

The Employer's or the Employee's
Right to Choose? The Practical Effects
of *Escriba v. Foster Poultry Farms,
Inc.* on Employer Family and Medical
Leave Policies in the Ninth Circuit

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INTRODUCTION

Employment is the centerpiece of American culture. Despite the complaints and jokes about the workplace popularized through cartoons like *Dilbert*¹ and television shows like *The Office*,² the workplace is essential to life. Employment provides the income necessary to pay the bills and save for retirement. Employment provides status in the community. Employment is generally considered the overall goal of our education system.

Approximately 59% of Americans are employed—with over 123 million people working full time and another 26 million working part time.³ With so many people in the workforce, there is endless advice about finding the balance between work and life.⁴ Situations in life, such as personal illness, illness of a family member, or welcoming a

¹ E.g., Scott Adams, *Carol Juggles Work Plus Family*, DILBERT (Dec. 9, 2014), <http://dilbert.com/strip/2014-12-09>.

² *The Office* is an adaption of a British comedy about workplace relationships and situations. *The Office* (NBC television broadcast 2005–2013). For more information, see <http://www.nbc.com/the-office>.

³ Approximately 149 million people are currently employed. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE USDL-15-1697, THE EMPLOYMENT SITUATION—AUGUST 2015 tbl.A (2015). Of those, over six million work part-time for economic reasons and almost twenty million work part-time for noneconomic reasons. *Id.* at tbl.A-8.

⁴ See generally, e.g., MATTHEW KELLY, OFF BALANCE: GETTING BEYOND THE WORK-LIFE BALANCE MYTH TO PERSONAL AND PROFESSIONAL SATISFACTION (2011) (arguing that balance is unattainable, so employees should strive for “personal and professional satisfaction” instead).

new child into the family through birth or adoption invariably require employees to be absent from the workplace. This need for balance is heightened because most families cannot afford for either spouse to remain home to care to their family's needs.

Many American households require dual-income to meet their everyday expenses.⁵ Beyond just an employee's personal illnesses, many Americans must also be absent from work to care for their families. In fact, in over 60% of all two-parent households in the U.S., both parents with children work outside of the home.⁶ Further complicating the issue, many households have elderly parents or grandparents that require care and assistance.⁷ Congress recognized these needs, and, in response, it enacted the Family and Medical Leave Act (FMLA) in 1993.⁸

In enacting FMLA, Congress also considered the needs of employers. Successfully functioning businesses depend upon a reliable workforce,⁹ and when employees are absent from work, their role is not being completed—or is being completed by another employee stretching to cover both roles. This stretch potentially results in reduced productivity. Therefore, as part of FMLA, Congress wanted to provide employers with flexibility in administering the prescribed leave.¹⁰ One area of flexibility provided is that employers may choose to substitute, or run concurrently, accrued paid leave during the employee's FMLA entitlement.¹¹ Most FMLA policies not

⁵ THE COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., NINE FACTS ABOUT AMERICAN FAMILIES AND WORK 4 (2014), https://www.whitehouse.gov/sites/default/files/docs/nine_facts_about_family_and_work_real_final.pdf.

⁶ *Id.* at 11; BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NEWS RELEASE USDL-15-0689, EMPLOYMENT CHARACTERISTICS OF FAMILIES—2014 2 (2015).

⁷ THE COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., *supra* note 5, at 12; *see also* Brigid Schulte, *Aging Population Prompts More Employers to Offer Elder-Care Benefits to Workers*, WASH. POST (Nov. 16, 2014), http://www.washingtonpost.com/local/aging-population-prompts-more-employers-to-offer-elder-care-benefits-to-workers/2014/11/16/25f9c8e6-6847-11e4-a31c-77759fc1eacc_story.html.

⁸ Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2012).

⁹ Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Settles Disability Bias Suit for \$650,000 Against United Blood (Aug. 21, 2001), 2001 WL 1851217 (announcing the settlement of a suit brought by the EEOC on behalf of employees who were terminated under an employer's illegal medical leave policy).

¹⁰ *See* 29 U.S.C. § 2601(b)(3).

