at 841–42.
125. *Id.* at 842.
126. *Id.*

that neither the Department of Labor regulations nor the statute itself use the term "treatment" in their definitions of care.[127] Instead, they:

> speak in terms of basic medical, hygienic, and nutritional needs—needs that, as in this case, do not change merely because a person is not undergoing active medical treatment. And it would be odd to read an ongoing-treatment requirement into the definition of "care" when the definition of "serious health condition" explicitly states that active treatment is *not* a prerequisite.[128]

Moreover, the court noted that if Ballard had sought leave to care for her mother in her hometown, her request would have fallen within the scope of the FMLA; also, if her mother had lived in Las Vegas and Ballard had cared for her there, her leave would have been covered by the FMLA.[129] Therefore, Ballard's activities constituted FMLA-qualifying care.[130]

b. *Briones v. Genuine Parts Co.*

Julian Briones's sixteen-month-old son, Calixto, became gravely ill and required hospitalization for several days.[131] Because Briones's wife needed to be at the hospital with Calixto, Briones took off work to stay at home with their three other healthy children.[132]

The employer argued that Briones was not entitled to FMLA leave because staying home to babysit three healthy children did not constitute care under the FMLA.[133] But the court found Briones's child-care activities to be within the scope of FMLA protection because Briones babysat his three healthy children only so that his wife could care for a child who *did* suffer from a serious health condition.[134] The court reasoned that Briones would have been

127. *Id.*

128. *Id.* (citing 29 C.F.R. § 825.114(a)(2)(iv) (2008) ("[A] patient with a terminal illness may have a serious health condition so long as she is 'under the continuing supervision of . . . a health care provider,' even if she is 'not . . . receiving active treatment . . . .'")).

129. *Id.* at 843.

130. *See id.*

131. Briones v. Genuine Parts Co., 225 F. Supp. 2d 711, 712 (E.D. La. 2002).

132. *Id.*

133. *Id.* at 713.

134. *Id.* at 715.

entitled to FMLA leave had he been at the hospital caring for Calixto himself instead of using leave to facilitate his wife fulfilling that role.[135] Moreover, because a "literal reading of the FMLA makes it clear that Congress passed it to aid families when faced with a crisis such as the one faced by the Briones family," the court concluded that the scope of the FMLA was broad enough to cover Briones's care for his healthy children.[136]

II. COURTS NEED TO BROADEN THE INTERPRETATION OF FMLA CARE TO FULFILL FMLA POLICY GOALS

While in some cases it is obvious that an employee has provided care for a seriously ill family member, a large number of cases involve situations that are not covered in the Department of Labor's broad definition of "care." Depending on the court, these gray-area situations can be interpreted narrowly or broadly. Although attempting to prevent placing excessive burdens on employers and to prevent potential employee abuse, narrow FMLA interpretations do not carry out the FMLA policy of "promot[ing] national interests in preserving family integrity."[137] The FMLA, a statute premised on the promise that employees will "never again have to choose between the job they need and the family they love,"[138] should cover employees providing all types of care—not just the active medical treatment of a family member.

A. The Typical Workplace Is Inflexible

For working caregivers, balancing time between work and family needs can be nearly impossible. The normal work schedule leads to tension between the home and the workplace.[139] Working parents find it difficult to make time "for school conferences; for doctor, dentist, and other appointments for their children; as well as for

135. *Id.*

136. *Id.* at 716.

137. 29 C.F.R. § 825.101(a) (2014).

138. Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 14 WASH. U. J.L. & POL'Y 193, 194–95 (2004).

139. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 U. KAN. L. REV. 355, 361 (2010).

recitals, classes, and sporting events."[140] Many employees have far more caregiving responsibilities than just those owed to their children; they also must care for "spouses, parents, or other adult relatives who are ill, injured, or disabled."[141] But many workplaces do not allow enough flexibility for working caregivers to meet their obligations at home.[142]

Many employers—especially employers of low-income, non-professional workers—adopt strict attendance policies.[143] The *2008 Study of National Employers* found that most employers offer flexible work options to only a small portion of their employees, and even fewer employers offer these benefits to all employees.[144] Some employers allow only six to eight absences or partial-day absences in an entire year.[145] Furthermore, some employers allow for little or no time off for longer-lasting leaves of absence.[146] As a result, many working caregivers find it "difficult, if not impossible, to meet their

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140. Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 782 (2010) (citing Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1471 (2001)).

141. *Id.*

142. Susan Gerstenzang, *The Best vs. The Rest*, WORKING MOTHER, Oct. 2007, at 75, 78. While 58% percent of all companies allow flex-time, only 20% allow job sharing; 33% allow telecommuting on a part-time basis, and 38% allow a compressed workweek. *Id. See also Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EQUAL EMP'T OPPORTUNITY COMM'N (2009), http://www.eeoc.gov/policy/docs/caregiving.html (discussing the prevalence of employers' inflexible policies).

143. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1237–38 (1989).

144. *See* Ellen Galinsky et al., 2008 NATIONAL STUDY OF EMPLOYERS 12–13 (2008), http://familiesandwork.org/site/research/reports/2008nse.pdf. The study also noted that only 32% of employers let some employees change starting and ending times on a daily basis; only 3% of employers allow most employees to work regular hours from home occasionally; only 13% of employers let all or most employees shift between full-time and part-time hours within the same position; and only 45% percent of employers offer short periods of time off during the workday to attend family needs. *Id.* at 13–14.

145. *See, e.g.*, *Employment*, MILLIKIN UNIV. FACILITY SERVS., http://www.campusdash.com/en-US/Facilities/MillikinUniv/ContactUs/Employment.htm (last visited May 22, 2015).

146. Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?*, 13 DUKE J. GENDER L. & POL'Y 7, 15 (2006) (stating that 49% of the workforce does not receive any paid leave).

employers' very strict attendance policies, and hence may find themselves making the impossibly unfair choice between keeping their jobs and doing what is required to care for their families."[147]

The issue is not limited to employers with demanding attendance policies: "Even in workplaces without strict attendance policies, high demands for face time make it difficult for caregivers to balance work and family."[148] Although working caregivers might be very productive and efficient while working, in part, from home, employers value employees primarily based on their time spent at work.[149] Many companies use face time as a proxy for talent and productivity because they lack a system of formal evaluation.[150]

The typical American workplace does not provide enough suitable opportunities for working caregivers, or for employees in general, to care for their family members. The FMLA takes a step towards solving this problem. But when courts narrowly interpret the FMLA, they fail to protect employees who seek to balance this work-family conflict. Courts should therefore more broadly interpret the FMLA to protect all methods of care in order to effectuate FMLA's underlying policy goals.

B. Work-Family Conflict Norms Are Changing

The concept of the work-family conflict has intensified over the past few years. As increasing numbers of caregivers enter the workforce to help support their families, their balance between work and family becomes progressively more concerning.[151] Recent changes in political discourse and in industry practice suggest "a link between [these] changes . . . and case outcomes with an examination of the distance we have traveled in the past" twenty years.[152] These

147. Porter, *supra* note 139, at 785 (citing Pamela Gershuny, *Family Values First When Federal Laws Collide: A Proposal to Create a Public Policy Exception to the Empoyment-At-Will Doctrine Based upon Mandatory Parenting Duty*, 21 WIS. WOMEN'S L.J. 195, 195 (2006)).

148. *Id.* (citing Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 11 (2005)).

149. *See generally* Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMPL. & LAB. L. 283 (2003) (examining the push towards decentralization of the workplace via telecommuting and the perpetuation of gender inequality in the digital age).

150. Travis, *supra* note 148, at 16 (noting that the difficulty of assessing performance contributes to the misplaced reliance on time spent on work).

151. Gershuny, *supra* note 147, at 197.

152. Silbaugh, *supra* note 138, at 209.

changes offer support for a broadened definition of FMLA care because they express concern for the working caregiver and thus support wider coverage of employees taking time off to care for their seriously ill family members.

1. Changes in Political Discourse

Recent proposed legislation, some of which has been enacted, reflects these changing work-family conflict norms. In his 1999 State of the Union Address, President Clinton advocated for the expansion of the FMLA.[153] Since that time, several bills have been introduced in both houses of Congress to extend FMLA coverage.

In both the 106th and 107th Congresses, legislators introduced bills seeking to expand the activities covered by the FMLA to include participating in a child's school or extracurricular activities,[154] accompanying an elderly relative to a medical appointment,[155] and caring for seriously ill family members outside of the traditional nuclear family.[156] President Clinton's 2001 budget included twenty million dollars to fund "competitive planning grants for states to study and develop wage-replacement programs for workers taking family leave."[157] Following President Clinton's initiative, at least 15

153. *'My Fellow Americans . . . State of Our Union is Strong,'* WASH. POST, Jan. 20, 1999, at A12.

154. *See* Time for Schools Act of 2001, S. 18, 107th Cong. § 522 (2001) (amending the FMLA to allow employees to take 24 hours of "school involvement" leave per year to participate in the academic activities of their children or to participate in literacy training); Time for Schools Act of 2001, H.R. 265, 107th Cong. § 522 (2001) (same); Time for Schools Act of 1999, S. 1304, 106th Cong. § 2 (1999) (same); Family and Medical Leave Act of 1993 Enhancement Act, H.R. 2103, 106th Cong. § 3 (1999) (amending the FMLA to allow employees to take up to 24 hours per year for "parental involvement leave" to participate in their children's educational and extracurricular activities); Family and Medical Leave Improvements Act of 1999, H.R. 91, 106th Cong. § 3 (1999) (same).

155. *See* H.R. 2103 § 5 (amending the FMLA to allow employees to take up to 24 hours per year to assist elderly relatives); H.R. 91 § 3 (amending the FMLA to allow employees to take up to 24 hours per year of "elder care" leave to accompany an elderly relative to routine and medical employments).

156. *See* H.R. 2104, 106th Cong. § 1 (1999) (amending the FMLA to permit leave to care for a domestic partner, parent-in-law, adult child, sibling, or grandparent with a serious health condition).

157. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 463–64 (2001) (citing Press Release, The White House, President Clinton Announces New Funds Enabling States to Provide

states have introduced legislation that would expand unemployment insurance to cover family leaves.[158]

More recently, President Obama signed the Caregivers and Veterans Omnibus Health Services Act of 2010.[159] This act provides different types of support for caregivers of wounded veterans, including a monthly stipend to compensate caregivers along with access to various caregiver support services, including mental health services, through the Civilian Health and Medical Program of the Department of Veterans Affairs.[160] The Caregivers and Veterans Act is an important enhancement to work-family law because it acknowledges that family care is valuable work that deserves compensation and support.

Additionally, another enhancement to work-family law was President Obama's breastfeeding provision in the Affordable Care Act "[t]o encourage and support higher rates of breastfeeding . . . for federal employees and . . . requiring larger employers to do the same," thus giving necessary support to working mothers.[161] Using his executive authority, President Obama guaranteed that all federal employees who needed to express milk in a private place would be entitled to do so during as many unpaid breaks as necessary.[162] Similarly, under the Affordable Care Act, all employers with 50 or more employees must provide "a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk" and "a place, other than a bathroom, that is shielded from view

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Paid Leave to America's Working Parents (Feb. 12, 2000), *available at* 2000 WL 150966).

158. *Id.* at 464.

159. Press Release, U.S. Dep't of Veteran's Affairs, New and Enhanced VA Benefits Provided to Caregivers of Veterans (Feb. 9, 2011), *available at* http.//www.va.gov/opa/pressrel/pressrelease.cfm?id=2048.

