"I CAN'T COME TO WORK. I'M DEPRESSED."
An Analysis of the Barriers to Accessing Leave Due to Mental Illness Under the Family and Medical Leave Act

As the national mental health crisis continues to surge, employees in the American workforce must often choose between seeking treatment for their mental illness and keeping their jobs. Unbeknownst to many, a third option exists. The Family and Medical Leave Act of 1993 (FMLA) allows eligible employees to request temporary leave from work due to a serious health condition. In many cases, mental illnesses are covered by this statute. Nonetheless, proving entitlement for FMLA leave due to mental illness is no small feat.

This paper will shed light on some of the major barriers that employees face when seeking FMLA leave due to mental illness. Part I will provide an overview of FMLA's history, purpose, and most salient provisions. Part II will then focus on the treatment of mental illness as a qualifying "serious health condition" under FMLA. Next, Part III will provide an analysis of some of the main barriers that employees face when seeking leave due to mental illness: proving the existence of a "serious health condition," obtaining adequate medical certification of the illness, and complying with FMLA's notice requirement. Finally, Part IV will conclude by advocating several potential avenues for reform.

I. OVERVIEW OF THE FAMILY AND MEDICAL LEAVE ACT

FMLA was enacted in 1993 in light of congressional findings indicating the importance of balancing workplace demands with the needs of employees and their families.[1] Namely, Congress sought to remedy the inadequacy of job security for employees suffering from serious health conditions and the discriminatory effects of societal gender roles that often compelled

[1] 29 C.F.R. § 825.101.

women to take on family caretaking responsibilities at the expense of their careers.[2] To that end, FMLA provides that eligible employees working for qualifying employers shall be entitled to twelve workweeks of unpaid, job-protected leave during any twelve-month period.[3] An employer is considered "qualifying" unless the "employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50."[4]

An employee may be deemed eligible for FMLA leave: (1) due to the birth of a child; (2) due to the placement of a child with the employee for adoption or foster care; (3) to care for a close relative suffering from a serious health condition; (4) because of a serious health condition that renders the employee unable to perform her job functions; or (5) due to a qualifying exigency.[5]

Employees who take FMLA leave are entitled to certain benefits both during and after their leave.[6] During leave, the employee is entitled to any benefits she would have maintained had she taken any other form of paid or unpaid leave.[7] If an employee is provided with group health insurance through her job, for example, the employee is entitled to the same terms of the insurance policy for the duration of her FMLA leave.[8] Further, when an employee returns from leave, she must be restored to the same job or an "equivalent job," which is a position that is "virtually identical to the original job in terms of pay, benefits, and other employment terms and

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[2] *Id.*
[3] *Id.* at § 825.200.
[4] *Id.* at § 825.104.
[5] *Id.* at § 825.200.
[6] U.S. Dep't of Labor Wage and Hour Div., *Fact Sheet #28: The Family and Medical Leave Act* (Feb 2023), https://www.dol.gov/agencies/whd/fact-sheets/28-fmla.
[7] *Id.*
[8] *Id.*

conditions (including shift and location)."[9] To qualify for FMLA leave to begin with, however, an employee must first establish that her mental illness constitutes a qualifying "serious health condition."

II. MENTAL ILLNESS AS A "SERIOUS HEALTH CONDITION" UNDER FMLA

FMLA expressly states that a "mental" illness or impairment may constitute a "serious health condition."[10] In keeping with this language, courts have long recognized that under certain circumstances, an employee may seek FMLA leave due to mental illness.[11] Nonetheless, not all mental illnesses constitute "serious health conditions." For example, "mental illness resulting from stress" is excluded from FMLA coverage unless it requires "inpatient care or continuing treatment by a health care provider."[12]

In May 2022, the Wage and Hour Division of the United States Department of Labor (DOL) promulgated a "fact sheet" in which it further emphasized that mental health conditions can be covered by FMLA.[13] Specifically, the DOL stated that mental health conditions constitute "serious health conditions" if they require inpatient care or continuing treatment by a health care provider.[14] "Inpatient care" includes an overnight stay in a hospital or medical care facility, such as "a treatment center for addiction or eating disorders."[15] The DOL also expanded upon the meaning of "continuing treatment by a health care provider" and the types of mental health

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[9] *Id.*
[10] 29 C.F.R. § 825.113.
[11] *See, e.g.*, Beckendorf v. Schwegmann Giant Super Markets, Inc., 134 F.3d 369 (5th Cir. 1997) (holding that an employee who was diagnosed with severe anxiety was eligible for FMLA leave); Collins v. NTN-Bower Corp., 272 F.3d 1006 (7th Cir. 2001) (concluding that depression may be considered a "serious health condition"); Spangler v. Fed. Home Loan Bank of Des Moines, 278 F.3d 847 (8th Cir. 2002) (same).
[12] 5 C.F.R. § 630.1202.
[13] U.S. Dep't of Labor Wage and Hour Div., *Fact Sheet # 280: Mental Health Conditions and the FMLA* (May 2022), https://www.dol.gov/agencies/whd/fact-sheets/28o-mental-health.
[14] *Id.*
[15] *Id.*

conditions that require it.[16] The first type is a condition that "incapacitate[s] an individual for more than three consecutive days and require[s] ongoing medical treatment."[17] Such "ongoing medical treatment" can constitute appointments with a health care provider such as a psychiatrist, clinical psychologist, or clinical social worker, or a single appointment coupled with follow-up care such as behavioral therapy or prescription medication.[18] The second type of mental health condition is a "chronic" condition such as anxiety, depression, or a dissociative disorder that causes "occasional periods" of incapacitation and requires treatment by a health care provider at least twice a year.[19] While mental illnesses can theoretically be considered "serious health conditions," there are additional barriers that employees must overcome before qualifying for leave.

