St. Thomas Law Review

Volume 34
Issue 2 *Spring 2022*

Article 3

2022

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I. INTRODUCTION

Jane has been a department store employee for the past six years.[1] Her employer has a policy whereby she receives a negative mark on her record for each unauthorized absence.[2] After accumulating ten negative marks on her record, her employer may terminate her.[3] Four years ago, Jane's two children were hospitalized, requiring her to take time off from work during a busy holiday season.[4] This resulted in three unauthorized absences as her employer denied

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[1] This is a hypothetical scenario designed to illustrate the problems with absenteeism policies as they relate to the statute of limitations under the Family and Medical Leave Act ("FMLA"). This scenario assumes that Jane is an eligible employee under the FMLA. *See generally* 29 U.S.C. § 2611(2) (2021) (defining an FMLA-eligible employee).

[2] This is known as an absenteeism policy. *See generally* Barrett v. Ill. Dep't of Corr., 803 F.3d 893, 894 (7th Cir. 2015) (involving a defendant-employer "who maintained a system of progressive discipline for repeat unauthorized absences"); Butler v. Owens-Brockway Plastics Prods. Inc., 199 F.3d 314, 315 (6th Cir. 1999) (involving a defendant-employer who implemented an absenteeism policy).

[3] *See generally Barrett*, 803 F.3d at 894 (noting that the defendant-employer's policy allowed for employee termination after twelve unexplained absences); *Butler*, 199 F.3d at 315 (noting that the defendant-employer's policy allowed for employee termination after the accumulation of twelve "points").

[4] These hospitalizations are FMLA-eligible events for which Jane may seek protected FMLA leave. *See generally* 29 U.S.C. § 2612(a)(1)(C) (2021) (discussing an employee's entitlement to FMLA leave to care for his or her child); *Barrett*, 803 F.3d at 894 (involving a plaintiff who missed work due to her daughter's hospitalization).

her leave requests due to the busy season.[5] Jane did not contest these denials for fear of losing her job, especially considering she had several unauthorized absences left until she risked termination.[6] She subsequently accrued additional unauthorized absences throughout the next few years.[7] Recently, Jane requested a day off to attend her daughter's graduation, but her employer again denied her request, resulting in an additional unauthorized absence.[8] Consequently, she received a termination letter citing to excessive absences in violation of their policy.[9] If Jane were to bring an FMLA claim against her employer, the claim's viability would depend on where it is filed.[10]

Currently, disagreement exists among federal circuits as to when a Family Medical Leave Act ("FMLA") claim begins to accrue.[11] According to the FMLA, the statute of limitations runs from "the date of the *last event* constituting the alleged [FMLA] violation . . . ."[12] However, courts are split on the interpretation of "last event," specifically in the context of scenarios involving employers like Jane's who adopt some form of an absenteeism policy.[13] This conflict has created inconsistent outcomes, thereby affecting employee rights.[14]

Under current case law in the Seventh and Eighth Circuits, if Jane decides to take legal action against her employer for FMLA violations, any claims relating to her three absences from four years ago would be time-barred.[15]

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[5] Assuming Jane's leave requests were FMLA-compliant, her employer's denials were unlawful. *See generally* 29 U.S.C. § 2615(a)(1) (making it unlawful for an employer to deny qualifying leave).
[6] *See generally Butler*, 199 F.3d at 317 (arguing that a negative mark on an employee's absentee record, before that mark results in termination, is not serious enough to warrant an employee's resort to the legal system).
[7] This assumes that the subsequent absences were not FMLA-eligible. *See generally* 29 U.S.C. § 2612(a)(1) (delineating qualifying events for FMLA leave).
[8] This leave request is also likely ineligible for FMLA leave. *See generally id.* (delineating qualifying events for FMLA leave).
[9] *See generally Barrett*, 803 F.3d at 894 (involving a plaintiff who was fired after twelve unexplained absences in violation of her employer's policy); Reed v. Lear Corp., 556 F.3d 674, 676 (8th Cir. 2009) (noting that Human Resources notified the plaintiff of termination due to excessive absences); *Butler*, 199 F.3d at 315 (involving a plaintiff who was fired after accumulating twelve "points," resulting in termination).
[10] Varying interpretations of the statute of limitations for FMLA claims have led to different outcomes, resulting in a federal circuit split. *See infra* Part III (discussing the FMLA circuit split).
[11] *See* Fugate v. Frontier W. Va., 304 F. Supp. 3d 503, 506 (S.D.W. Va. 2018) ("The federal circuit courts of appeals disagree as to whether an employee's termination constitutes a 'last event' under the FMLA's statute of limitations."); *see also* Yaskowsky v. Phantom Eagle, LLC, No. 4:19cv9, 2020 U.S. Dist. LEXIS 27929, at *16 (E.D. Va. Feb. 18, 2020) (noting conflicting case law as to the interpretation of "last event" for FMLA claims).
[12] 29 U.S.C. § 2617(c)(1) (emphasis added).
[13] *Compare Butler*, 199 F.3d at 317 (holding that an employee's termination constitutes a "last event"), *with Barrett*, 803 F.3d at 894 (holding that the employee's last denial of leave constitutes a "last event").
[14] *See Yaskowsky*, 2020 U.S. Dist. LEXIS 27929, at *16 ("[T]here is a Circuit split over which event qualifies as the 'last event' for an FMLA interference claim."); *see also Fugate*, 304 F. Supp. 3d at 506 (noting that the federal circuit courts disagree on what constitutes a "last event" under the FMLA's statute of limitations).
[15] Under this interpretation, claims begin to accrue when an employer denies leave. These claims

However, in the Sixth Circuit, these claims may still be viable.[16] If Jane were to bring suit in the Fourth Circuit, the viability of the claims would depend on the district court.[17] In light of the foregoing, clarity regarding accrual dates for FMLA claims is essential for plaintiff-employees to avail themselves of needed job protection.[18] Sadly, many workers may find themselves in dilemmas such as Jane's as they likely juggle work and caregiving responsibilities.[19] Given the increased importance and applicability of the FMLA, it is in the workforce's best interest to seek uniformity when applying the statute of limitations.[20]

This Comment addresses the ambiguity within the FMLA statute of limitations, specifically the contested interpretation of "last event."[21] Part II provides background on the FMLA, including its history, purpose, and relevant provisions such as eligibility, rights, and enforcement thereunder.[22] Part III analyzes

would be time-barred because the denial of leave occurred four years ago, a period outside of the two-year and three-year statutes of limitations. *See Barrett*, 803 F.3d at 897 ("[T]he last event constituting the claim ordinarily will be the employer's rejection of the employee's request for leave."); *see also* Reed v. Lear Corp., 556 F.3d 674, 681 (8th Cir. 2009) (finding that the statute of limitations began to run when the employee was improperly denied FMLA leave).

[16] Under this interpretation, claims begin to accrue upon an employee's termination. These claims may be viable as the termination date occurred within the two-year statute of limitations. *See Butler*, 199 F.3d at 317 (holding that the statute of limitations begins to run when an employee is terminated, not necessarily when the leave request is denied); *see also* Maher v. Int'l Paper Co., 600 F. Supp. 2d 940, 946 (W.D. Mich. 2009) (noting the use of the employee's termination date as the "last event").

[17] Lower courts within the Fourth Circuit have reached divergent interpretations of the FMLA statute of limitations. *Compare Fugate*, 304 F. Supp. 3d at 507 ("[T]he last event for the purpose of determining the statute of limitations was the last denial of leave and not [the employee's] ultimate termination."), *with Yaskowsky*, 2020 U.S. Dist. LEXIS 27929, at *24 (holding that the date of the last denial of leave was not the "last event").