160. *See* Caregivers and Veterans Omnibus Health Services Act of 2010, Pub. L. No. 111-163, tit. 1, 124 Stat. 1130, 1132–40 (codified as amended at 38 U.S.C.A. § 1720G (Westlaw 2015)).

161. Kitchen, *supra* note 9, at 243–44.

162. *See* Barack Obama, *Presidential Memorandum for the Director of the Office of Personnel Management, Delegation of Certain Functions and Authorities* (Dec. 20, 2010), http://www.whitehouse.gov/the-press-office/2010/12/20/presidential-memorandum-delegation-functions-and-authorities; John Berry, Director, *Memorandum for Heads of Executive Departments and Agencies, Nursing Mothers in Federal Employment* (Dec. 22, 2010), http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=3281.

and free from intrusion from coworkers and the public . . . ."[163] These policies make a limited contribution toward strengthening work-family balance by easing the struggles of mothers who breastfeed their infants while working, but more comprehensive solutions remain necessary.

In addition to this recent legislation, numerous bills have been proposed to further ease the work-family conflict faced by employed caregivers.[164] Although these bills ultimately died before being signed into law, their proposal shows the growing concern surrounding the work-family conflict and a need for change. These proposed bills are a "strong symbolic acknowledgment" that the burdens of working caregivers are an important consideration.[165]

2. Changes in Industry Practice

Human-resources departments at many employers now offer programs and expertise in work-family balance that were unheard of when the FMLA was first introduced.[166] One human-resources group lists the following benefits that some employers now offer, many of which are family-oriented: work-life counseling, elder care, on-site

163. 29 U.S.C.A. § 207(r)(1) (Westlaw 2015).

164. *See* Pandemic Protection for Workers, Families, and Businesses Act, H.R. 4092, 111th Cong. (2009) (proposing paid sick leave so that employees could "address their own health needs, and the health needs for their families related to contagious illness"); Balancing Act, H.R. 3047, 111th Cong. (2009) (proposing extended FMLA-bonding-leave coverage for new parents and extended paid sick leave); Healthy Families Act, H.R. 2640, 111th Cong. (2009), S. 1152, 111th Cong. (2009), H.R. 1876, 112th Cong. (2011), S. 984, 112th Cong. (2011) (proposing a requirement of flexible paid sick leave for every 30 hours an employee works); Domestic Violence Leave Act, H.R. 2515, 111th Cong. (2009) (amending the FMLA to provide eligible employees with the right to take leave to care for a spouse, child, parent, or themselves, due to domestic violence, sexual assault, or stalking); FMLA Enhancement Act, H.R. 824, 111th Cong. (2009) (proposing extended FMLA job protection to millions more workers, and FMLA job-protected leave for "parental involvement"); Federal Employees Paid Parental Leave Act, H.R. 626, 111th Cong. (2009) (making the federal government a model employer and providing federal employees with four weeks of paid parental leave).

165. Kessler, *supra* note 157, at 466.

166. *See* LOTTE BAILYN ET AL., INTEGRATING WORK AND FAMILY LIFE 27–28 (2001), *available at* http://web.mit.edu/workplacecenter/docs/WorkFamily.pdf.

childcare, lactation services, flexible-work consulting, financial education, and emergency back-up childcare, among others.[167]

The fact that human-resources departments are offering such programs demonstrates a change in cultural awareness of the work-family conflict as well as an acceptance that working caregivers' non-medical needs should be considered too. Moreover, it shows that employers are increasingly acknowledging the home-life demands of working caregivers, which suggests that employers would likely accept a broadened definition of FMLA care.

III. COURTS SHOULD ADOPT A THREE-PART TEST FOR BETTER GUIDANCE IN FMLA CARE CASES

Courts should take into account the underlying policy goals of the FMLA and adopt a broader approach to care that does not necessarily involve active medical treatment. The most effective way to broaden the approach is to adopt a carefully crafted test that would allow courts to produce consistent results. The test that this Comment proposes would afford FMLA protection for an employee's leave to care for a seriously ill family member only if the following factors are met: (1) medical need, (2) intent to serve the medical need, and (3) likely conferral of a benefit on the ill family member.

A. Why a New Test Is Needed

Because the FMLA's definition of "care" is "deceptively simplistic,"[168] courts find it difficult to apply, especially in cases involving unconventional care. With no uniform test to apply, courts are forced to rely on their own interpretations of the statute. The varying statutory interpretations yield inconsistent results, depriving employers and employees of consistent guidance.

Some courts narrowly interpret FMLA care in an attempt to avoid imposing burdens on employers and to avoid potential abuse by employees. These courts use a variety of narrow approaches including the proximity test, which excludes activities performed while not in "close and continuing proximity"[169] to the family member in question. But these narrow interpretations do not

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167. *See Looking for Ways to Balance Your Career and Personal Life?*, UNIV. OF MICH. WORK/LIFE RES. CTR., http://hr.umich.edu/worklife/docs/main-flier.pdf (last visited June 20, 2015).

168. Lindsey, *supra* note 14.

169. Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1047 (9th Cir. 2005).

effectuate the FMLA's policy of "preserving family integrity"[170] and sparing employees from having to choose "between the job they need and the family they love."[171] These policy goals require a broader interpretation of "care" under which unconventional activities may invoke FMLA protection.

Broad interpretations of care better effectuate FMLA policy by alleviating employment burdens for a wider range of employees. But these interpretations lack specific guidelines, relying solely on courts' own intuitions. While these courts are correct in their analyses, they need a sharper, more effective way to evaluate FMLA care. The three-part test proposed by this Comment is ideal because it yields wide FMLA coverage while also requiring an in-depth analysis of an employee's caregiving activities. Therefore, this test provides courts with uniform guidelines that will effectuate FMLA policy goals.