III. Barriers to Employees Accessing FMLA Leave Due to Mental Illness

Though the requirements for FMLA leave can be onerous for all employees, there are certain barriers that disproportionally affect employees seeking FMLA leave due to mental illness. First, employees bear the burden of proving that their mental illness constitutes a qualifying "serious health condition." Second, employees must ensure that their health care providers are furnishing their employers with adequate medical proof or certification of their mental illness. Third, employees are typically required to comply with their employer's "usual and customary" notice requirement when requesting leave. These are only a few examples of the many barriers that employees seeking FMLA leave due to mental illness face every day. In addition, different courts have adopted inconsistent interpretations of FMLA's requirements, making the process even more difficult for employees to navigate.

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

A. Proving the Existence of a "Serious Health Condition"

To establish eligibility for FMLA leave, an employee must prove that she suffers from a "serious health condition." A mental illness constitutes a "serious health condition" if it is "chronic" or if it requires inpatient care or continuing treatment by a healthcare provider.[20] A chronic condition is one that causes any period of incapacity or treatment, requires at least two periodic visits for treatment, continues over an extended period of time, and may cause episodic rather than a continuing period of incapacity.[21] A condition involving "continuing treatment," on the other hand, is one that causes a period of incapacity lasting more than three days and involves at least two visits to a healthcare provider within thirty days of the first day of incapacity or one visit to a healthcare provider in addition to a regimen of continuing treatment.[22] Importantly, the employee's first or only visit to a health care provider must take place in person within seven days of the first day of incapacity.[23] Thus, employees seeking FMLA leave must satisfy three requirements to demonstrate that their mental illness is a "serious health condition" requiring "continuing treatment."

First, employees bear the burden of proving that they sought treatment within seven days of the start of their incapacity. Several courts have adopted stringent approaches to this requirement. In *Giddens v. UPS Supply Chain Solutions*, for example, the Third Circuit held that the employee failed to show that he suffered from a "serious health condition" because his symptoms began on December 19, his first day of incapacity was December 22, but he did not visit a doctor until December 28.[24] Because the employee received treatment after nine days

[20] 29 C.F.R. § 825.113.
[21] *Id.* at § 825.115.
[22] *Id.*
[23] *Id.*
[24] 610 F. App'x 135, 138 (3d Cir. 2015).

instead of the requisite seven, he was not entitled to leave.[25] Similarly, in *McDonnell v. Overhead Door Company*, the court held that an employee who started experiencing anxiety and had a "nervous breakdown" on May 13 and 14 failed to prove that he had a "serious health condition" because he did not seek medical care until the "end of May, early June."[26] The inordinately narrow timeframe in which employees are required to visit a health care provider often presents an insurmountable challenge for employees seeking FMLA leave.

Second, employees bear the burden of showing that they received "in-person" medical treatment.[27] FMLA's "in-person" treatment requirement became particularly burdensome for employees during the Covid-19 pandemic when many providers started scaling back their operations.[28] A study conducted in 2020 found that, at the height of the pandemic, over 35% of adults delayed or did not receive medical care due to limited provider services.[29] Importantly, adults with mental illnesses were at a higher risk of delaying or forgoing care, with approximately 52% of those adults not receiving necessary care.[30] Because of the limited access to medical care, many adults suffering from mental illness would be unable to schedule medical

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[25] *Id.*
[26] No. 4:20-CV-00242, 2022 WL 402684, at *4 (M.D. Pa. Feb. 9, 2022); *see also* Watkins v. Blind & Vision Rehab. Servs. of Pittsburgh, No. 2:16CV01850, 2018 WL 4491162, at *3–4 (W.D. Pa. Sept. 19, 2018) (holding that an employee failed to establish a "serious health condition" because even though she previously visited her doctor weekly due to Post-Traumatic Stress Disorder, she switched to only visiting on an as-needed basis and she could not recall whether she visited on the day of her mental health emergency); Godfrey v. Inalfa Roof Sys., Inc., No. 1:20-CV-5211-MHC-JSA, 2022 WL 887170, at *6 (N.D. Ga. Jan. 24, 2022) (holding that an employee failed to establish a "serious health condition" because he did not seek medical treatment until ten days after the first day of his incapacity).
[27] 29 C.F.R. § 825.115.
[28] Dulce Gonzalez et al., *Delayed and Forgone Health Care for Nonelderly Adults During the Covid 19 Pandemic*, URB. INST. (Feb. 2021), https://www.urban.org/research/publication/delayed-and-forgone-health-care-nonelderly-adults-during-covid-19-pandemic.
[29] *Id.*
[30] *Id.*

appointments within the requisite seven-day period. Thus, countless employees who might otherwise have been eligible for FMLA leave would have been precluded from qualifying for it through no fault of their own.