[18] Millions of employees take advantage of and rely on the FMLA for job protection. *See FMLA 25: States are Covering Workers Left out of the FMLA*, A BETTER BALANCE (Mar. 23, 2018), https://www.abetterbalance.org/fmla-25-states-are-covering-workers-left-out-of-the-fmla/ (explaining the function of FMLA and what states are doing to fill up the gaps in the law); s*ee also The 15th Anniversary of the Family Medical Leave Act: Achievements and Next Steps: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Labor*, 110th Cong. 60 (2008) (statement of Debra Ness, President, National Partnership for Women and Families) ("[The FMLA] make[s] the difference between economic survival and economic disaster for families in this country . . . .").

[19] In 2020, 90% of families with minor children had at least one employed parent. *See Table 4. Families With Own Children: Employment Status of Parents by Age of Youngest Child and Family Type, 2019-2020 Annual Averages*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/news.release/famee.t04.htm (last modified Apr. 21, 2021) (discussing the employment status of U.S. parents in 2019-2020).

[20] According to the U.S. Department of Labor, employees have used the FMLA over 100 million times. *See Family and Medical Leave Employer Guide*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/fmla/employer-guide (last visited May 9, 2022) (explaining the importance of the FMLA).

[21] FMLA claims must be brought within two or three years (whichever applies) "after the date of the *last event*" constituting the employer's alleged FMLA violation. 29 U.S.C. § 2617(c)(1)–(2) (emphasis added).

[22] *See infra* Part II (providing relevant background information on the FMLA); *see also, e.g.,* 29 U.S.C. §§ 2601, 2612, 2615 (2021) (discussing eligibility, rights, and enforcement under the FMLA).

how federal circuit courts are split on the interpretation of "last event" and how this affects the timeliness of FMLA claims.[23] Part IV proposes amending the FMLA regulations to clarify the limitations period using the *Barrett* holding that "last event" constitutes the last denial of FMLA rights.[24] Finally, Part V concludes, asserting that if this solution is adopted, the circuit split will be resolved, thereby addressing the ambiguity associated with the accrual period for FMLA claims involving absenteeism policies.[25]

II. HISTORY, PURPOSE, AND PROVISIONS OF THE FMLA

A. HISTORY OF THE FMLA

Prior to the enactment of the FMLA, the United States was the only industrialized nation without some form of family leave policy.[26] However, an increased number of working mothers with young children, coupled with the more demanding needs of single-parent households and the elderly, elicited a need for the federal provision of family leave.[27] As a result, after years of proposals and compromise, the FMLA was signed into law by President Bill Clinton on February 5, 1993.[28] The Act was considered landmark legislation as it was the first federal law to formulate a work-family policy.[29] When signing the bill into law, President Clinton declared that the American workforce "[would] no longer have to choose between the job they need and the family they love."[30]

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[23] *See infra* Part III (discussing the FMLA circuit split); *see also* Fugate v. Frontier W. Va., 304 F. Supp. 3d 503, 506–07 (S.D.W. Va. 2018) (providing a summary of case law showing how multiple circuits differ in their interpretations of "last event").
[24] *See infra* Part IV (discussing a proposed solution to the circuit split).
[25] *See infra* Part V (summarizing the proposed solution to the circuit split).
[26] *See* Sabra Craig, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 52 (1995) (stating that the U.S. was the only industrialized nation that "did not have a national policy guaranteeing some type of maternity"); *see also* Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: The Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 77 (2000) (noting that the U.S. was one of the "last industrialized nations to pass parental leave legislation").
[27] *See* Robert J. Aalberts & Lorne H. Seidman, *The Family and Medical Leave Act: Does It Make Unreasonable Demands on Employers?*, 80 MARQ. L. REV. 135, 135 (1996) (noting that these events merged to shape the FMLA); *see also* 29 U.S.C. § 2601 (codifying congressional findings and purposes).
[28] *See* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (stating that the FMLA's date of enactment was February 5, 1993); *see also Statement on Signing the Family Medical Leave Act of 1993*, 29 WEEKLY COMP. PRES. DOC. 143, 144 (Feb. 8, 1993) ("[I]t took 8 years and two vetoes to make this legislation the law of the land.").
[29] *See* Pauline T. Kim, *The Family and Medical Leave Act of 1993: Ten Years of Experience*, 15 WASH. U. J.L. & POL'Y 1, 1 (2014) (discussing the significance of the FMLA); *see also* Robert J. Aalberts & Lorne H. Seidman, *The Family and Medical Leave Act: Does It Make Unreasonable Demands on Employers?*, 80 MARQ. L. REV. 135, 137 (1996) ("The FMLA is . . . a federally mandated exception to the common law concept of employment at will.").
[30] *Statement on Signing the Family Medical Leave Act of 1993*, *supra* note 28, at 144.

B. PURPOSE OF THE FMLA

Ultimately, the FMLA was enacted by Congress "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity . . . ."[31] Congress also sought "to entitle employees to take reasonable leave" for FMLA-eligible events, including: medical reasons, a child's birth or adoption, or the care of a child, spouse, or parent suffering from a "serious health condition."[32] While part of Congress viewed the FMLA as a new minimum labor standard with protections similar to the Fair Labor Standards Act,[33] in reality, it is "grounded in the same soil as other federal antidiscrimination statutes."[34] Organized labor was slow to render support for the FMLA, emphasizing that it could not have been regarded as a minimum labor standard.[35] Additionally, it is unlikely Congress created the FMLA as a minimum labor standard given its limited scope when compared to existing minimum labor standards.[36]

The Act itself has anti-discriminatory underpinnings[37] and was heralded by the Supreme Court as a guard against sex-based discrimination and stereotyping.[38] It was targeted to combat gender discrimination, specifically

[31] 29 U.S.C. § 2601(b)(1).

[32] 29 U.S.C. § 2601(b)(2).

[33] *See* 139 CONG. REC. 2124, 2251 (1993) (statement of Sen. McCain) (noting that the FMLA would "establish a reasonable, fair minimum labor standard"); *see also* Boyd Rogers, *Individual Liability Under the Family and Medical Leave Act of 1993: A Senseless Detour on the Road to a Flexible Workplace*, 63 BROOK. L. REV. 1299, 1306 (1997) (noting that some members of Congress saw the FMLA as a labor standard). The Fair Labor Standards Act provides certain job protections for workers, including setting a minimum wage, restricting child labor, and limiting the number of hours an employee may lawfully work. *See generally* 29 U.S.C. §§ 201–219 (codifying the Fair Labor Standards Act).

[34] Rogers, *supra* note 33, at 1306 (discussing the FMLA's anti-discriminatory nature). In addition, prior to the FMLA, Congress had attempted to address FMLA-type violations through Title VII, a federal anti-discriminatory act. *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 737 (2003) (noting that Congress had already unsuccessfully attempted to combat "stereotypes about women's domestic roles" through Title VII).

[35] *See* RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 153 (1995) (noting that organized labor did not regard the family leave bill as high priority); *see also* Rogers, *supra* note 33, at 1308 ("Perhaps one of the most surprising aspects of the history of the FMLA is the fact that organized labor was slow to support the bill.").