B. A New Three-Part Test

Care can take many different forms depending on the facts of each specific case. For this reason, the test proposed by this Comment does not define "care" based on any bright-line rule. Instead, this test would evaluate the mental and physical aspects of each activity to determine if it constitutes FMLA-protected care. Under this test, FMLA care would require three elements: (1) medical need, (2) intent to serve the medical need, and (3) likely conferral of a benefit on the ill family member. Together, these three elements logically demonstrate legitimate care.

Under any reasonable analysis, intent to care for a need and actually benefitting that need constitutes legitimate care. Even unconventional activities, such as performing household chores, clearly constitute care if performed for the sole purpose of serving a need when the chores do, in fact, benefit that need. Therefore, any activity, no matter how unconventional, should plausibly invoke FMLA protection if it meets these requirements.

170. 29 C.F.R. § 825.101(a) (2014).
171. Silbaugh, *supra* note 138.

1. Components of the Test

a. Time-Sensitive Medical Need

Employee leave is covered under the FMLA only when the care is "medically necessary."[172] The purpose of the FMLA is to protect employees "[w]hen a family emergency arises,"[173] giving them "reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to *vital needs* at home."[174] Therefore, for employees with family members who can take care of themselves or whose need for care can wait until after the confines of the workday, the FMLA should not provide protection.

Department of Labor regulations discuss the meaning of an employee being "needed to care for" a family member:

> The medical certification provision that an employee is needed to care for a family member . . . encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.[175]

The term "needed to care for" also includes "situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home."[176] Further, "[t]he employee need not be the only individual or family member needed to care for" the patient.[177] For example, in *Romans v. Michigan Department of*

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172. 29 U.S.C.A § 2612 (Westlaw 2015); *see also* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002) ("Leave must be granted, when 'medically necessary.'"); 29 C.F.R. § 825.202(b) ("[T]here must be a medical need for leave . . . .").

173. 29 C.F.R. § 825.101(b).

174. *Id.* (emphasis added).

175. 29 C.F.R. § 825.124(a).

176. 29 C.F.R. § 825.124(b).

177. *Id.*

Human Services,[178] although the plaintiff's sister was present at the hospital to care for the hospitalized mother, the court afforded FMLA protection for the plaintiff to leave work and also attend to his mother.[179] The court reasoned that an employee was not required to be the only individual, or even the only family member, available to provide care to the mother. The court also reasoned that FMLA regulations did not require an employee to make a life-support decision without the help of other family members.[180]

An employee can thus easily prove that he or she was "needed to care for" a family member, especially considering that the family member in question must also have a serious health condition as defined by the FMLA. Discussing what constitutes a serious health condition under the Act would require a separate analysis, so this Comment will not examine that issue. Instead, for present purposes it can be assumed that employees will easily pass this prong of the test so long as they can prove that the medical need was time sensitive.

Time-sensitive care cannot reasonably be provided before or after the employee's workday; that is, the employee must be needed to care for his family member *during working hours* in order to meet the medical-need requirement. For example, in *Lane v. Pontiac Osteopathic Hospital*,[181] the employee's leave to clean the flooding in his mother's house was not immediately required for his mother's basic medical, hygienic, or safety needs; therefore, this activity did not constitute FMLA-qualifying care.[182] Moreover, in *Overley v. Covenant Transportation., Inc.*,[183] the employee's meeting with the overseer of her daughter's trust was not time sensitive and thus was not protected by the FMLA.[184]

b. Intent to Serve the Medical Need

Most courts do not examine intent in FMLA-care analyses. In cases involving unconventional care, however, analysis of intent is crucial because unconventional activities are difficult to classify as care. Moreover, this prong is particularly important because it places a limit on employees' FMLA coverage. For instance, an employee

178. 668 F.3d 826 (6th Cir. 2012).
179. *Id.* at 831–32.
180. *Id.*
181. No. 09-12634, 2010 WL 2558215 (E.D. Mich. June 21, 2010).
182. *Id.* at *5.
183. 178 F. App'x 488 (6th Cir. 2006).
184. *Id.* at 490.

may care for a seriously ill family member without personally administering direct care. If an employee goes to the hospital for "mere visitation"[185] of a patient undergoing serious surgery, the FMLA's care provision should not be "automatically implicated."[186] Without having the intent to care for the patient during the hospital visit, the employee should not receive FMLA protection. Although this Comment argues for a broad interpretation of the statute in order to effectuate the policy of the FMLA, the Act "cannot be read so broadly that the concept of providing care is read out of the statute."[187]

Other situations, however, when an employee merely visits an ailing family member can constitute FMLA-qualifying care. For example, in *Plumley v. Southern Container, Inc.*,[188] the plaintiff spent time with his hospitalized father, who testified that his son's presence was both comforting and reassuring.[189] The court concluded that this activity sufficed to meet the threshold of psychological care under the FMLA.[190] Moreover, in *Brunelle v. Cytec Plastics, Inc.*,[191] a plaintiff's father was hospitalized for severe burns.[192] During the hospital stay, the plaintiff kept vigil at his father's bedside.[193] According to his father's physician, the plaintiff helped the doctors make decisions concerning his father's care.[194] The court concluded that this activity constituted FMLA-qualifying care.[195] Similarly, the court in *Fioto* noted that:

> a child's offering comfort and reassurance to a bedridden parent qualifies as "caring for" the parent. Moreover . . . assisting in the making of medical decisions on behalf of that parent also qualifies as "providing physical or psychological care" within the meaning of FMLA regulations. Indeed, it seems . . .

185. Fioto v. Manhattan Woods Golf Enters., 270 F. Supp. 2d 401, 406 (S.D.N.Y 2003).
186. *Id.*
187. *Id.*
188. No. 00-140-P-C, 2001 WL 1188469 (D. Me. Oct. 9, 2001).
189. *Id.* at *9.
190. *Id.*
191. 225 F. Supp. 2d 67 (D. Me. 2002).
192. *Id.* at 71.
193. *Id.* at 72.
194. *Id.* at 77.
195. *Id.* at 82.