In addition, even if employees were able to schedule medical treatment, they were often limited to virtual appointments. A recent study found that telehealth use by Medicare recipients increased from five million services from April to December 2019 to more than fifty-three million services during those same months in 2020.[31] Despite the benefits of virtual healthcare, the rise of telehealth medicine led to unprecedented challenges. For example, one patient noted that when her therapy sessions for post-traumatic stress disorder were switched to telehealth, she was deprived of her usual eye movement desensitization and reprocessing therapy that could only be conducted in person.[32] While the surge in telehealth use helped assuage the shortage caused by the scant availability of medical appointments, the shift to virtual healthcare presented the novel question of whether employees seeking leave could ever satisfy FMLA's "in-person" treatment requirement.

Fortunately, the DOL addressed this issue in its Covid-19 emergency bulletin, where it announced that telemedicine appointments would constitute "in-person" visits for the purposes of FMLA.[33] To be considered an "in-person" visit, though, the telemedicine visit must include an examination, evaluation, or treatment by a health care provider, be permitted by state licensing

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[31] U.S. Gov't Accountability Off., *Telehealth in the Pandemic—How Has it Changed Health Care Delivery in Medicaid and Medicare?* (Sep. 29, 2022), https://www.gao.gov/blog/telehealth-pandemic-how-has-it-changed-health-care-delivery-medicaid-and-medicare.
[32] Ramey Moore et al., *"I Am Hesitant to Visit the Doctor Unless Absolutely Necessary": A Qualitative Study of Delayed Care, Avoidance of Care, and Telehealth Experiences During the COVID-19 Pandemic* (Aug. 12, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9370251/#.
[33] U.S. Dep't of Labor Wage and Hour Div., *Field Assistance Bulletin No. 2020-8* (Dec. 29, 2020), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_8.pdf.

authorities, and generally, should be performed by video conference.[34] Phone calls, emails, or text messages are insufficient.[35] While this exception to FMLA's "in-person" visit requirement gave employees some much-needed flexibility, the DOL's bulletin was not promulgated until late December 2020. This means that there would have been several months at the height of the Covid-19 pandemic—before the bulletin went into effect—when employees lacked clear guidance on how they could possibly satisfy the "in-person" treatment requirement.

To be sure, this exception to FMLA's "in-person" requirement alleviated some of the burdens that were troubling employees seeking FMLA leave. However, the rise of virtual healthcare also raised concerns about equity and access to the digital resources required to receive such care.[36] Older patients, racial or ethnic minorities, non-English speakers, and those of lower socioeconomic status were among the most affected groups.[37] While racial disparities in mental health treatment have been well-established since long before the pandemic,[38] the shift to telemedicine disproportionately impacted minority groups because they were less likely to own computers or have access to reliable internet or cellphone data plans with which to attend their virtual appointments.[39]

Third, employees seeking FMLA leave bear the burden of proving that their "serious health condition" caused "incapacity," which is defined as the "inability to work, attend school

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[34] *Id.*
[35] *Id.*
[36] Lauren Eberly et al., *Patient Characteristics Associated with Telemedicine Access for Primary and Specialty Ambulatory Care During the COVID-19 Pandemic* (Dec. 3, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7772717/.
[37] *Id.*
[38] Simmons Univ., *Racial Disparities in Mental Health Treatment*, https://online.simmons.edu/blog/racial-disparities-in-mental-health-treatment-text-only/#three (last visited May 7, 2023).
[39] Eberly, *supra* note 36.

or perform other regular daily activities."[40] Different circuits have adopted inconsistent approaches in determining what constitutes sufficient evidence of an employee's incapacity. Several circuits have held that lay testimony on its own is sufficient to create a genuine dispute of material fact as to whether an employee's "serious health condition" was incapacitating.[41]

For example, in *Lubke v. City of Arlington*, the Fifth Circuit held that an employee successfully demonstrated the existence of an incapacitating "serious health condition" when she and her husband testified at trial about her symptoms.[42] There, the court noted that expert medical testimony was not necessary to prove an employee's incapacity.[43] The Seventh Circuit arrived at the same conclusion in *Hansen v. Fincantieri Marine Group, LLC*, holding that an employee's lay testimony was sufficient to create a genuine dispute of material fact as to whether he was incapacitated by his depression.[44] Similarly, in *Marchisheck v. San Mateo County*, the Ninth Circuit placed great weight on a patient's statement regarding his condition even though it contradicted his own treating physician's assessment.[45] In that case, the court held that even though the patient's treating physician said that the patient was doing "remarkably well," the patient's own statement that he "just did not and could not do anything for four or five days" was sufficient to preclude summary judgment on the issue of his incapacity.[46]

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[40] 29 C.F.R. § 825.113.
[41] *See, e.g.*, Lubke v. City of Arlington, 455 F.3d 489, 495 (5th Cir. 2006); *cf.* Haefling v. United Parcel Serv., Inc., 169 F.3d 494, 499 (7th Cir. 1999) (reviewing the employee's diary entry in search of evidence that the employee suffered incapacity).
[42] *Lubke*, 455 F.3d at 496; *see also* Stanton v. Jarvis Christian Coll., No. 20-40581, 2022 WL 738617, at *3 (5th Cir. Mar. 11, 2022) (considering the employee's own testimony about her anxiety and depression to determine the severity of her condition).
[43] *Lubke*, 455 F.3d at 495–96.
[44] 763 F.3d 832, 839 (7th Cir. 2014).
[45] 199 F.3d 1068, 1074 (9th Cir. 1999).
[46] *Id.* at 1071, 1074.