[36] The FMLA's scope of coverage pales in comparison to that of the FLSA. *Compare* 139 CONG. REC. 2124, 2163 (1993) (statement of Sen. Lautenberg) (stating that 95% of employers were not covered under the FMLA), *with* Barbara Kate Repa, *Who is Covered by the Fair Labor Standards Act?*, NOLO, https://www.nolo.com/legal-encyclopedia/free-books/employee-rights-book/chapter2-2.html (last visited May 9, 2022) (noting that the FLSA covers nearly all employers).

[37] *See* 29 U.S.C. §§ 2601(a)(6), (b)(4)–(5) (discussing minimizing discrimination as a purpose of the FMLA); *see also* 29 U.S.C. § 2615(a)(2) (making it unlawful to discriminate in certain instances).

[38] *See Hibbs*, 538 U.S. at 737 (noting that the FMLA drafters designed the FMLA to remedy the workplace discrimination and stereotyping that women continue to experience); *see also* Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 59 (2004) ("[T]he Court embraced the [FMLA] as an appropriate federally

discrimination present at the work and family partition line where there existed gender-based overgeneralization.[39] By designing an all-encompassing, routine employment benefit, Congress sought to rid family leave of its stigmatized view as an excessive drain on the workplace caused by female employees.[40]

C. FMLA PROVISIONS

i. Eligible Employees and Covered Employers

Surprisingly, the FMLA does not apply to many employers and employees due to its extensive coverage criteria.[41] Ironically, women are more likely to be excluded from coverage.[42]

For an employee to become FMLA-eligible, he or she must work for the same employer for at least one year[43] and at least 1,250 hours within the past year, an average of twenty-five hours per week.[44] However, meeting these requirements does not necessarily guarantee an employee's eligibility because the FMLA must also apply to the employer.[45]

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mandated remedy for a history of state-sponsored discrimination against women . . . .").

[39] *See Hibbs*, 538 U.S. at 738 (discussing the Act's narrowly targeted purpose); *see also* Grossman, *supra* note 38, at 29 (discussing how pre-FMLA empirical data showed that "women almost always [took] time away from work for childbirth and new parenting," while "men rarely [took] time off for new parenting").

[40] *See Hibbs*, 538 U.S. at 737 (stating that Congress created "an across-the-board, routine employment benefit" to combat the stigma against working women); *see also* Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 65 (2004) (noting that the Court's opinion in *Hibbs* focused on how the legislature created the FMLA with women as primary caregivers in mind).

[41] According to the most recent findings released by the U.S. Department of Labor, only 56% of U.S. employees are eligible for FMLA leave and only 10% of private sector employers are large enough to be required to comply with the FMLA. *See* Scott Brown et al., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Results from the 2018 Surveys*, at iii, https://www.dol.gov/sites/dol-gov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_FinalReport_Aug2020.pdf (last visited May 9, 2022).

[42] Women tend to work for smaller employers whom the FMLA does not cover. *See* Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 339 n.92 (2014).

[43] These twelve months do not necessarily need to be consecutive. *See* 29 C.F.R. § 825.110(b) (2021) (stating that the twelve months need not be consecutive in certain instances); *see also* GERALD MAYER, CONG. RESEARCH SERV., THE FAMILY AND MEDICAL LEAVE ACT (FMLA): AN OVERVIEW 3 (2012) (discussing how a non-consecutive twelve-month period may apply to certain breaks in service).

[44] *See* 29 U.S.C. § 2611(2)(A) (2021) (stipulating this eligibility requirement); *see also* 29 C.F.R § 825.110(a)(2) (2021) (defining an eligible employee). This requirement, however, does not apply to airline flight crew members, whose work hours are calculated differently pursuant to the Airline Flight Crew Technical Corrections Act of 2009. *See* 29 C.F.R. § 825.801 (2021) (delineating a distinct hours of service requirement for airline flight crew employees); *see also* MAYER, *supra* note 43, at 3 (noting that special rules apply to airline flight crew members).

[45] *See* 29 U.S.C. § 2611(2)(A) (noting that the term "eligible employee" means an employee employed by an "employer," as defined under the FMLA); *see also* 29 U.S.C. § 2611(4) (defining

All public sector employers are covered under the FMLA, regardless of the number of workers employed.[46] However, private-sector employers must meet additional criteria.[47] They must employ at least 50 employees "for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."[48] Additionally, the 50 or more employees must be within 75 miles of the worksite[49] of the eligible employee.[50] Finally, the private employer must be "engaged in commerce or in any industry or activity affecting commerce."[51] Only employees meeting the above requirements may avail themselves of the FMLA's rights and protections.[52]

ii. FMLA Rights

Once an employee is eligible for FMLA leave,[53] he or she is permitted to take up to 12 weeks of unpaid leave annually for the following circumstances:[54] (a) to care for a newborn child; (b) to care for a newly adopted child or newly placed foster child; (c) to care for a spouse, child, or parent suffering from a

"employer" under the FMLA).

[46] This includes any public agency, such as local, state, or federal government agencies, and any public or private elementary or secondary schools. *See* 29 U.S.C. § 2611(4)(A)(iii); *see also* U.S. DEP'T OF LAB., *Fact Sheet #28: The Family and Medical Leave Act*, https://www.dol.gov/agencies/whd/fact-sheets/28-fmla (last visited May 9, 2022) (defining covered employer to include public agencies and public or private elementary or secondary schools, "regardless of the number of employees [employed]").

[47] *See* 29 U.S.C. § 2611(4)(A)(i) (defining an FMLA-covered employer); *see also* 29 C.F.R. § 825.104 (2021) (discussing additional criteria for FMLA-covered employers).

[48] 29 U.S.C. § 2611(4)(A)(i); *see* 29 C.F.R. § 825.105 (2021) (discussing how to count employees to determine FMLA coverage).

[49] "Worksite" is construed in the same manner as "single site of employment" under the Worker Adjustment and Retraining Notification Act. *See* Craig, *supra* note 26, at 67 (discussing the definition of worksite); *see generally* 29 C.F.R. § 825.111(a) (2021) (defining "worksite" under the FMLA). If an employee has no fixed worksite, as is the case with many construction workers and salespersons, the employee's worksite is the site assigned as his or her home base, from which work is assigned, or to which he or she reports. *See* 29 C.F.R. § 825.111(a)(2).

[50] *See* U.S.C. § 2611(2)(B)(ii) (excluding eligibility for employees whose employers do not meet this requirement); *see also* 29 C.F.R. § 825.111 (discussing how to determine the employment of 50 employees within 75 miles).

[51] 29 U.S.C. § 2611(4)(A)(i). This requirement, however, seems redundant as employers who meet the "50-employee coverage test" are deemed to be "engaged in commerce or in an industry or activity affecting commerce." 29 C.F.R. § 825.104(b).

[52] *See* Kim, *supra* note 29, at 2 (noting that the FMLA only provides unpaid leave for workers eligible for its protections); *see also* Craig, *supra* note 26, at 66–70 (discussing prerequisites needed to invoke the protections of the FMLA).

[53] This assumes that the employee has: (a) met the eligibility criteria discussed in *supra* Section II.C.i. and (b) provided the employer with proper FMLA leave notice. *See generally, e.g.*, 29 U.S.C. § 2612(e) (2021) (discussing notice requirements for FMLA leave); 29 C.F.R. §§ 825.302–303 (discussing FMLA notice requirements for foreseeable and unforeseeable leave).