> that making medical decisions on behalf of an ailing parent is far more than psychological, and qualifies as assisting in the physical care of the parent.[196]

Therefore, while employees' intent to serve their family members' medical needs is difficult to determine, instances when an employee passively visits with his or her family member must be carefully examined. Such activity should not automatically allow an employee to meet the intent requirement. But if the employee's visitation serves as either physical or psychological care, then the employee's intent can properly be assumed.

c. Likely Conferral of Benefit

Along with the necessary time-sensitive medical need and intent to serve that need, an employee must prove a likely conferral of benefit. This prong is important because proving intent is not sufficient unless that intent is effectuated.

According to the applicable Department of Labor regulations, the FMLA medical-certification provision "encompasses both physical and psychological care . . . [which] includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition . . . ."[197] Furthermore, employees are entitled to FMLA protection for leaving work "to make arrangements for changes in care, such as transfer to a nursing home."[198] Therefore, in order to meet this third prong, employees must prove that their actions conferred at least a psychological benefit to the patient, whether related to the patient's care or to changes in care. Moreover, the employee "need not be the only individual or family member available to care" for the patient.[199]

Some courts have used proximity to the family member as a bright-line rule to determine whether the employee was, in fact, caring for the family member in question.[200] But defining care by mere proximity does not carry out the goals of the FMLA.[201] The

196. Fioto v. Manhattan Woods Golf Enters., 270 F. Supp. 2d 401, 405 (S.D.N.Y. 2003).

197. 29 C.F.R. § 825.124(a) (2014).

198. 29 C.F.R. § 825.124(b).

199. *Id.*

200. *See* Baham v. McLane Foodservice, Inc., 431 F. App'x 345 (5th Cir. 2011); Tellis v. Alaska Airlines, Inc., 414 F.3d 1045 (9th Cir. 2005); Scamihorn v. Gen. Truck Drivers, 282 F.3d 1078 (9th Cir. 2002).

201. 29 C.F.R. §825.124.

FMLA defines care as encompassing "both physical and psychological care,"[202] which includes "providing psychological comfort."[203] An employee may provide psychological comfort without being near the patient, such as by talking with the patient by telephone or other means of communication. Determining FMLA-qualifying care using physical proximity alone is an archaic approach, especially considering the rapidly developing advancements in technology that allow individuals from across the world to speak to each other as if in person.

The FMLA also covers family members needed "to make arrangements for changes in care, such as transfer to a nursing home."[204] Such arrangements can take shape in a variety of different ways, such as transferring the patient, preparing the new care site, or determining whether to continue treatment.[205] If an employee likely conferred a benefit on the ill family member by providing actual care or making arrangements, then the FMLA should apply when the employee acted with intent to care for a time-sensitive medical need.[206]

2. Defense of the Test as the Best Way to Implement FMLA Policy Goals

The test proposed in this Comment effectuates FMLA policy goals by affording wide coverage to eligible employees, including those providing care by unconventional methods.[207] Moreover, by requiring an intent to serve a time-sensitive medical need and a likely conferral of benefit on the ill family member, the test logically pinpoints legitimate care before affording FMLA protection.

Without this test, courts may still effectuate FMLA policy goals by broadly interpreting FMLA care.[208] But doing so without specific guidelines may still yield inconsistent results, providing employers and employees with an unclear definition of care. Therefore, to increase fairness and consistency as well as to fulfill FMLA policy goals, courts need such a test to apply in FMLA disputes.[209]

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202. 29 C.F.R. § 825.124(a).
203. *Id.*
204. 29 C.F.R. § 825.124(b).
205. *Id.*
206. *Id.*
207. *See* Lindsey, *supra* note 14.
208. *See id.*
209. *See id.*

Further, withholding FMLA coverage from employees who prove these three elements defies the logical definition of "care."[210] Commonsensically, intent to care for a need and actually benefitting that need constitutes legitimate care.[211] Therefore, requiring more than need, intent, and likely conferral of benefit is unrealistic and unfair.

Indeed, narrow interpretations of FMLA care seek to alleviate employers' burdens and prevent employee abuse; however, the proposed test's intent requirement better ensures that employees have no ulterior motives.[212] Moreover, while this test yields broad FMLA coverage, its requirements are not always easily met.[213] Employees' activities pass this test only when they are forced to miss work for the sole purpose of providing legitimate, beneficial care. Therefore, this test more effectively balances employment and family obligations by protecting only those employees who appear to effectively and purposely serve the needs of their families.[214]

C. Application of the Test to Existing Caselaw

1. Proximity Interpretations of Care

The proximity test strictly limits FMLA care to activities performed in the physical presence of the ill family member. While proximity is an important consideration when examining FMLA care, it should not be the determinative factor. Defining "care" based solely on proximity improperly excludes many legitimate methods of care that warrant FMLA protection.