Some circuits have adopted a moderate approach, holding that lay testimony of incapacity is sufficient to raise a genuine dispute of material fact on the issue if it is supported by some corroborating medical testimony.[47] In *Schaar v. Lehigh Valley Health Services, Inc.*, for example, the Third Circuit held that an employee could create a genuine dispute of material fact as to whether she was incapacitated "through a combination of expert medical and lay testimony."[48] Similarly, the Eighth Circuit allowed an employee to supplement medical records with an affidavit saying that she was "too sick to work" in order to prove that she was incapacitated by her illness.[49]

Other circuits have categorically declined to consider lay testimony in determining whether an employee was incapacitated. For example, the Sixth Circuit held that an employee's "own subjective testimony" that she was unable to work was insufficient to establish that she was incapacitated.[50] Even if an employee can successfully prove that she suffered from an incapacitating mental illness, however, she must also prove that her illness rendered her unable to perform the functions of her job.

B. Medical Certification and the Inability to Perform the Functions of the Job

Another barrier to accessing FMLA leave is the medical documentation and certification requirement. In addition to establishing the existence of a "serious health condition," an employee seeking FMLA leave must also furnish medical documentation proving that the employee's condition rendered her "unable to perform the functions" of her job.[51] Though some

[47] *See, e.g.*, Schaar v. Lehigh Valley Health Servs., Inc., 598 F.3d 156, 161 (3d Cir. 2010); Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148–49 (8th Cir. 2001).
[48] *Schaar*, 598 F.3d at 161; *see also* Kissinger v. Mennonite Home, No. CV 20-3000, 2021 WL 5356801 (E.D. Pa. Nov. 17, 2021).
[49] *Rankin*, 246 F.3d at 1148–49.
[50] Culpepper v. BlueCross BlueShield of Tenn., Inc., 321 F. App'x 491, 497 (6th Cir. 2009).
[51] 29 C.F.R. § 825.123.

courts have conflated these requirements and combined them into a single one,[52] these inquiries are separate—albeit interrelated. As discussed above, employees generally need proof that they received medical treatment in order to qualify for FMLA leave.[53]

Additionally, FMLA grants employers the discretion to require that the employee seeking FMLA leave provide additional medical certification proving the existence of a "serious health condition."[54] Such certification must include the date on which the condition started, the probable duration of the condition, appropriate medical facts about the condition, and a statement that the employee is unable to perform the functions of her position.[55] If the employer has any reason to doubt the validity of the certification, the employee may be required to seek a second opinion from a provider designated and paid for by the employer.[56]

To determine whether an employee satisfied the certification requirement, courts must first decide whether the employee's health care provider was "qualified" to provide a valid medical certification. The term "health care provider" is defined broadly and includes psychiatrists, psychologists, licensed clinical social workers and counselors, and certain practitioners of alternative medicine.[57] Nonetheless, courts have exercised unfettered discretion in determining which "health care providers" are "qualified" to provide medical opinions for the purposes of FMLA. Unsurprisingly, courts have varied in their conclusions.

The Sixth Circuit has held that a medical certification is only valid if it is signed by the patient's treating physician; signatures by another physician in the same practice or by the

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[52] *See, e.g.*, *Stekloff*, 218 F.3d 858.
[53] 29 U.S.C.A. § 2611.
[54] *Id.* at § 2613.
[55] *Id.*
[56] *Id.*
[57] Miranda W. Turner, *Psychiatric Disabilities in the Workplace: Employment Law Considerations*, 55 A.F. L.REV. 313, 326 (2004) (citing 5 C.F.R. § 630.1202).

treating physician's staff member are insufficient.[58] In addition, some courts have categorically refused to allow licensed counselors to provide medical certifications,[59] which presents a substantial obstacle to accessing FMLA leave due to mental illness. This strict approach was illustrated by the Eleventh Circuit in *Martin v. Financial Asset Management Systems, Inc.*[60] There, an employee was diagnosed with anxiety and an adjustment disorder by a licensed professional counselor provided by her health insurance company.[61] Nonetheless, the court held that the licensed professional counselor did not qualify as a "health care provider" for the purposes of FMLA and declined to adopt a "liberal interpretation" of the statute.[62] Similarly, another federal district held that an employee was not entitled to FMLA leave because visiting a "professional counselor/therapist" did not constitute seeking medical treatment.[63]

The national shortage of mental health professionals is a glaring issue that is yet to be resolved.[64] In the United States, there are approximately four times as many clinical social workers and licensed therapists as there are clinical psychologists.[65] The National Alliance on Mental Health considers licensed counselors to be health care professionals who are qualified to