[54] However, if a married couple is seeking FMLA leave for circumstances (a) through (c), and if they are both eligible for such leave and employed by the same FMLA-covered employer, then their leave may be limited to a *combined* total of twelve weeks of leave during any twelve-month period, not twelve weeks of leave each. *See* 29 C.F.R. § 825.120(a)(3) (2021) (codifying this exception for married couples).

serious health condition;[55] and (d) to care for himself or herself due to a serious health condition.[56] In addition, the FMLA provides eligible employees with two types of military family leave.[57] It also provided temporary leave related to the COVID-19 pandemic, although this benefit has since expired.[58]

Although the Act requires unpaid leave, there are circumstances in which accrued paid leave, such as vacation and sick time, may be substituted for unpaid leave.[59] An employee may elect, or an employer may require, such a substitution.[60] However, if accrued paid leave is less than 12 weeks (or 26 weeks in the case of military caregiver leave), the employer is required to provide additional unpaid leave to attain the 12 weeks (or 26 weeks, if applicable).[61]

The FMLA also protects three basic rights of covered employees.[62] First, it protects an employee's right to be restored to the same or equivalent position

[55] Serious health condition means "an illness, injury, impairment, or physical or mental condition" involving: (i) "inpatient care in a hospital, hospice, or residential medical care facility"; or (ii) "continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The most common serious health conditions are hospitalizations and pregnancies. *See FMLA Frequently Asked Questions*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/fmla/faq (last visited May 9, 2022).

[56] *See* 29 U.S.C. §§ 2612(a)(1)(A)–(D) (listing FMLA-covered events).

[57] These two types of military family leave include (i) qualifying exigency leave and (ii) military caregiver leave. *See* MAYER, *supra* note 43, at 5–6 (discussing both types of military family leave). Qualifying exigency leave entitles an eligible employee to take up to twelve weeks of FMLA leave during a twelve-month period for exigent circumstances relating to a spouse, child, or parent on covered active duty in the Armed Forces. *See* 29 U.S.C. § 2612(a)(1)(E). Military caregiver leave entitles an eligible employee to take up to twenty-six weeks of FMLA leave during a twelve-month period to care for a spouse, child, parent, or next of kin who is a covered servicemember with a serious medical condition. *See* 29 U.S.C. § 2612(a)(3).

[58] On April 1, 2020, in response to the workplace effects of the COVID-19 pandemic, the Department of Labor announced temporary leave provisions authorized as part of the Families First Coronavirus Response Act ("FFCRA"). *See Temporary Rule: Paid Leave Under the Families First Coronavirus Response Act*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/ffcra (last visited May 9, 2022); *see also* 29 U.S.C. § 2612(a)(1)(F) (stipulating leave entitlement relating to COVID-19). In essence, these provisions required employers with less than 500 employees to provide paid leave to covered employees. However, this requirement expired on December 31, 2020, instead becoming optional for covered employers through September 30, 2021. Any applicable employer who voluntarily paid FFCRA leave benefits from January 1, 2021, to September 30, 2021, received dollar-for-dollar tax credits for monies paid. *See* Mark Spring, *FFCRA Extended Through September 30, 2021 With Some Key Amendments*, JD SUPRA (Mar. 16, 2021), https://www.jdsupra.com/legalnews/ffcra-extended-through-september-30-4872934/.

[59] *See* 29 U.S.C. § 2612(d)(2) (discussing the substitution of paid leave); *see also* Craig, *supra* note 26, at 74 (discussing how an employer may require the substitution of paid leave for mandated unpaid leave).

[60] *See* 29 U.S.C. § 2612(d)(2) (discussing the substitution of paid leave); *see also* Chuck Halverson, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 258 (2003) ("[T]he employee can elect, or the employer may require an employee, to use all accrued vacation and sick time as part of the FMLA extended leave . . . .").

[61] *See* 29 U.S.C. § 2612(d)(1) (discussing the relationship of paid leave to unpaid leave); *see also* Halverson, *supra* note 60, at 258 ("[T]he employer must allow the employee to take unpaid time off in excess of paid time the employee has accrued.").

[62] *See* Grossman, *supra* note 38, at 20; *see also* Craig, *supra* note 26, at 66–74 (discussing these FMLA protections).

upon return from FMLA leave.[63] Therefore, the employer must restore the employee to a position with the same duties and responsibilities as the previous position and with the same required skills and authority.[64] The FMLA also protects a covered employee's right to continued benefits throughout protected leave.[65] This protection requires employers to maintain benefits, including medical insurance, and also requires the continued payment of premiums typically covered by the employer.[66] Finally, the Act protects a covered employee's right not to be penalized for exercising, or attempting to exercise, FMLA rights.[67] More specifically, it prohibits employers from interfering with, restraining, or denying employees from exercising, or attempting to exercise, their FMLA rights or from discharging or otherwise discriminating against an employee for exercising such rights.[68]

Notably, the rights prescribed by the FMLA are a minimum standard.[69] As such, employees may be entitled to more generous benefits by way of more comprehensive state or local leave laws or through employers with more generous leave policies.[70]

iii. FMLA Enforcement

Employees who believe employers have violated their FMLA rights have two choices: (i) file a complaint with the U.S. Department of Labor's Wage and

[63] *See* 29 U.S.C. § 2614(a) (2021) (discussing the entitlement of an eligible employee's restoration to his or her position).
[64] *See* 29 C.F.R. § 825.215 (2021) (defining "equivalent position"). This protection, however, may not apply to the top ten percent of highest-paid employees if an employer can prove that reinstatement would cause "substantial and grievous economic injury." *See* 29 U.S.C. § 2614(b) (discussing the exemption for certain highly compensated employees).
[65] *See* Craig, *supra* note 26, at 72 (discussing an employer's maintenance of benefits obligation); *see also* Kim, *supra* note 29, at 2 (noting that employers are required to maintain workers' benefits).
[66] *See* 29 U.S.C. §§ 2614(a)(2), (c)(1) (stipulating an employer's requirement to maintain health and other benefits of the employee); *see also* 29 C.F.R. § 825.209 (2021) (discussing maintenance of employee benefits).
[67] *See* 29 U.S.C. § 2615(a)(1) (2021) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]."); *see also* 29 U.S.C. § 2615(a)(2) ("It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful under [the FMLA].").
[68] *See* 29 U.S.C. §§ 2615(a)(1)–(2) (discussing prohibited acts under the FMLA).
[69] *See* Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993,* 42 WM. & MARY L. REV. 1507, 1528 (2001) ("Congress intended that the FMLA establish minimum standards . . . ."); *see also* Selmi, *supra* note 40, at 66 (noting that the FMLA provides "a minimum standard of family leave for all eligible employees").
[70] *See* Hayes, *supra* note 69, at 1528–29 ("[S]tates and employers are free to provide more [FMLA] protection, but may not provide less."); *see also* MAYER, *supra* note 43, at 5 (noting that employers, state governments, or local governments may offer employees more generous family and medical leave).