¹¹ *Id.* § 2612(d)(2)(A). “The term substitute means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave.” 29 C.F.R. § 825.207(a) (2015). “Accrued

only require substitution, but also require employees to invoke FMLA protection anytime that a qualifying reason exists regardless of the employee's accrued leave balance.¹²

The Ninth Circuit's 2014 decision in *Escriba v. Foster Poultry Farms, Inc.*¹³ has caused employers and employment attorneys to question whether an employee may decline FMLA protection and only invoke their paid leave balance.¹⁴ The fear, especially for employers with generous leave policies, is that employees will decline FMLA protection so they can invoke it at a later time.¹⁵ If an employee may subsequently use accrued leave and FMLA leave, the employee could be absent from the workplace for five or more months.¹⁶

In *Escriba*, contrary to common practice and Department of Labor (DOL) guidance, the court declared that "an employee can

leave means the leave earned by an employee during the current leave year that is unused at any given time in that year." 5 C.F.R. § 630.201(b) (emphasis omitted). This includes vacation and other employer-sponsored paid leave. See *Fact Sheet: Annual Leave (General Information)*, U.S. OFF. PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/annual-leave/> (last visited Nov. 27, 2015).

¹² For a sample FMLA policy, see *Family and Medical Leave Act (FMLA) (Includes Qualifying Exigency and Military Caregiver Leave)*, SOC'Y FOR HUM. RESOURCE MGMT., § G (July 15, 2015), [http://www.shrm.org/templatestools/samples/policies/pages/fmlaleave\(withservicememberleaveexpansion\).aspx](http://www.shrm.org/templatestools/samples/policies/pages/fmlaleave(withservicememberleaveexpansion).aspx) [hereinafter *SHRM Sample Policy*].

¹³ 743 F.3d 1236 (9th Cir. 2014).

¹⁴ E.g., Karin Jones, *Ninth Circuit Approves Employees' Right to Strategically Decline FMLA Leave in Escriba v. Foster Poultry Farms*, STOEL RIVES: WORLD EMP. (June 20, 2014), <http://www.stoelrivesworldofemployment.com/2014/06/articles/statutes/fmla/ninth-circuit-approves-employees-right-to-strategically-decline-fmla-leave-in-escriba-v-foster-poultry-farms/> (advising that employers must allow employees to exhaust accrued leave prior to requiring them to invoke FMLA); Jeff Nowak, *Can an Employee Decline FMLA Leave Even Though the Absence is Covered by the Act?*, FMLA INSIGHTS (Mar. 6, 2014), <http://www.fmlainsights.com/can-an-employee-decline-fmla-leave-even-though-the-absence-is-covered-by-the-act-court-says-yes/> (advising that employers do not need to update their FMLA policies after *Escriba*).

¹⁵ See Margaret Kostopolos, *You Want to Grant FMLA, But the Employee Won't Cooperate*, WORKPLACE REP. WITH ANCEL GLINK (Mar. 18, 2015), <http://workplacereport.ancelglink.com/2015/03/you-want-to-grant-fmla-but-employee.html>.

¹⁶ For example, the State of Oregon allows its employees, depending upon classification, to accrue up to 350 hours (8.75 weeks) of paid vacation. CHIEF HUMAN RES. OFFICE, OR. DEP'T OF ADMIN. SERVS., VACATION LEAVE POLICY NO. 60.000.05(1)(i)(A) (2015). With an additional twelve weeks provided by FMLA, an employee's absence could last approximately five months before an employee would need to take sick leave, which accrues at an additional eight hours per month. See HUMAN RES. SERVS. DIV., OR. DEP'T OF ADMIN. SERVS., SICK LEAVE WITH PAY POLICY NO. 60.000.01(1)(a) (2010).

affirmatively decline to use FMLA leave.”¹⁷ Since then, there has not been an authoritative interpretation of the *Escriba* decision, and subsequent judicial opinions that cite *Escriba* have not provided a meaningful clarification of the court’s position on whether an employer may require an employee to take FMLA leave, or whether the employer must allow an employee to decline FMLA.¹⁸ Further, employment attorneys have reached differing conclusions about *Escriba*’s implications for employers’ FMLA policies.¹⁹