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[58] *See Culpepper*, 321 F. App'x at 497; Novak v. MetroHealth Med. Ctr., 503 F.3d 572, 578 (6th Cir. 2007).
[59] *See, e.g.,* Martin v. Fin. Asset Mgmt. Sys., Inc., 959 F.3d 1048, 1052–53 (11th Cir. 2020).
[60] 959 F.3d 1048 (11th Cir. 2020).
[61] *Id.* at 1051.
[62] *Id.* at 1052–53.
[63] Towns v. Kipp Metro Atlanta Collab., Inc., No. 1:18-CV-405-MHC-CCB, 2019 WL 5549279, at *9 (N.D. Ga. July 30, 2019).
[64] Teddy Amenabar, *Therapists Say They Can't Meet High Demand as Anxiety, Depression Linger*, WASH. POST (Nov. 17, 2022), https://www.washingtonpost.com/wellness/2022/11/16/therapist-high-demand-mental-health/.
[65] Ashley Castro, *Getting Real About the Therapist Shortage*, THERAPY 4 THE PEOPLE (Mar. 29, 2022), https://therapy4thepeople.org/getting-real-about-the-therapist-shortage ("In the US, there are about 106,000 clinical psychologists, 250,000 clinical socialworkers, 120,000 licensed counselors, and 50,000 marriage and family therapists.").

evaluate a person's mental health and provide therapeutic treatment.[66] These counselors are generally required to obtain a master's degree in a mental-health-related field and complete state licensing exams.[67] Despite these credentials, multiple courts have severely hampered employees' ability to qualify for FMLA leave by refusing to allow their licensed therapists and counselors to provide the requisite medical certifications.

Even if an employee does satisfy the preliminary requirement of seeking care from a qualified "health care provider," though, there are additional hurdles to clear. To qualify for FMLA leave, the employee must prove that her mental illness rendered her "unable to perform the functions" of her position. Courts disagree on how exactly employees can meet this requirement, but this question often hinges on the adequacy of the health care provider's "note" or medical certification.

In *Boyd v. State Farm Insurance*, the Fifth Circuit held that the employee failed to prove that he was "unable to perform the functions" of his job even though his doctor's note explicitly stated that his medical condition "rendered him unable to perform his job," "left him disabled," and that "the only solution to [the employee's] medical condition would have been a leave of absence."[68] Despite its clarity and detail, the court deemed the doctor's note an "unsupported conclusion" and stated that, "without more than [the doctor's] credentials and a subjective opinion, an expert's testimony that a medical condition simply 'is so' is not admissible."[69] Almost two decades later, however, the Fifth Circuit revisited this question in *Stanton v. Jarvis Christian College*.[70] There, the court took a more lenient approach, holding that a medical form

[66] National Alliance on Mental Illness, *Types of Mental Health Professionals* (Apr. 2020), https://www.nami.org/About-Mental-Illness/Treatments/Types-of-Mental-Health-Professionals.
[67] *Id.*
[68] 158 F.3d 326, 332 n.5 (5th Cir. 1998).
[69] *Id.* at 331.
[70] No. 20-40581, 2022 WL 738617 (5th Cir. Mar. 11, 2022).

stating that the employee's episodic flare-ups of anxiety and depression prevented her from performing her job functions was sufficient documentation of her illness.[71]

Other circuits have taken similarly permissive approaches. For example, the Eighth Circuit held that an employee demonstrated that she was unable to work because her physician testified as much.[72] Similarly, the First Circuit also interpreted this requirement broadly in *Hodgens v. General Dynamics Corp*.[73] There, the court held that an employee was "unable to perform" his job simply because he had to miss work to attend a medical appointment.[74] To support its decision, the First Circuit cited FMLA's legislative history, which indicated that an employee need not "literally be so physically and mentally incapacitated that he or she is generally unable to work."[75] If an employee does succeed in proving that her mental illness rendered her "unable to perform" the functions of her job, she must then comply with FMLA's notice requirement when requesting leave.

C. The "Usual and Customary" Notice Requirement

Ensuring compliance with FMLA's notice requirement is another barrier that employees face when seeking leave due to mental illness. If medically necessary, eligible employees may take intermittent leave in separate blocks of time or on a reduced leave schedule.[76] When the approximate timing of the leave is not foreseeable, the employee must notify her employer of her intent to seek leave "as soon as practicable" based on the circumstances.[77] Because symptoms of

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[71] *Id.*, at *3; *see also* Watkins v. Tregre, 997 F.3d 275, 284 (5th Cir. 2021) (holding that a doctor's note stating that the employee required a schedule change due to anxiety was sufficient medical documentation).
[72] *Stekloff*, 218 F.3d at 861.
[73] 144 F.3d 151 (1st Cir. 1998).
[74] *Id.* at 172.
[75] *Id.* at 164.
[76] 29 C.F.R. § 825.202.
[77] *Id.* at § 825.303.

mental illness are sometimes episodic in nature, eligible employees often take FMLA leave on an intermittent basis when they are suffering from flare-ups of their condition.[78] The unplanned nature of this leave tends to be cumbersome for employers,[79] as it often requires them to make staffing or scheduling changes at a moment's notice.