Under this test, activities crucial to the family member's condition lack FMLA protection if performed even just a few miles away from the family member. Alternatively, insignificant activities may invoke protection if performed in the family member's presence. Moreover, under the proximity test, FMLA coverage for identical activities depends solely on the employee's location. For example, employees performing household chores while in the proximity of

210. *See id.*
211. *See id.* at 570.
212. *See id.* at 560.
213. *Id.*
214. *See* Glassman, *supra* note 5, at 837.

the family member are covered,[215] while those doing household chores while their family member is hospitalized are not.[216]

Clearly, the proximity test overgeneralizes FMLA care by disregarding legitimate care performed in the absence of ill family members. For this reason, courts should adopt a new test that relies on factors beyond mere proximity. The test proposed by this Comment thoroughly analyzes employee activities, performed with or without proximity, to afford FMLA protection for all legitimate types of care.

a. Cases Refusing FMLA Protection

i. *Baham v. McLane Foodservice, Inc.*

In *Baham*, when the plaintiff's daughter suffered serious head trauma, the plaintiff left the state where his daughter was undergoing surgery to return home to prepare their house for her arrival.[217] These preparations included tending to the yard after neighbors' complaints but also included cleaning the house and padding the furniture for his daughter's safety.[218] Still, because the plaintiff's activities did not involve proximity to his daughter, the court found them to fall outside the scope of FMLA care.[219]

The plaintiff's daughter met the medical-need requirement with her head trauma and surgery; she would obviously need care immediately after surgery.[220] Therefore, the principal determination in this case would be whether the plaintiff had intent to care for his daughter when he was preparing the house.[221] While tending to his yard, the plaintiff most likely did not have intent to care for his daughter because he was doing so in response to neighbors' complaints.[222] But cleaning the house and, at the very least, padding the furniture likely involved the requisite intent. The plaintiff would not have padded the furniture for other than the purpose of making the house safe for a patient with head trauma. Moreover, a clean house would be safer for the plaintiff's daughter, especially if

215. *See* Scamihorn v. Gen. Truck Drivers, 282 F.3d 1078, 1088 (9th Cir. 2002).
216. *See* Baham v. McLane Foodservice, Inc., 431 F. App'x 345, 349 (5th Cir. 2011).
217. *Id.* at 346.
218. *Id.* at 348–49.
219. *Id.* at 349.
220. *Id.* at 346.
221. *Id.*
222. *Id.*

cleaning included moving obstructions or mopping slippery floors. Therefore, the plaintiff had the requisite intent in this case.

The plaintiff also met the last prong of the proposed test because padding the furniture conferred a benefit on his daughter.[223] Whether or not the daughter fell at home, padded furniture still made a reasonably safer environment for this head-trauma patient.[224] To prove that cleaning the house also conferred a benefit on his daughter, the plaintiff would have to prove that doing so also created a safer environment for her. In any case, his activity of padding the furniture is enough to satisfy the last prong of the test.

Therefore, the plaintiff's activities, especially padding the furniture, most likely provided FMLA-protected care under this test.[225] Denying FMLA coverage simply because he was away from his daughter is improper because if the plaintiff had padded the furniture while his daughter was in the home, the court would have held that his activities constituted FMLA-covered care.[226] Whether or not the daughter was present in the home while the plaintiff performed his activities would not have changed the purpose of those activities in any way. Moreover, waiting to clean the home or pad the furniture until his daughter returned home could have been detrimental to her health because she could have fallen or struck her head before the plaintiff was able to install the safeguards. FMLA coverage of the plaintiff's activities should not depend on his daughter's being in the home when he performed them.

ii. *Tellis v. Alaska Airlines, Inc.*

In *Tellis*, the plaintiff took a trip several states away from his pregnant wife to retrieve a car after his own car broke down.[227] He stayed in constant telephone contact with his wife throughout the trip during which his wife gave birth.[228] The plaintiff claimed that his trip provided psychological comfort to his wife because having a working vehicle gave her reassurance.[229] But the court applied the proximity

223. *See id.*
224. *Id.* at 347.
225. *Id.* at 346.
226. *Id.* at 349.
227. Tellis v. Alaska Airlines, Inc., 414 F.3d 1045, 1046 (9th Cir. 2005).
228. *Id.*
229. *Id.* at 1048.

test, ultimately ruling that the plaintiff was not caring for his wife because he was not in close proximity to her.[230]

There was a time-sensitive medical need in this case because the plaintiff's wife was about to give birth. Assuming the plaintiff's sincere intent in retrieving the car was to psychologically comfort his wife, the relevant question in this analysis would be whether the plaintiff conferred a benefit on his wife through both his retrieving the car and his frequent phone calls.

The plaintiff and his wife owned only one functioning car—the one that the plaintiff left to retrieve—so it is plausible that retrieving the car did provide some benefit to the plaintiff's wife.[231] There can be little doubt that plaintiff's wife experienced psychological comfort from knowing that she had a working vehicle, especially after giving birth and thus having a greater need for transport.[232] Moreover, the plaintiff's conferral of a benefit could also be a physical one if a court were to find that other forms of transportation were difficult to come by. Therefore, it might be more than simply a benefit—but more of a necessity—for the plaintiff's wife to have a working vehicle. If the plaintiff did confer a psychological benefit upon his wife by retrieving the car, then the plaintiff should have received FMLA protection.[233]

The court's reasoning in *Tellis* is flawed because it assumes that a plaintiff cannot provide psychological—or even physical—care for an ill family member when away from that person.[234] Under this reasoning, had the plaintiff traveled several states away to retrieve his wife's medicine, the court would refuse FMLA protection simply because the plaintiff was away from his wife.[235] Surely, traveling to retrieve needed medicine would confer both a physical and psychological benefit on the ill family member. The same can be said about retrieving a working vehicle for the mother of a new baby.

iii. *Alsoofi v. Thyssenkrupp Materials NA, Inc.*

In *Alsoofi*, the plaintiff accompanied his sister to Yemen because, according to their customs, she was required to travel with a male

230. *Id*.
231. *See id.* at 1046.
232. *See id.*
233. *See id.* at 1046–47.
234. *See id.* at 1048.
235. *See id.*

family member.[236] The plaintiff had taken off work to care for his seriously ill mother; however, at the last minute, he was chosen to travel with his sister because the family member scheduled to travel with her had to undergo emergency surgery.[237] While in Yemen, the plaintiff attended to his sister's wedding and visited family and friends; he also communicated with his mother, but he did not speak to any doctors or make any medical decisions.[238] The court determined that although the plaintiff's travelling with his sister might have provided some psychological comfort to his mother, he was not protected by the FMLA because he did not meet the close-and-continuing-proximity requirement.[239]

Because the plaintiff's mother was seriously ill and required a full-time caretaker, the medical-need requirement in this case was met.[240] The other two prongs of the test may also be met, depending on how much the plaintiff's sister's trip affected the seriously ill mother psychologically. If concerns about the sister's safety had a serious psychological effect on the mother, then the plaintiff's travelling with his sister could invoke FMLA coverage if he could prove that his intent was to provide a psychological benefit to his mother. The plaintiff would need to prove—through testimony or otherwise—that the purpose for his trip was more about providing psychological comfort for his mother and less about helping his sister abide by their customs. Moreover, the plaintiff would need to prove that travelling with his sister, and perhaps his phone calls to his mother, did in fact provide her with psychological comfort.