This Note explores the FMLA, DOL regulations and guidance, and judicial precedent that provide the backbone of the Ninth Circuit’s decision. Part I of this Note describes FMLA, including the legislative intent, responsibilities of both employers and employees under FMLA, and the statute’s coexistence with DOL regulations, state laws, and employer policies. Part I then outlines the claims available to employees under FMLA and the judicial precedent supporting the Ninth Circuit’s assertion that FMLA protection may be affirmatively declined.

After providing a background of FMLA and its administrative and judicial interpretations, this Note discusses *Escriba* and its implications for employer leave policies. Part II of this Note reviews the background facts, policies at issue, and arguments of the parties. Then, Part III explains the Ninth Circuit’s reasoning in *Escriba*. And finally, Part IV argues that the decision in *Escriba* supports employer freedom in crafting leave policies that are best for their particular business. Part IV also argues that reading *Escriba* as a new FMLA right given to employees by citing a single sentence from the opinion is a misinterpretation of FMLA and *Escriba* because of inconsistencies with the statute, regulations, and judicial precedent. This Note concludes that *Escriba* does not require employers to change their FMLA policies. Instead, *Escriba* allows employers to choose whether to provide an additional benefit to their employees by allowing subsequent use of accrued and FMLA-protected leave.

¹⁷ *Escriba*, 743 F.3d at 1244.

¹⁸ See discussion *infra* Part IV.A.

¹⁹ Compare, e.g., Jones, *supra* note 14, with, e.g., Nowak, *supra* note 14.

I

BACKGROUND: THE FAMILY AND MEDICAL LEAVE ACT

On February 5, 1993, FMLA was the first bill signed into law by President Bill Clinton. President Clinton stated that he was proud of the bill and felt that it “truly put[] people first.”²⁰ The United States Congress passed FMLA to protect employees that need to be absent from the workplace for “particular circumstances that are critical to the life of a family.”²¹ FMLA allows employees up to twelve weeks of protected unpaid leave each year.²² Protected leave may be used for absences related to specific family and medical obligations such as the birth or adoption of a child, care for the employee’s own qualifying illness, or care for the illness of a close family member.²³

In the 1980s, Congress recognized that the rising number of women in the workforce significantly affected American families.²⁴ Without a full time caregiver in the home, balancing the stability and economic security of employment with the ability to fulfill personal responsibilities became an important national interest.²⁵ However, Congress also recognized that providing employers the ability to maintain a stable workforce was of vital importance.²⁶ To promote both objectives, Congress tasked the DOL with providing administrative guidelines and enforcing FMLA.²⁷ The statute and the accompanying DOL guidelines set out duties for both employers and employees to balance the needs of family and industry. Courts also enforce FMLA and defer to the DOL’s reasonable interpretations of FMLA when adjudicating related interference and retaliation claims.²⁸

To understand the Ninth Circuit’s decision in *Escriba*, it is important to first understand the statutory background and judicial enforcement of FMLA. It is also important to appreciate the rights

²⁰ William J. Clinton, *Remarks on Signing the Family and Medical Leave Act of 1993, February 5, 1993*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, ADMINISTRATION OF WILLIAM J. CLINTON, 1993 49, 49 (1993).

²¹ S. REP. NO. 103-3, at 1–2 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 4.

²² 29 U.S.C. § 2612(a)(1) (2012).

²³ *Id.*

²⁴ 139 CONG. REC. 1690 (1993) (statement of Sen. Dodd).

²⁵ See 29 U.S.C. § 2601(b)(1).

²⁶ *Id.* § 2601(b)(3).

²⁷ *Id.* § 2654.

²⁸ *E.g.*, *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1123 n.9 (9th Cir. 2001).

and responsibilities of both employers and employees, and to be aware of the remedies available under FMLA.