Hour Division;[71] or (ii) initiate a private lawsuit in state or federal court.[72] These choices are mutually exclusive.[73]

For administrative complaints, the Department of Labor investigates the complaint and issues a ruling thereafter.[74] For employees pursuing a private cause of action, the employee must allege that his or her employer violated section 2615 of the FMLA; this section creates two distinct claims: interference and retaliation.[75] An interference claim is premised on an employee's right to take FMLA leave free from interference or restraint by an employer.[76] An employee may have an interference claim against his or her employer if the employer refuses to authorize FMLA leave or discourages the employee from using FMLA leave.[77] A retaliation claim is premised on an employee's right to exercise or attempt to exercise his or her FMLA rights without employer retaliation.[78] An employee may have a retaliation claim if he or she suffers an adverse employment decision and either was (i) treated less favorably by an employer for requesting FMLA leave or (ii) subjected to the adverse decision because of the FMLA leave request.[79] One example of FMLA retaliation involves an employee's termination by an employer because he or she took

[71] *See* 29 C.F.R. § 825.400(a)(1) (2021) (stating that an employee may file a complaint with the Secretary of Labor); *see also* 29 U.S.C. § 2617(b)(1) (2021) (discussing FMLA administrative action). The option to file an FMLA complaint with the Wage and Hour Division only applies to private sector and state and local government employees. *See* MAYER, *supra* note 43, at 9 (discussing FMLA administration and enforcement). Federal employees must follow their respective agencies' administrative procedures. *See id*.

[72] *See* 29 U.S.C. § 2617(a)(2) (discussing employee's private right of action); *see also* 29 C.F.R. § 825.400(a)(2) (stating that the employee may file a private lawsuit).

[73] *See* Hayes, *supra* note 69, at 1511 ("There are two mutually exclusive ways in which employees may seek redress if their FMLA rights are violated by their employer."); *see also* Porter, *supra* note 42, at 337–38 (noting that employees can only choose *one* of these options).

[74] A complaint may be filed in person at a local Wage and Hour Division office, by mail, or by telephone, and simply needs to contain the employee's statement of the perceived FMLA violations. *See Family and Medical Leave Act Advisor*, U.S. DEP'T OF LAB., https://webapps.dol.gov/elaws/whd/fmla/13.aspx (last visited May 9, 2022).

[75] *See* O'Connor v. PCA Fam. Health Plan, Inc., 200 F.3d 1349, 1352 (11th Cir. 2000) (discussing the two types of FMLA claims); *see generally* 29 U.S.C. §§ 2615(a)(1)–(2) (2021) (codifying prohibited acts under the FMLA).

[76] *See* 29 U.S.C. § 2615(a)(1) (making it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]").

[77] *See* 29 C.F.R. § 825.220(b) (2021) ("Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave."); *see also* Maher v. Int'l Paper Co., 600 F. Supp. 2d 940, 954–55 (W.D. Mich. 2009) (noting that an interference claim involves an employer's denial of FMLA benefits to which the employee is entitled).

[78] *See* 29 U.S.C. § 2615(a)(2) (making it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful" by the FMLA).

[79] *See* 29 C.F.R. § 825.220(c) ("[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions . . . ."); *see also Maher*, 600 F. Supp. 2d at 955 (noting that a retaliation claim may arise when an employer takes adverse action against an employee, and "there was a causal connection between the FMLA-protected activity and the adverse employment action").

FMLA leave.[80] Both interference and retaliation claims require a showing that the employer's violation prejudiced the employee.[81]

If an employee-plaintiff prevails in a suit against his or her employer, he or she is entitled to certain relief, such as compensatory damages and various equitable remedies.[82] In addition, an employee may be entitled to double damages when an employer fails to act in good faith.[83] Punitive damages, however, are not available in FMLA suits.[84]

iv. FMLA Statute of Limitations

Generally, an FMLA claim must be brought within "2 years after the date of the last event" constituting the employer's alleged FMLA violation.[85] However, if an employer's violation is "willful,"[86] the claim may be brought "within

[80] *See* Rogers, *supra* note 33, at 1320 n.133 (noting that a plaintiff was alleging retaliatory discrimination when she said she was terminated for taking FMLA-protected leave). Another example may include an employer taking adverse action against an employee for suing the employer for FMLA violations. *See* 29 U.S.C. § 2615(b)(1) (making it unlawful for an employer to discriminate against an employee because such individual has filed a charge under the FMLA).

[81] This is a main element of any FMLA claim. *See* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002) (noting that the FMLA damages provision provides no relief unless the employee has been prejudiced by the violation); *see also* Jacobs v. Lockheed Martin Corp., No. 1:14-CV-03575-CAP-AJB, 2016 U.S. Dist. LEXIS 196502, at *30 (N.D. Ga. July 13, 2016) (discussing that a plaintiff must "show some impairment of his rights and resulting prejudice"). A plaintiff may meet this prejudice requirement by showing harm remediable by damages or equitable relief. *See* Evans v. Books-A-Million, 762 F.3d 1288, 1296 (11th Cir. 2014) (discussing the requisite showing of prejudice for FMLA claims).

[82] Available remedies include equitable relief, payment of attorneys' fees, and compensatory damages for lost wages, benefits, and other monetary losses. *See* 29 U.S.C. §§ 2617(a)(1), (a)(3) (2021) (discussing remedies available to prevailing plaintiff-employees); *see also* 29 C.F.R. § 825.400(c) (2021) (listing potential remedies available to prevailing plaintiff-employees).

[83] *See* 29 U.S.C. § 2617(a)(1)(A)(iii) (providing for a mandatory award of liquidated (double) damages for any award under the FMLA unless an employer proves violations were in good faith).

[84] *See* Zawadowicz v. CVS Corp., 99 F. Supp. 2d 518, 540 (D.N.J. 2000) (noting that nothing in the FMLA damages provision authorizes an award of punitive damages); *see also* Nancy Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335, 354 (1993) (noting that FMLA remedies do not include punitive damages).

[85] *See* 29 U.S.C. § 2617(c)(1). This only applies to non-willful violations. *Id.*

[86] *See* McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (holding that a "willful" violation occurs when "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute"). Most federal circuit courts have applied McLaughlin's definition of "willful" to the FMLA. *Id. See, e.g.,* Hillstrom v. Best W. TLC Hotel, 354 F.3d 27, 33–34 (1st Cir. 2003) (applying the FLSA definition of "willful" to the FMLA in the 1st Circuit); Porter v. N.Y. Univ. Sch. of L., 392 F.3d 530, 531–32 (2d Cir. 2004) (applying the FLSA definition of "willful" to the FMLA in the 2d Circuit); Settle v. S.W. Rodgers Co., No. 98-2312, 1999 WL 486643, at *3 (4th Cir. July 12, 1999) (applying the FLSA definition of "willful" to the FMLA in the 4th Circuit); Henson v. Bell Helicopter Textron, Inc., 128 F. App'x 387, 392–93 (5th Cir. 2005) (applying the FLSA definition of "willful" to the FMLA in the 5th Circuit); Hoffman v. Prof'l Med. Team, 394 F.3d 414, 417 (6th Cir. 2005) (applying the FLSA definition of "willful" to the FMLA in the 6th Circuit); Hanger v. Lake Cty., 390 F.3d 579, 583–84 (8th Cir. 2004) (applying the FLSA definition of "willful" to the FMLA in the 8th Circuit); Packard v. Cont'l Airlines, Inc., 24 F. App'x 960, 961 (10th Cir. 2001) (applying the FLSA definition of "willful" to the FMLA in the 10th

3 years of the date of the last event."[87] While a reading of the FMLA's statute of limitations may seem simple, the interpretation of the words "last event" has been largely debated, resulting in a federal circuit split.[88]

III. CIRCUIT SPLIT

As illustrated in Part I, split federal circuit courts have led to diverging lower court rulings regarding when the statute of limitations on an FMLA claim begins to run, specifically for those cases involving absenteeism policies.[89] The Seventh and Eighth Circuits clash with the Sixth Circuit in their statutory interpretations, resulting in widespread uncertainty.[90]

A. "LAST EVENT" MEANS THE DATE THAT FMLA LEAVE WAS LAST DECIDED

The Seventh and Eighth Circuits have held that a claim accrues, and the limitations period begins to run, when an employer denies a request for FMLA leave.[91] This issue was one of first impression for the Seventh Circuit.[92]

In *Reed v. Lear Corp.*, an Eighth Circuit case, an employee sued his employer for violating the FMLA when he was fired for excessive absenteeism.[93] The defendant-employer maintained a no-fault attendance policy where an employee is discharged upon accumulating twenty-four absence points in one year.[94] Reed, the plaintiff-employee, was fired upon reaching twenty-four points but argued that he accrued his absences in reliance on his employer's representations that he was on provisional FMLA leave.[95] The district court

Circuit).