The proximity test in this case again fails to consider the psychological effect of activities performed while not in the ill family member's proximity.[241] Although there is only a slight chance that the plaintiff would be protected by the FMLA under the three-prong test, the proximity test immediately excludes this plaintiff, even if his exclusive purpose for the trip was to provide psychologically care for his mother.

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236. Alsoofi v. Thyssenkrupp Materials NA, Inc., No. 09-CV-12869, 2010 WL 973456, at *1 (E.D. Mich. Mar. 15, 2010).

237. *Id.*

238. *Id.*

239. *Id.* at *5–6.

240. *Id.* at *4.

241. *See id.* at *5–6.

iv. *Boecken v. Gallo Glass Co.*

In *Boecken*, the plaintiff on several occasions left work and, instead of immediately going home to care for his ill grandmother, went to a local park to take walks.[242] The plaintiff admitted that he was not providing care for his grandmother during these walks but instead was relieving his own stress.[243] The court concluded that because he was not in close and continuing proximity with his grandmother during these walks, the plaintiff was not providing FMLA-protected care.[244]

Because the plaintiff's grandmother was very old and had a chronic disease, the medical-need requirement in this case was met. But the intent-to-care prong of the proposed test was not met. The plaintiff was indeed attempting to relieve his own stress while walking in the park; however, these walks involved the plaintiff's intent to care for *himself*, not for his seriously ill grandmother. Moreover, the plaintiff was not conferring a benefit upon his grandmother, which the plaintiff conceded when he admitted that he was not providing care. Therefore, the plaintiff in *Boecken* failed all prongs of the test.

Although the court in *Boecken* correctly refused to afford FMLA protection for the plaintiff's walks, it did so for the wrong reasons. Instead of evaluating the plaintiff's activities as a whole, the court looked only to the fact that the plaintiff was not in the physical presence of his grandmother. Under the proximity test, had the plaintiff been walking to the pharmacy to pick up his grandmother's medication, for example, he would likely be refused FMLA coverage. Therefore, the proximity test, although producing the correct result, was insufficient in its application.

b. Cases Affording FMLA Protection

i. *Scamihorn v. General Truck Drivers*

In *Scamihorn*, the plaintiff took off work to move to his severely depressed father's hometown.[245] The plaintiff talked daily with his father, performed various chores around the house, and drove his

242. Boecken v. Gallo Glass Co., No. 1:05-cv-00090-OWW-DLB, 2008 WL 4470759, at *3 (E.D. Cal. Sep. 30, 2008).

243. *Id.* at *4.

244. *Id.* at *10–11.

245. Scamihorn v. Gen. Truck Drivers, 282 F.3d 1078, 1080 (9th Cir. 2002).

father to counseling sessions.[246] The court found that because the plaintiff's activities contributed to his "constant presence in his father's life,"[247] the plaintiff was entitled to FMLA protection. The court did not explicitly note that this "constant presence" was a physical one; however, all of the plaintiff's activities involved close proximity to his father.[248]

The plaintiff's father met the medical-need requirement because of his severe and crippling depression, and because he testified that he needed the plaintiff by his side "full time."[249] Additionally, the plaintiff also met the intent requirement because, as the court noted, the plaintiff "moved to his father's hometown precisely to be a part of his treatment."[250] Also, the plaintiff met the likely-conferral-of-benefit requirement because his daily talks with his father about his depression aided his father psychologically. The plaintiff's chores around the house also comforted his father, thereby amounting to psychological care. Therefore, the plaintiff was protected by the FMLA.

While the court in *Scamihorn* correctly categorized the plaintiff's activities as FMLA-protected care, it did so *only* because these activities were performed in the physical presence of his father. Had the plaintiff performed the various chores around the house while his father was away, the court likely would not have found the chores to be protected, even if it was proven that the father benefitted psychologically from the plaintiff's chores. Moreover, had the plaintiff talked daily with his father over the phone about his depression, the court likely would not have provided FMLA coverage. But simply hearing from the plaintiff could have greatly benefitted the plaintiff's father psychologically. Therefore, while the *Scamihorn* court reached the correct decision, it should have used a test more effective than the proximity test.

2. Other Interpretations of Care

Other than the proximity test, many courts use a variety of different approaches to narrowly interpret the FMLA. These narrow interpretations frequently exclude employees providing unconventional care, even when such care is legitimate. Thus,

246. *Id.* at 1087.
247. *Id.* at 1088.
248. *See id.* at 1087–88.
249. *Id.*
250. *Id.* at 1088.

narrowly interpreting care does not effectuate FMLA work-family balancing goals because it excludes employees needed by their families to provide legitimate care.