A. Statutory and Regulatory Background

This Part provides a basic overview of FMLA. First, Part I.A.1 discusses Congress's intent when it enacted the statute. Then, Part I.A.2 supports the strong deference given to the DOL regulations and guidelines by the courts. Part I.A.3 outlines employer rights under FMLA and highlights the flexibility Congress gives employers in the administration of their policies. Next, Part I.A.4 summarizes employee responsibilities under FMLA, and Part I.A.5 explores the options available to employers and employees for accrued leave substitution. Finally, Part I.A.6 discusses the interaction of FMLA with state laws and individual employer policies.

1. Legislative Intent

In the 1980s, Congress recognized a need for family leave.²⁹ Primarily, this was based upon the high number of women entering the workforce³⁰ and thus removing a full time caregiver from the home.³¹ In 1992, 48% of two-parent households with children

²⁹ See *History of the FMLA: A Story of Passion, Patience and Persistence: The Nine-Year Fight to Make FMLA the Law of the Land*, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/issues/work-family/history-of-the-fmla.html?referrer=https://www.google.com/> (last visited Nov. 27, 2015) ("In 1984 . . . we wrote the first draft of the legislation that would later become . . . FMLA.").

³⁰ See 139 CONG. REC. 1693 (1993) (letter from DOL Secretary Robert Reich) ("Over the past 25 years the American family and the American workplace have undergone unprecedented changes, which have created a compelling need for [FMLA] [E]conomic necessity and changing cultural standards—as well as greater opportunity—have resulted in large numbers of women entering the work force . . .").

³¹ *Id.* at 1981. One of FMLA's cosponsors, Colorado Congresswoman Pat Schroeder, responded to the apprehension of her colleagues about the bill by highlighting that families who required dual-income were unable to have a stay-at-home wife and mother:

The answer is always, "If you are a care-giver, you shouldn't be in the workplace. You should be able to afford somebody full time to stay home." In other words, get a wife.

I mean I would like a wife; I think most of the Congresswomen would like a wife. My husband would like a wife. . . . [but we] realize that we do have to be both care-givers and good employees.

Id. Congresswoman Schroeder is recognized as an important leader for women's and family issues during her twenty-four years in Congress. For information on her career, see Jeanine Cali, *Former U.S. Representative Pat Schroeder Discusses Her Tenure on the*

reported that they would be unable to meet expenses without dual-income, resulting in approximately two-thirds of women with children working full-time.³² This was a 200% increase since 1970.³³ By 1990, 60% of women with children under the age of six and 75% of women with children between the ages of six and seventeen worked outside the home.³⁴ Further, beyond responsibilities to children, Congress was concerned with the obligations that working women had to elderly family members.³⁵ Family obligations, however, did not, and do not, only affect women. Congress recognized that men were also affected by changing family and health situations that may require protected leave from work; thus, it made FMLA protections available to men and women equally.³⁶

Generally, the Senate supported FMLA; however, Republican opposition in the House of Representatives led to fervent debate on several issues.³⁷ Foremost, representatives were concerned about legislating employer policies rather than allowing businesses to control their own employee benefit programs.³⁸ In addition,

Hill, LIBR. CONGRESS: IN CUSTODIA LEGIS (June 13, 2014), <http://blogs.loc.gov/law/2014/06/former-u-s-representative-pat-schroeder-discusses-her-tenure-on-the-hill/>.

³² 139 CONG. REC. 1693 (letter from DOL Secretary Robert Reich).

³³ *Id.* at 1982 (statement of Rep. Gunderson).

³⁴ *Id.* at 1697 (statement of Sen. Boxer).

³⁵ *See id.* at 1690 (statement of Sen. Dodd). In the early 1990s, approximately one million working women with children reported that they also cared for elderly family members. *Id.*

³⁶ 29 U.S.C. § 2601(b)(4) (2012) (“consistent with the Equal Protection Clause of the Fourteenth Amendment”); *see also* 139 CONG. REC. 1693 (approximately one-fourth of American children were raised by a single parent in 1992).