Courts disagree on whether leave due to the flare-up of a pre-existing mental illness is considered foreseeable or unforeseeable. Due to this lack of clarity, the questions of when and how employees must provide notice of their intent to seek leave often demand an unpredictable and fact-intensive inquiry that courts are left to determine on a case-by-case basis. In *Collins v. NTN-Bower Corp.*, the Seventh Circuit held that an employee could have reasonably provided her employer with advanced notice of her leave due to mental illness.[80] Though the court acknowledged that *some* absences are unpredictable, it ultimately concluded that the employee's depression "had been developing for years" and "did not come on her overnight," so the employee could have notified her employer that she might need leave in the future.[81] In *Spangler v. Federal Home Loan Bank of Des Moines*, however, the Eighth Circuit found in favor of the employee.[82] Unlike the employer in *Collins*, the employer in *Spangler* was aware that the employee had suffered from depression in the past.[83] Accordingly, the court placed heavy weight on the employer's "general knowledge" of the employee's mental illness when deciding that the employer had sufficient notice of the employee's need for leave.[84]

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[78] 11 No. 8 Fam. & Med. Leave Handbook Newsl. 4, *Attorney Discusses How FMLA Intermittent Leave Applies to Workers Suffering from Mental Illness* (Thompson Pub. Grp. Nov. 2003).
[79] 29 C.F.R. § 825.303.
[80] 272 F.3d at 1008.
[81] *Id.*
[82] 278 F.3d 847 (8th Cir. 2002).
[83] *Id.*
[84] *Id.*

When an employee's need for leave is unforeseeable, the employee must comply with her employer's "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances."[85] This requirement can relate to the method, timing, or contents of the notice. For example, an employer may require employees to call, rather than email or text, a specific person to provide notice of a future absence. An employer may also require that notice be given at least twenty-four hours before the absence. Circuits are split on the extent—if any—to which an employee must comply with her employer's "usual and customary" notice policies when requesting leave due to mental illness. While some circuits require strict compliance with employer policies, others provide employees with more flexibility.[86]

For decades, the Seventh Circuit has been among the most flexible circuits with respect to FMLA's notice requirements. In *Byrne v. Avon Products, Inc.*, a seminal case from 2003, the Seventh Circuit held that the clear changes in an employee's behavior constituted sufficient notice of his medical condition and need for leave.[87] There, an employee began routinely falling asleep on the job after more than four years of exceptional work.[88] In explaining its reasoning, the court noted that it was "not beyond the bounds of reasonableness to treat a dramatic change in behavior as notice of a medical problem."[89] Accordingly, the court held that the employee's sleeping on the job was "unusual behavior" that constituted sufficient notice to his employer.[90]

More than a decade later, the Seventh Circuit reiterated this holding in *Valdivia v. Township High School District 214.*[91] There, an employee started exhibiting symptoms of

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[85] 29 C.F.R. § 825.302.
[86] *See, e.g.*, Byrne v. Avon Prods., Inc., 328 F.3d 379 (7th Cir. 2003).
[87] *Id.* at 382–83.
[88] *Id.* at 380.
[89] *Id.* at 381.
[90] *Id.* at 382.
[91] 942 F.3d 395 (7th Cir. 2019).

depression and anxiety on the job, which included uncontrollable crying, leaving work early, and arriving late.[92] The court explained that even though the employee explicitly mentioned her depression diagnosis to her employer, her change in behavior alone might have been sufficient to put her employer on notice of her need for leave.[93]

In 2023, however, the Seventh Circuit adopted a more moderate approach in *Elenowitz v. Fedex Ground Package System, Inc.*[94] There, an employee spoke to his supervisors about being diagnosed with bipolar disorder, discussed his new medication and its side effects, and requested his supervisors' help while adjusting to his new medicine.[95] Despite the employee's disclosure of his mental illness, the court distinguished this case from *Valdivia*, holding that the employee did not provide his employer with constructive notice of his need for FMLA leave because he did not request a work accommodation and only had one conversation about his mental illness with his supervisors.[96] Recent case law suggests that although the Seventh Circuit has moderated its approach to the "usual and customary" notice requirement, it still allows for "constructive notice" in certain circumstances.

The Fourth Circuit adopted a middle-ground approach to FMLA's "usual and customary" notice requirement in *Roberts v. Gestamp West Virginia, LLC.*[97] There, an employee was terminated after he notified his employer of his need for medical leave via a Facebook message.[98] Though the employer had previously accepted Facebook messages as a valid method of communicating absence, the employer's written attendance policy required that employees

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[92] *Id.* at 397, 399.
[93] *Id.* at 400.
[94] No. 0:21-CV-2109-SAL, 2023 WL 2473121 (D.S.C. Mar. 13, 2023).
[95] *Id.*, at *4.
[96] *Id.*
[97] 45 F.4th 726 (4th Cir. 2022).
[98] *Id.* at 730.

"notify their group leader via a call-in line at least 30 minutes before their shift."[99] The court considered what constitutes a "usual and customary" policy by consulting the words' dictionary definitions.[100] After noting that "usual" was defined as "expected based on previous experience" and that "customary" meant "commonly practiced," the court sided with the employee.[101] The Fourth Circuit held that even though an employer's written policy will be considered when determining its "usual and customary" policy, an employee may still expand on "that presumption with evidence that the employer also accepts informal absentee notice in practice."[102]

A federal district court adopted a similarly flexible approach in *Blake v. Alstom Transportation Inc.*[103] There, the court acknowledged FMLA's "usual and customary" notice requirement but also noted the procedural posture of the case.[104] The court explained that Third Circuit precedent suggested that summary judgment in favor of employers based on an employee's failure to follow the employer's policy is typically appropriate only where the employee has followed the policy before or where the employee was specifically directed to follow it after making an improper request for leave.[105] Thus, the court provided the employee with some flexibility and denied the employer's motion for summary judgment on the issue.[106]