[87] 29 U.S.C. § 2617(c)(2).

[88] *See infra* Part III (discussing the circuit split).

[89] *See supra* Part I (using Jane's example to show differing results depending on the circuit).

[90] *Compare* Reed v. Lear Corp., 556 F.3d 674, 681 (8th Cir. 2009) (finding that "last event" is the last denial of leave), *and* Barrett v. Ill. Dep't of Corr., 803 F.3d 893, 896 (7th Cir. 2015) (holding that "last event" means when the employee was last denied leave), *with* Butler v. Owens-Brockway Plastics Prods. Inc., 199 F.3d 314, 317 (6th Cir. 1999) (holding that "last event" constitutes the employee's date of termination).

[91] *See Barrett*, 803 F.3d at 897 (adopting the date of the last "denial of leave" as the "last event"); *see also Reed*, 556 F.3d at 681–82 (holding that the statute of limitations began to run when the plaintiff was allegedly improperly denied leave).

[92] *See Barrett*, 803 F.3d at 895–96 ("This is a legal question of first impression in this circuit.").

[93] *See Reed*, 556 F.3d at 675; *see also Place Employee on 'Provisional' FMLA Leave While Seeking 2nd, 3rd Certifications*, BUS. MGMT. DAILY (May 16, 2009), https://www.businessmanagementdaily.com/9027/place-employee-on-provisional-fmla-leave-while-seeking-2nd-3rd-certifications/ (discussing the facts of the *Reed* case).

[94] *See Reed*, 556 F.3d at 675 ("Accumulating 24 points in any 12–month period would result in the employee's termination.").

[95] *See id.* at 682 (noting that the plaintiff "reasonably believed that he was on provisional leave" due to his employer's statements); *see also* 29 C.F.R. § 825.307(a) (2021) (discussing how provisional FMLA leave occurs while an employer seeks a second or third opinion certifying an employee's initial showing of a serious health condition necessitating leave. During this time, the employee is

found that Reed's claims were time-barred by the two-year FMLA statute of limitations, concluding the denial of FMLA benefits occurred on November 4, 2003, and November 26, 2003, and that he did not file his action until January 5, 2006.[96] On appeal, Reed argued that there was a genuine issue of material fact regarding whether the "last event" occurred on November 26, 2003, when his employer last denied his leave request, or on January 7, 2003, when he was terminated.[97] However, the court disagreed, finding that "no genuine issue of material fact exist[ed] concerning whether the alleged violation occurred on November 26, 2003."[98] Without going into much detail in its holding, the court ruled that an "FMLA violation occurs when an employer improperly denies a request for leave."[99] Therefore, the court concluded that Reed's claim was ripe once his employer informed him of its denial of leave.[100]

Despite criticizing the holding in *Reed*, the Seventh Circuit aligned with the Eighth Circuit in *Barrett v. Illinois Department of Corrections*.[101] The *Barrett* case involved a defendant-employer who maintained a progressive absentee policy where twelve unauthorized absences could result in an employee's termination.[102] Barrett, the plaintiff-employee, was fired in 2010 after accumulating twelve absences.[103] Barrett took issue with her employer's characterization of her December 15, 2003, December 22, 2004, and August 10, 2005 absences.[104] Prior to her termination, but after these absences, Barrett argued before her employer's Employee Review Board that the absences were authorized, contending she was absent for medical reasons.[105] Nonetheless, the Employee Review Board found her "guilty" of an unauthorized absence each time.[106]

provisionally entitled to the FMLA benefits.).

[96] *See Reed*, 556 F.3d at 676.

[97] *See id.* at 681. Had Reed successfully established that the limitations period began upon his termination, his claims would have been timely under the three-year limitations period for willful FMLA violations. *Id.* (discussing Reed's arguments before the court).

[98] *Reed*, 556 F.3d at 682; *see* Favreau v. Liberty Mut., Inc., 451 F. Supp. 3d 150, 162 (D. Mass. 2020) (noting that the court in *Reed* considered that the "last event" occurred when the plaintiff's request for leave was denied).

[99] *Reed*, 556 F.3d at 681.

[100] *See id.* at 681 ("An FMLA violation occurs when an employer improperly denies a request for leave."); *see also* Jacobs v. Lockheed Martin Corp., No. 1:14-CV-03575-CAP-AJB, 2016 U.S. Dist. LEXIS 196502, at *29 (N.D. Ga. July 13, 2016) (noting that the court in *Reed* held that "the statute of limitations is triggered when the leave is denied").

[101] *See* Barrett v. Ill. Dep't of Corr., 803 F.3d 893, 896 n.1 (7th Cir. 2015) (noting that the decision in *Reed* was "thinly reasoned").

[102] *See id.* at 894 ("Employees in the Illinois Department of Corrections ('IDOC') can be fired if they accumulate [twelve] unauthorized absences from work."); *see also Jacobs*, 2016 U.S. Dist. LEXIS 196502, at *29 (describing the progressive disciplinary policy in the *Barrett* case).

[103] *See Barrett*, 803 F.3d at 894.

[104] *See id.*

[105] *See id.* at 894–95 (providing factual background for the contention that three of the twelve unauthorized absences were justified).

[106] *See id.* (explaining that Barrett was found guilty for missing work without the proper authorization on the three contested absences); *see also* Yaskowsky v. Phantom Eagle, LLC, No. 4:19cv9, 2020 U.S. Dist. LEXIS 27929, at *16–17 (E.D. Va. Feb. 18, 2020) (addressing the facts that were

In 2012, Barrett sued her employer for FMLA interference, stating that but for her employer's incorrect classification of three of her absences, she would not have accumulated the twelve unauthorized absences warranting her discharge.[107] She also claimed that the three absences were FMLA-protected.[108] Barrett argued that the limitations period began upon her termination on October 15, 2010, not when the three contested absences were classified as unauthorized in 2003, 2004, and 2005, respectively.[109] Under Barrett's interpretation, her claims would have been timely because she had filed suit seventeen months after termination.[110] Nonetheless, the court disagreed, instead finding that "[e]ach time the Employee Review Board ruled against Barrett, an actionable FMLA claim accrued and the limitations clock started to run."[111] Like the Eighth Circuit's holding in *Reed*, the Seventh Circuit held that "the employer's denial of the employee's request for leave is the 'last event constituting the alleged violation' on which the action is based."[112]

However, the *Barrett* court was more detailed than the *Reed* court in its opinion, concluding that Barrett suffered prejudice[113] *each time* her absences were deemed unauthorized.[114] The *Barrett* court also offered two reasons why it disagreed with Barrett's interpretation that the limitations period began to run upon her termination.[115] First, the court argued that her position was "not a reasonable reading of the statute," noting that there can only be one "last event" under § 2617(c)(1).[116] Second, the court believed that adopting her

considered by the Seventh Circuit in reaching its decision in the *Barrett* case, including a history of formal proceedings in which "the plaintiff argued in hearings before the defendant's employee review board that the absences should be 'excused' for medical reasons, but she lost each time.").