³⁷ *See generally* 139 CONG. REC. 1958–2048. While FMLA had bipartisan support to pass both bodies of Congress, voting to override President Bush’s veto still generally fell along party lines. Donna R. Lenhoff & Lissa Bell, *Government Support for Working Families and for Communities: Family and Medical Leave as a Case Study*, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, at 9, <http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf> (last visited Nov. 27, 2015). In 1993, the United States Senate was comprised of fifty-seven Democrats and forty-three Republicans. *Party Division in the Senate, 1789-Present*, U.S. SENATE, <http://www.senate.gov/history/partydiv.htm> (last visited Oct. 2, 2015). Meanwhile, the House of Representatives was comprised of 258 Democrats, 176 Republicans, and 1 Independent. *Party Divisions of the House of Representatives, 1789-Present*, HIST., ART & ARCHIVES: U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Oct. 2, 2015).

³⁸ “Strong competitive businesses are not built on the theory that Government knows best.” 139 CONG. REC. 1990–91 (statement of Rep. Hoekstra). “Since when does Government know what is best for our Nation’s businesses? Or better yet, for our families? It is this kind of Government intervention that has crippled businesses and the American families in the first place.” *Id.* at 1982 (statement of Rep. Dornan).

representatives debated the potential cost of family leave to businesses,³⁹ along with the potential disruption to business operations if an employee was absent from work for three months.⁴⁰ Opposition also voiced fears that employees would abuse the entitlement.⁴¹

Meanwhile, other representatives did not feel that the bill went far enough to protect American workers.⁴² In 1993, 127 other countries already offered some form of family leave.⁴³ Many of these countries mandated paid leave during family absences.⁴⁴ Further, representatives called FMLA, as written, discriminatory against employees who work for ineligible small businesses,⁴⁵ and debated whether opportunities for women of childbearing age would be limited by FMLA because employers would be unwilling to hire these women into key positions.⁴⁶ Lastly, some representatives expressed tremendous concern about employees who could not afford to take unpaid leave despite having a qualifying reason.⁴⁷ These representatives argued that a more comprehensive bill would better effectuate FMLA's purpose and better meet the needs of American workers.⁴⁸

³⁹ In 1993, the average cost of family leave to a business would have been six dollars per employee annually. *Id.* at 1981 (statement of Rep. Boehlert).

⁴⁰ *Id.* at 1998 (statement of Rep. Fowler).

⁴¹ *E.g., id.* at 1982 (statement of Rep. Dornan). Republican Representative Boehlert avidly rebuked his colleagues who made this assertion. *Id.* at 1981. Democratic Representative Mink echoed Representative Boehlert's outrage: "It is ridiculous to assume that people will abuse this law. Who in the world is going to take leave without pay for other than the most serious of all reasons?" *Id.* at 1986.

⁴² *See id.* at 1987 (statement of Rep. Owens). Earlier drafts of the bill offered up to twenty-six weeks of protected leave. *Id.*

⁴³ *Id.* at 1692, 1987.

⁴⁴ "[O]ur chief economic competitors like Japan and Germany [provide] paid family leave." *Id.* at 1987 (statement of Rep. Owens); *see also id.* at 2000 (statement of Rep. Manzullo) ("I received a letter this morning from the Secretary of Labor, Mr. Reich, who stated that the United States is the only industrialized country in the world that does not have mandated family leave.").

⁴⁵ *E.g., id.* at 1988 (statement of Rep. Kim).

⁴⁶ *E.g., id.* at 1999 (statement of Rep. Dunn).

⁴⁷ *E.g., id.* at 1987 (statement of Rep. Owens); *id.* at 1988 (statement of Rep. Kim).

⁴⁸ *See id.* at 1987 (statement of Rep. Owens) ("[W]e must press on to assure that income replacement is made part of our national family and medical leave policy.").