In contrast, the Eighth Circuit has adopted a more rigid approach to the "usual and customary" notice requirement. In fact, the Eighth Circuit specifically considered and rejected

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[99] *Id.*
[100] *Id.* at 734.
[101] *Id.*
[102] *Id.* at 735.
[103] No. CV 20-13603, 2022 WL 17250561 (D.N.J. Nov. 28, 2022).
[104] *Id.*, at *6.
[105] *Id.* (first citing Soutner v. Penn State Health, 841 F. App'x 409 (3d Cir. 2021); and then citing Int'l Bhd. of Elec. Workers Loc. 1600 v. PPL Elec. Utils. Corp., No. 16-04675, 2017 WL 6547138 (E.D. Pa. Dec. 22, 2017)).
[106] *Id.*, at *6–7.

the Seventh Circuit's allowance of "constructive notice" in *Scobey v. Nucor Steel-Arkansas.*[107] There, the court expressed "serious doubts about the continuing validity of constructive notice in the FMLA context" and declined to absolve employees of their "affirmative duty" to provide notice of intent to seek FMLA leave.[108] Additionally, in *Garrison v. Dolgencorp, LLC* the Eighth Circuit held that the employee "lost any right that she had to FMLA leave" when she failed to comply with her employer's two-step policy for requesting leave, which required employees to contact both their manager and the employer's third-party leave administrator.[109] In that case, the employee made it clear to her supervisor that she needed a leave of absence due to her anxiety and depression.[110] However, the court held that the notice was insufficient because the employee failed to contact the employer's third-party leave administrator.[111] While such strict applications of the "usual and customary" notice requirement ensure that employers' needs are met, they often do so at employees' expense.

IV. PROPOSALS FOR CHANGE: BREAKING DOWN BARRIERS AND IMPROVING ACCESS TO FMLA LEAVE FOR MENTALLY ILL EMPLOYEES

FMLA's exacting requirements coupled with courts' inconsistent interpretations thereof have created undue challenges for employees seeking leave due to mental illness. While employees will always bear the initial responsibility of proving that they are entitled to leave under FMLA, courts are in a unique position to alleviate some of the unnecessary burdens placed on these employees. Courts can do so by enacting several changes that will facilitate the process and improve access to FMLA leave. First, courts should adopt a uniform, streamlined approach to evaluate employees' eligibility for FMLA leave. Second, courts should afford health care

[107] 580 F.3d 781 (8th Cir. 2009).
[108] *Id.* at 788.
[109] 939 F.3d 937, 944 (8th Cir. 2019).
[110] *Id.* at 940.
[111] *Id.* at 944.

providers and their professional opinions with heightened deference. Third, courts should replace the "usual and customary" notice requirement with a more flexible and balanced approach.

A. Streamlining FMLA's Eligibility Requirements

To establish eligibility for FMLA leave, an employee suffering from a mental illness must prove the existence of a "serious health condition," incapacity, *and* inability to perform the functions of the job. Requiring an employee to satisfy all three of these elements is redundant, if not wholly unnecessary; these requirements are nearly inextricably intertwined. Anxiety and depression are the most common mental illnesses among adults in the United States, with almost 20% suffering from an anxiety disorder and over 8% suffering from depression.[112] Out of the 52.9 million American adults who experienced mental illness in 2020, more than 80% suffered from an anxiety disorder.[113] To be diagnosed with anxiety or a mood disorder such as depression, a person must exhibit symptoms causing "clinically, significant distress or impairment in social, occupational, or other important areas of functioning."[114] This description is remarkably similar to the definition of "incapacity," which is an "inability to work, attend school or perform other regular daily activities."[115] This similarity shows that most people who have been diagnosed with a mental illness necessarily satisfy the criteria to establish "incapacity" as well.

Of course, mental illnesses present differently in different people. Even people who share the same diagnosis will have their unique struggles and experience symptoms to varying degrees of severity. In addition, the same individual might experience the waxing and waning of

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[112] National Alliance on Mental Illness, *Mental Health by the Numbers* (Apr. 2023), https://nami.org/mhstats?gclid=Cj0KCQiA7bucBhCeARIsAIOwr-_mryPgVr3hp8Lz9-i-aijtm5GJWQeY_Q8IM0faz9DI722oo2Q2TFAaAjFGEALw_wcB.
[113] *Id.*
[114] Turner, *supra* note 57, at 334 n.35.
[115] 29 C.F.R. § 825.113.

symptoms, with some periods being more severe than others. Thus, it might be too simplistic to categorically decide that all mental illness diagnoses constitute "serious health conditions" causing incapacity. Nonetheless, the existence of these nearly identical requirements exemplifies the oftentimes unnecessary hurdles that employees face when seeking FMLA leave. This redundancy is further highlighted by an additional requirement: proving that the employee is unable to perform the functions of her job.