Alternatively, some courts broadly interpret the FMLA to cover unconventional care. These interpretations best effectuate the FMLA's policy goals by alleviating the burdens of work for employees providing any legitimate care. But while correct in their decisions, these courts lack clear guidelines to regulate their analyses. Instead, they afford or deny FMLA protection by relying on their own intuitions and varying statutory interpretations. Determining FMLA care without any specific guidelines poses a risk of inconsistency and unfairness in FMLA disputes and provides employers and employees with no clear and reliable definition of "care." Therefore, all courts need a guiding test for FMLA-care disputes, including courts that are properly using a broad interpretation of care.

a. Cases Refusing FMLA Protection

i. *Overley v. Covenant Transport, Inc.*

In *Overley*, the plaintiff took off work to visit her severely disabled daughter in an assisted-living home.[251] The plaintiff also met with a possible overseer of her daughter's trust and visited a vacant lot being considered for the construction of her daughter's future residence.[252] She spent the remainder of the day making a preliminary visit to a funeral home and doing her daughter's laundry.[253] The court found that the plaintiff failed to show either that she was "needed to care for" her daughter or that her activities constituted FMLA-qualifying care.[254] The plaintiff testified that the meeting was not time sensitive, and the record gave no indication of an immediate need to look at the plot of land.[255] Moreover, the court classified the remaining activities—picking up the laundry, visiting the funeral home, and checking on her daughter's care and condition—as "routine activities" that failed to qualify as FMLA care.[256]

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251. Overley v. Covenant Transp., Inc., 178 F. App'x 488, 490 (6th Cir. 2006).
252. *Id.*
253. *Id.*
254. *Id.* at 495.
255. *Id.* at 490, 495.
256. *Id.* at 495.

Although the daughter's severe disability likely meets the medical-need requirement, most of the plaintiff's activities do not meet the first prong of the test because they lack time-sensitivity. The plaintiff testified that her meeting was not time-sensitive; her visit to the plot of land and preliminary funeral-home visit likely lack time-sensitivity as well. Cleaning her daughter's laundry is also not likely an urgent need.

The court, however, incorrectly glanced over the plaintiff's visit with her daughter, classifying it as "routine."[257] While her daughter's condition probably did not require the plaintiff's urgent visit, the court should have more thoroughly analyzed the visit before dismissing it as unnecessary. The daughter's condition might have required her mother's immediate presence; for example, the plaintiff could have possessed urgently-needed medication, or her daughter could have urgently needed her mother for psychological reasons. If the plaintiff visited her daughter with intent to alleviate the daughter's condition and her presence benefited her daughter, the FMLA should have protected the visit.

Absent these extenuating circumstances, the court likely reached the correct result, but its shallow analysis of the plaintiff's activities demonstrates the danger of evaluating FMLA care without specific guidelines. Without a clear test, courts risk refusing FMLA protection to deserving employees who provide legitimate care.

b. Cases Affording FMLA Protection

i. *Ballard v. Chicago Park District*

In *Ballard*, the plaintiff took time off work to travel with her terminally ill mother to Las Vegas.[258] While in Las Vegas, the two "participated in typical tourist activities."[259] The plaintiff also served as her mother's caretaker on the trip by administering her medications, draining fluids from her heart, and bathing and dressing her.[260] The court afforded FMLA protection, noting that during the trip the plaintiff continued to assist her mother with her basic needs, which did not change while they were in Las Vegas.[261] Therefore, the

257. *Id.*
258. Ballard v. Chi. Park Dist., 741 F.3d 838, 840 (7th Cir. 2014).
259. *Id.*
260. *Id.* at 839–40.
261. *Id.* at 841.

court found that, at the very least, the plaintiff provided physical care to her mother.[262]

In this case, the medical-need requirement was met because the plaintiff's mother was terminally ill and needed someone to act as her caretaker. Intent to serve the medical need was also demonstrated because in administering her mother's medications, draining fluids from her heart, and other similar activities, the plaintiff was obviously doing so with intent to care for her mother. The plaintiff also satisfied the possible-conferral-of-benefit prong because her activities clearly conferred a benefit on her mother.

Certainly, the three-prong test does not account for the fact that the plaintiff and her mother were on a trip to Las Vegas. As the court in *Ballard* noted, there is nothing in the FMLA that requires care in a particular geographic location.[263] Therefore, although the plaintiff and her mother were engaged in tourist activities while on the trip, the plaintiff should still be covered by the FMLA.

ii. *Briones v. Genuine Parts Co.*

In *Briones*, the plaintiff took time off work to stay with his three healthy children when his wife was needed at the hospital to care for their other sick child.[264] Although the plaintiff was caring for three children without serious health conditions, the court found that he was covered by the FMLA because he was doing so only to fill in for his wife, who was caring for a child who *did* suffer from a serious health condition.[265]

In this case, the medical-need requirement was met by the condition of the sick child, who required immediate care. It is irrelevant that the other three healthy children were healthy because the plaintiff was caring for them only to fill in for his wife, who was caring for the sick child.[266] Moreover, the second and third prongs of the test are met because the plaintiff clearly took time off work with intent to care for his children so that his wife could go to the hospital, and in doing so, he conferred a benefit to his sick child by allowing his wife to care for the child.

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262. *Id.* at 842.
263. *Id.* at 840.
264. Briones v. Genuine Parts Co., 225 F. Supp. 2d 711, 712 (E.D. La. 2002).
265. *Id.* at 715–16.
266. *See id.* at 715.

CONCLUSION

Courts must consider the underlying policy goal of the FMLA, which is to aid working caregivers in balancing their employment obligations and their family's needs. While many courts have done so by broadly interpreting the FMLA to cover unconventional care, their reasoning relies on judges' own intuitions and understanding of the FMLA rather than uniform guidelines, thereby yielding inconsistent results. In order to create consistency and to effectuate FMLA policy, courts need a guiding test that produces broad FMLA coverage for employees. The test this Comment proposes meets these requirements by thoroughly evaluating each aspect of care and by broadly covering employees providing unconventional care. Accordingly, courts can more easily decide FMLA care disputes, the results of such disputes will be more consistent, and the FMLA will fulfill its goals by allowing employees to more easily balance their work and family obligations.