Compromise ensued and, eight years and two vetoes after the initial draft, President Bill Clinton signed FMLA into law.⁴⁹ As part of the statute, Congress delegated enforcement power to the DOL.⁵⁰

2. Deference to Department of Labor Regulations

Provided requisite tests are met, courts defer to the assigned agency's interpretation of the statute,⁵¹ and every court thus far has deferred to the DOL's regulations and guidelines when interpreting FMLA.⁵² There is a two-step process to determine if an agency's interpretation of a statute is granted deference.⁵³ First, using the plain language of the statute, the court determines whether the explicit directive of Congress contradicts the agency's regulations.⁵⁴ If not, or if the statute is silent on the issue, the court must then determine if the agency's interpretation is reasonable.⁵⁵

[When] Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. . . . [A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.⁵⁶

Under the *Chevron* test, courts give deference to DOL's interpretations of FMLA.⁵⁷ Congress explicitly authorized the DOL to promulgate regulations to effectuate the statute.⁵⁸ The DOL regulations applicable to this analysis, regarding both notice⁵⁹ and substitution of accrued leave,⁶⁰ are either identical or coexist with

⁴⁹ Lenhoff & Bell, *supra* note 37, at 9, 20. President George H.W. Bush vetoed FMLA twice. 139 CONG. REC. 1690 (statement of Sen. Dodd). His second veto could have been overridden by the Senate, where the bill passed with seventy-five supporting votes. *Id.* However, the House of Representatives did not have the required two-thirds majority to override President Bush's decision. *See id.*

⁵⁰ 29 U.S.C. § 2654 (2012).

⁵¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

⁵² *See, e.g., Bement v. Cox*, No. 3:12-cv-00475-MMD-WGC, 2014 WL 4699620, at *3 (D. Nev. Sept. 22, 2014) (citing *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1133 (9th Cir. 2003)).

⁵³ *Chevron*, 467 U.S. at 842–44 [hereinafter the *Chevron* test].

⁵⁴ *Id.* at 842–43.

⁵⁵ *Id.* at 843–44.

⁵⁶ *Id.* (footnote omitted).

⁵⁷ *E.g., Escriba v. Foster Poultry Farms*, 793 F. Supp. 2d 1147, 1158 (E.D. Cal. 2011).

⁵⁸ 29 U.S.C. § 2654 (2012).

⁵⁹ Compare 29 C.F.R. §§ 825.302–825.303 (2015) with 29 U.S.C. § 2612(e).

⁶⁰ Compare 29 C.F.R. § 825.207 with 29 U.S.C. § 2612(d)(2).

their FMLA counterparts without contradiction. When interpreting the FMLA—including each party's rights and responsibilities—courts should first look at the statute itself, the applicable regulations, and other DOL guidance to determine compliance.⁶¹

3. Employer Rights and Responsibilities Under FMLA

Employers have several responsibilities under FMLA and the accompanying DOL regulations. FMLA requires employers to post notice educating their employees about their FMLA rights.⁶² Once the employee has provided sufficient information for an employer to make an informed decision, DOL regulations require employers to recognize FMLA-qualifying absences.⁶³ Employers must also properly designate qualifying absences as protected leave either prior to the commencement of leave or retroactively.⁶⁴ However, whether designated before or after leave commences, the employer may only base its designation upon information provided by the employee.⁶⁵

The employer's obligations are triggered by either an employee's request or by otherwise learning that a FMLA-qualifying reason for leave exists.⁶⁶ Within five business days of receiving this information, the employer must provide the employee with written notification of the designation of leave.⁶⁷ The notification must include whether the request has been approved and the amount of leave that will be counted against the employee's FMLA entitlement.⁶⁸

⁶¹ *Chevron*, 467 U.S. at 842–44.

⁶² 29 U.S.C. § 2619(a); 29 C.F.R. § 825.300(a).

⁶³ 29 C.F.R. § 825.301(a).

⁶⁴ *Id.* §§ 825.300(d), 825.301(d).

⁶⁵ *Id.* § 825.301(a). If the employer would like a second opinion about an employee's own illness, the employer may request another examination at their own expense. 29 U.S.C. § 2613(c).

⁶⁶ 29 C.F.R. §§ 825.301(a)–(b).