[107] *See* Barrett v. Ill. Dep't of Corr., 958 F. Supp. 2d 984, 988 (C.D. Ill. 2013), *aff'd*, 803 F.3d 893 (7th Cir. 2015) (discussing Barrett's arguments before the district court).

[108] *See Barrett*, 803 F.3d at 894 ("She claims that three of these absences . . . were for family or medical care and thus were protected by the [FMLA] . . . .").

[109] *See id.* at 895 ("Barrett had urged the court to find that the limitations period began to run when her employment was terminated . . . .").

[110] *See* Chrissie Peterson, *Seventh Circuit Interprets Statute of Limitations for Family and Medical Leave Act*, NAT'L L. REV. (Jan. 12, 2016), https://www.natlawreview.com/article/seventh-circuit-interprets-statute-limitations-family-and-medical-leave-act ("Barrett argued that the limitations period began to run when she was terminated on October 15, 2010 and her suit was timely as it was filed within 17 months of that date.").

[111] *Barrett*, 803 F.3d at 897.

[112] *Id.*; *accord* Reed v. Lear Corp., 556 F.3d 674, 681 (8th Cir. 2009) ("An FMLA violation occurs when an employer improperly denies a request for leave.").

[113] As discussed, FMLA claims require a showing that the employer's violation prejudiced the employee. *See supra* Part II; *see also* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002) (noting that this is required to obtain relief); *see also* Jacobs v. Lockheed Martin Corp., No. 1:14-CV-03575-CAP-AJB, 2016 U.S. Dist. LEXIS 196502, at *30 (N.D. Ga. July 13, 2016) (discussing that an FMLA plaintiff must "show some impairment of his rights and resulting prejudice.").

[114] *See Barrett*, 803 F.3d at 897 ("With each [Employee Review Board] ruling . . . [Barrett] suffered prejudice . . . ."); *see also* Yaskowsky v. Phantom Eagle, LLC, No. 4:19cv9, 2020 U.S. Dist. LEXIS 27929, at *17 (E.D. Va. Feb. 18, 2020) (noting that the "real prejudice" in the *Barrett* case was the classification of past absences as "unauthorized[.]").

[115] *See Barrett*, 803 F.3d at 899.

[116] *Id.*

interpretation would allow for an indefinite tolling of the FMLA limitations period.[117] Although the court acknowledged Barrett's argument that it may be "impractical to sue each time leave is wrongly denied, especially when the immediate consequence is nothing more than . . . another unauthorized absence," it pointed to conflicting congressional intent.[118] The court noted that Congress intended a bifurcated process for FMLA violations, meaning that if a plaintiff finds litigation impractical, then the FMLA offers an alternative administrative route where an employee may seek relief.[119]

The *Barrett* court also found it significant that the termination was a mere *consequence* of the FMLA violation alleged by Barrett, not the violation itself.[120] It essentially described Barrett's termination as "an unfortunate event in history which has no present *legal* consequences."[121] For these reasons, the *Barrett* court ultimately reasoned that "last event" constitutes the date of the last denial of leave, not the date of termination.[122]

B. "LAST EVENT" MEANS THE DATE OF TERMINATION

The Sixth Circuit, however, conflicts with the Seventh and Eighth Circuits.[123] In *Butler v. Owens-Brockway Plastic Products, Inc.*, the Sixth Circuit disagreed with the *Reed* and *Barrett* decisions, finding that a claim accrues, and the limitations period begins to run, when a plaintiff is terminated.[124]

Similar in facts to *Reed* and *Barrett*, *Butler* involved a defendant-employer who maintained a point-based absenteeism policy where an employee could face termination upon accumulating twelve points.[125] Butler, the plaintiff-

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[117] *See id.* ("Barrett's argument is really a plea for a tolling rule that would hold the limitations period in abeyance indefinitely . . . ."); *see also Jacobs*, 2016 U.S. Dist. LEXIS 196502, at *30–31 ("*Barrett* concluded therefore that the FMLA did not have an open-ended tolling rule.").

[118] *Barrett*, 803 F.3d at 899–900.

[119] *See id.* at 899 ("Congress was aware that private litigation may not always be the most practical or desirable means of vindicating rights under the FMLA."); *see also* Peterson, *supra* note 110 ("The *Barrett* decision would appear to require the employee to bring a suit or an administrative complaint with each individual denial of FMLA leave.").

[120] *See Barrett*, 803 F.3d at 898; *see also* Peterson, *supra* note 110 (discussing that the "last event" of the claim in question in the *Barrett* case was the employer's rejection of the employee's request for leave).

[121] *Barrett*, 803 F.3d at 898 (citing United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)).

[122] *See id.* at 894, 896–97; *see also* Yaskowsky v. Phantom Eagle, LLC, No. 4:19cv9, 2020 U.S. Dist. LEXIS 27929, at *19 (E.D. Va. Feb. 18, 2020) (noting that the *Barrett* case "adopt[s] the date of the last 'denial of leave' as the 'last event' . . . .").

[123] *Compare* Reed v. Lear Corp., 556 F.3d 674, 681–82 (8th Cir. 2009) (finding that the statute of limitations began to run when the employee was last denied FMLA leave), *and Barrett*, 803 F.3d at 894 (holding that the "last event" constituted when the employee was last denied leave), *with* Butler v. Owens-Brockway Plastic Prods., Inc., 199 F.3d 314, 317 (6th Cir. 1999) (holding that the "last event" constitutes the employee's date of termination).

[124] *See Butler*, 199 F.3d at 317.

[125] Under this policy, an employee accrues one point per unexcused absence. *See Butler*, 199 F.3d at 315–16 (describing the defendant-employer's absenteeism policy); *see also* Jacobs v. Lockheed Martin Corp., No. 1:14-CV-03575-CAP-AJB, 2016 U.S. Dist. LEXIS 196502, at *31 n.17 (N.D.

employee, was fired on September 18, 1995, due to excessive absenteeism in violation of her employer's policy.[126] She argued that, despite having been eligible for FMLA leave, her employer improperly assessed points on her record for three absences in 1994 and 1995.[127] She filed FMLA claims against her employer on March 19, 1998, arguing that she was put on probation and eventually terminated because of these points.[128] On appeal, her employer argued that her claims "must be time-barred if the other claims based upon its previous decisions to post the absences to plaintiff's record are time-barred, because plaintiff's termination claim is built upon the assessment of those points and the two claims cannot be separated."[129] However, the Sixth Circuit rejected this argument.[130]

Instead, the Sixth Circuit held that the statute of limitations ran from the date of Butler's termination because it was "the first material adverse action" that had occurred.[131] The Sixth Circuit further explained that:

> [T]ermination was the first action serious enough to warrant plaintiff's resort to the legal system. To hold otherwise would force plaintiffs to bring suit each time they are assessed a negative mark on their absentee record, but before this mark results in probation, termination, failure to reinstate, or other adverse action . . . . [S]uch a requirement would unnecessarily clog the federal courts with premature claims.[132]

This pragmatic approach taken by the *Butler* court directly conflicts with the Seventh Circuit's reasoning seen in the *Barrett* case.[133] The court in *Barrett*

Ga. July 13, 2016) (noting that *Barrett* and *Butler* contained similar facts, including an employer with an absenteeism policy).