There is a substantial overlap between "incapacity" and the inability to work or perform the functions of the job. Nonetheless, employees are often required to prove both separately. To satisfy the "incapacity" requirement, an employee must prove that she is unable to work or perform other regular daily activities.[116] Though FMLA does not define "regular daily activities," courts have analogized this term to the Americans with Disabilities Act's (ADA) definition of "major life activities."[117] The ADA's definition includes but is not limited to activities such as seeing, hearing, eating, walking, speaking, reading, concentrating, communicating, and working.[118] The ability to perform each of these activities is required in order to work in virtually any position in any field. Thus, if an employee proves incapacity, she must also have proven either the inability to work or the existence of symptoms that make it practically impossible for the employee to work.

On the surface, the redundancy of these requirements might appear harmless. If "serious health condition," "incapacity," and "the inability to perform the functions of the job" are essentially synonymous, then is it not to be expected that if an employee meets one, she will meet the others as well? Though theoretically true, the interrelatedness of these requirements has

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[116] *Id.*
[117] *See, e.g.*, Navarro v. Pfizer Corp., 261 F.3d 90, 96–98, 103 (1st Cir. 2001); Wegelin v. Reading Hosp. & Med. Ctr., 909 F.Supp.2d 421, 427 (E.D. Pa. 2012).
[118] 29 C.F.R. § 1630.2.

not prevented courts from ruling in favor of the employee on one but against the employee or another. For example, in *Pivac v. Component Services & Logistics*, the First Circuit held that even though it was undisputed that the employee was incapacitated by her anxiety and depression, the employee failed to prove the existence of a "serious health condition" because she only sought medical treatment once.[119] By considering these requirements separately, courts are given more opportunities to find in favor of employers even if justice demands a different outcome. Instead of treating these requirements as individual tests for employees to fail, courts should acknowledge their interrelatedness and presume that—barring extraneous circumstances—if an employee can satisfy one, she can satisfy the others as well.

B. Deferring to Health Care Providers

Health care providers play an integral role in determining whether employees will be deemed entitled to FMLA leave. In reviewing FMLA cases, courts should afford heightened deference to health care providers and their findings. To that end, courts should first broaden their definition of "health care providers" to include, at the very least, licensed counselors and social workers. FMLA defines "health care provider" broadly, including providers recognized or licensed under federal or state law.[120] Since *licensed* counselors and social workers meet these criteria, courts should recognize them as health care providers qualified to provide diagnoses and opinions regarding employees' mental health. This is especially important given that, in light of the national therapist shortage, patients might not always have the option of choosing the type of provider from whom they will receive treatment.

Second, courts should be more lenient when considering the adequacy of health care providers' notes or certifications. Given the prevalence of mental illness in American

[119] 570 F. App'x 899, 903 (11th Cir. 2014).
[120] 5 C.F.R. § 630.1202.

workplaces, it is reasonable for employers to question the validity of an employee's purported motive for requesting leave. This is especially true when an employee seeks FMLA leave for a health condition—such as a mental illness—that might be invisible. Nonetheless, courts should not allow employers' skepticism to unjustifiably deprive eligible employees of FMLA leave. Thus, absent a reason to believe that a health care provider's note or certification is invalid, courts should afford these trained professionals with the appropriate level of deference.

One way in which courts might defer to health care providers is by loosening restrictions on providers' "conclusory" findings. If a qualified provider states that an employee is "unable to work," for example, this assertion should be presumptively true. Of course, it is within the courts' authority to determine questions of law, even if when those questions require an inquiry in other fields, such as medicine. However, courts should endeavor to afford trained professionals with the appropriate level of deference whenever doing so is possible. Recent case law suggests that some courts might be trending in this direction.[121] The courts that have yet to do so should follow suit.

C. Adopting a Balanced Notice Requirement

Another way courts can facilitate employees' access to leave is by adopting a more flexible and balanced approach to FMLA's notice requirement. Though notice requirements may be burdensome for employees, they are ultimately necessary to ensure that employers' interests are protected. It would be unreasonable to completely absolve employees of their duty to inform their employers of their need for leave. However, courts should adopt an approach that is consistent with the purpose of FMLA: balancing the interests of employers with the needs of their employees. To that end, courts should expand their interpretation of FMLA's notice

[121] *See, e.g.*, *Stanton*, 2022 WL 738617; *Hodgens*, 144 F.3d 151; *Stekloff*, 218 F.3d 858.

requirement and allow employees to satisfy it by proving that their employers had actual notice of the employee's need for leave.

This balanced approach might be modeled after the one adopted by the Fourth Circuit in *Roberts*. There, the court acknowledged the existence of the employer's policy but ultimately held that the employee could supplement this policy with extrinsic evidence that the employer often accepted informal methods of notice in practice.[122] By requiring the employee to provide notice to his employer, the court ensured that the employer would have time to plan for the employee's absence. Also, by noting that the employer had previously accepted informal notifications of absences, the court relieved the employee of the burden of complying with an entirely new policy. This approach exemplifies the very purpose of FMLA.

At its core, FMLA was designed to harmonize two seemingly competing interests: the concerns of employers and the needs of employees. FMLA's success hinges on the balancing of these interests, and courts are in a unique position to ensure the maintenance of this delicate equilibrium. By revisiting their interpretations of some of FMLA's most burdensome requirements, courts can enact meaningful changes to facilitate the leave process for both employers and employees suffering from mental illness. Only then can FMLA's purpose truly be realized.

[122] *Roberts*, 45 F.4th at 735.