[126] *See Butler*, 199 F.3d at 315–16 (describing the plaintiff's termination that occurred after she called in sick the same day she was informed that she had accumulated twelve absentee points resulting in a six month probation "during which time if she was absent for anything less than admission to a hospital she would be terminated."); *see also Yaskowsky*, 2020 U.S. Dist. LEXIS 27929, at *20 (noting that the plaintiff in *Butler* "had accrued the designated number of absences resulting in termination.").

[127] *See Butler*, 199 F.3d at 316.

[128] *See id.* at 315–17.

[129] *Id.* at 317.

[130] *See id.* at 317 (noting that the court does not agree with the defendant-employer's position); *see also* Sparenberg v. Eagle All., No. JFM-14-1667, 2016 U.S. Dist. LEXIS 13447, at *4 (D. Md. Feb. 4, 2016) (noting that the *Butler* court held that the "last event constituting the alleged violation was the termination, and not previous reprimands for taking FMLA leave").

[131] *Butler*, 199 F.3d at 317. Essentially, an "FMLA claim is not ripe until some materially adverse action occurs, such as loss of pay or termination." Jacobs v. Lockheed Martin Corp., No. 1:14-CV-03575-CAP-AJB, 2016 U.S. Dist. LEXIS 196502, at *33 (N.D. Ga. July 13, 2016).

[132] *Butler*, 199 F.3d at 317.

[133] *Compare* Barrett v. Illinois Dep't of Corr., 803 F.3d 893, 897 (7th Cir. 2015) (finding that the employee suffered prejudice each time her absences were classified as unauthorized), *with Butler*, 199 F.3d at 317 (finding that the employee suffered prejudice when she was terminated, not when

regarded a negative mark on an employment record as a sufficient showing of prejudice, while the court in *Butler* required more, specifically termination.[134] Although not explicitly stated, the court in *Butler* essentially concluded that the plaintiff could not have satisfied the requisite elements to bring an FMLA claim until she was terminated.[135] These inconsistent conclusions exemplify the divergent interpretations of the FMLA limitations period, showing that this area necessitates clarification.[136]

IV. SOLUTION

This Comment proposes that the Department of Labor clarify the language of 29 C.F.R. § 825.400 to adopt the approach taken in *Barrett* for claims involving absenteeism policies: that accrual begins upon each leave denial, not upon termination.[137] The *Barrett* approach pays deference to the statutory language itself[138] and aligns with the Supreme Court's reasoning in a related area of law,[139] making it an appropriate addition to the FMLA regulations.

This Comment proposes amending the regulations by adding a subsection (d) to 29 C.F.R. § 825.400 to read as follows:

> This subsection shall apply to claims by employees against employers who maintain an absenteeism policy. The term "last action" (as set forth in paragraph (b) of this section) and the term "last event"

she was "assessed a negative mark on [her] absentee record").

[134] *See Barrett*, 803 F.3d at 897 n.5 (noting that the prejudice the plaintiff suffered by having her absences classified as unauthorized resulted in an increased number of unexcused absences on her record and her "eighth unauthorized absence—in October 2007—resulted in an actual suspension and loss of three days' wages"); *see also Butler*, 199 F.3d at 317 ("In this case, the last adverse action against Butler was her termination on September 18, 1995.").

[135] *See Butler*, 199 F.3d at 317.

[136] *See* Yaskowsky v. Phantom Eagle, LLC, No. 4:19cv9, 2020 U.S. Dist. LEXIS 27929, at *16 (E.D. Va. Feb. 18, 2020) ("[T]here is a Circuit split over which event qualifies as the 'last event' for an FMLA interference claim."); *see also* Fugate v. Frontier W. Virginia, Inc., 304 F. Supp. 3d 503, 506 (S.D.W. Va. 2018) (noting that the federal circuit courts disagree on what constitutes a "last event" under the FMLA's statute of limitations).

[137] *See Barrett*, 803 F.3d at 894 (holding that the meaning of "last event" is the date of last denial of leave); *see also* 29 C.F.R. § 825.400 (2021) (codifying current Department of Labor regulations that detail FMLA enforcement mechanisms).

[138] In a 2016 online law review article, the author makes a convincing argument that the statutory language suggests that "the statute of limitations begins to run with each denial of FMLA leave rather than later with the termination for excessive absences." Catherine Cranfield, *The Clock Is Ticking: The Start of the Statute of Limitations Under the FMLA*, LA. L. REV. (Feb. 18, 2016), https://lawreview.law.lsu.edu/2016/02/18/the-clock-is-ticking-the-start-of-the-statute-of-limitations-under-the-fmla/.

[139] In a Title VII case, the Supreme Court specifically stated that discrete acts included, for example, "termination, failure to promote, denial of transfer, or refusal to hire." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002). The Court further stated that each such discrete act "starts a new clock for filing charges alleging that act." *Id.* at 102. As such, it is likely the Supreme Court would consider leave denial as a discrete act that starts a "new clock." *Id.*

> (as set forth in section 2617(c)) shall mean the date that the employer last denied the employee an FMLA right, not the date the employee was discharged for violating an absenteeism policy, unless such discharge was in violation of section 2615(a)(2) or (b).[140]

This addition to the FMLA regulations would settle the circuit split with finality and provide clarity to those finding themselves in factually similar circumstances as the plaintiffs in *Reed*, *Barrett*, and *Butler*.[141] This proposal would solve the following ambiguity caused by the circuit split: the viability of an FMLA claim involving a termination that occurs inside the limitations period where the underlying unauthorized absence, and denied leave, occurred outside of the limitations period.[142]

V. CONCLUSION

The conflicting interpretations of the Sixth, Seventh, and Eighth Circuits have led to uncertainty in the realm of FMLA violations involving absenteeism policies.[143] Current case law regarding this issue is scarce and inconclusive, making it difficult for employees to know whether they are likely to have a viable FMLA claim.[144] Therefore, the Department of Labor should amend the FMLA regulations to apply the *Barrett* decision, delineating that the limitations period begins to run when an employee is last unlawfully denied FMLA rights.[145] This proposed solution would resolve the current circuit split and eliminate existing ambiguity.[146]

[140] *See* 29 C.F.R. § 825.400 (delineating the current regulation in place). This proposed language is modeled after the *Barrett* court's interpretation of the FMLA statutes of limitations for those claims involving absenteeism policies. *See Barrett*, 803 F.3d at 898.
[141] *See generally Yaskowsky*, 2020 U.S. Dist. LEXIS 27929, at *16 (noting that "a review of caselaw suggests that federal circuits have adopted conflicting rules" and inconsistent outcomes).
[142] *See* Jacobs v. Lockheed Martin Corp., No. 1:14-CV-03575-CAP-AJB, 2016 U.S. Dist. LEXIS 196502, at *28–31 (N.D. Ga. July 13, 2016) (discussing the circuit split issue); *see also Barrett*, 803 F.3d at 894–895 (depicting this issue).
[143] *See supra* Part I (describing Jane's example); *see also supra* Part III (discussing the divergent interpretations of the Sixth, Seventh, and Eighth Circuits).
[144] *See supra* Part I (showing how an employee may experience different results depending on the circuit in which his or her claim is brought); *see also Barrett*, 803 F.3d at 896, n.1 ("There is little authority on this question elsewhere, and it points in divergent directions.").
[145] *See supra* Part IV (proposing the adoption of the *Barrett* holding); *see also Barrett*, 803 F.3d at 894 (holding that "last event" means the date of the last denial of leave).
[146] *See supra* Part IV (discussing a solution to the circuit split).