⁶⁷ *Id.* §§ 825.300(b)(1), 825.300(c). The written notification may be distributed electronically so long as it meets all the other requirements of 29 C.F.R. § 825.300(c). *Id.* § 825.300(c)(6). However, whether the employer must do more than simply post the designation in the organization's intranet system is a material question of fact for the jury. *Alexander v. Boeing Co.*, No. C13-1369RAJ, 2014 WL 3734291, at *7 (W.D. Wash. July 28, 2014).

⁶⁸ 29 C.F.R. §§ 825.300(d)(4), (6). A DOL approved sample form is available at <http://www.dol.gov/whd/forms/WH-382.pdf>.

An employer may also retroactively designate FMLA leave.⁶⁹ To retroactively designate leave, the employer must provide the same notice to the employee that would have been provided if the leave was designated prior to the qualifying absence.⁷⁰ An employer may choose when to retroactively designate FMLA leave so long as a qualifying reason existed during the designated period of leave and the retroactive designation does not cause harm to the employee.⁷¹

A viable FMLA claim may exist if an employer incorrectly designates leave as FMLA-qualifying.⁷² However, this only arises if the employer later denies FMLA leave for a qualifying reason because the entitlement has been exhausted and later disciplines the employee for unauthorized absences that are related to the FMLA-qualifying reason.⁷³ This is called involuntary leave.⁷⁴ Involuntary leave claims are not viable if the employer based its decision on a FMLA-qualifying reason that existed at the time of the designation.⁷⁵ An employee's request does not determine if the absence is designated as FMLA-protected, and the employee may not bar a legitimate designation.⁷⁶ No legal harm arises from qualifying leave being counted against the employee's twelve-week entitlement.⁷⁷

Employers are also given rights under FMLA. DOL allows employers to have broad discretion in the creation and implementation of their FMLA policies.⁷⁸ Employers may choose to create policies which give their employees additional benefits or

⁶⁹ *Id.* § 825.300(d)(1).

⁷⁰ *Id.* § 825.301(d).

⁷¹ *Id.* Harm has been interpreted as prejudice against the employee or economic harm. See *Rincon v. AFSCME*, No. C12-4158MEJ, 2013 U.S. Dist. LEXIS 114403, at *43–44 (N.D. Cal. Aug. 13, 2013).

⁷² See Megan E. Blomquist, Comment, *A Shield, Not a Sword: Involuntary Leave Under the Family and Medical Leave Act*, 76 WASH. L. REV. 509, 526–28 (2001).

⁷³ *Walker v. Trinity Marine Prods., Inc.*, 721 F.3d 542, 544 (8th Cir. 2013) (quoting *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 449 (6th Cir. 2007)).

⁷⁴ See *infra* Part I.B.1.

⁷⁵ See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA-68 (July 21, 1995); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA-49 (Oct. 27, 1994).

⁷⁶ U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA-83 (Aug. 7, 1996) (citing 29 C.F.R. § 825.208) [hereinafter FMLA-83].

⁷⁷ See *Rincon v. AFSCME*, No. C12-4158MEJ, 2013 U.S. Dist. LEXIS 114403, at *42–44 (N.D. Cal. Aug. 13, 2013).

⁷⁸ “The choice of options was intended to give maximum flexibility for ease in administering FMLA in conjunction with other ongoing employer leave plans” *Bachelor v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1120 (9th Cir. 2001) (quoting *The Family and Medical Leave Act of 1993*, 60 Fed. Reg. 2180, 2199 (Jan. 6, 1995)).

which only meet the statutory minimums.⁷⁹ Either way, clear communication with employees about how FMLA is administered is the key to employer autonomy under FMLA.⁸⁰

4. *Employee Responsibilities Under FMLA*

FMLA also places certain responsibilities upon employees who invoke the entitlement. An employer may require an employee to produce a medical certification verifying the FMLA-qualifying reason for leave.⁸¹ This certification must include the date on which the condition commenced,⁸² which allows employers to retroactively designate FMLA leave if necessary.⁸³ The certification must also include the appropriate medical facts to properly designate the leave, as well as the expected duration and need for FMLA leave.⁸⁴ The employer may also require a doctor's clearance before allowing an employee to return to work if the absence was due to the employee's own qualifying illness.⁸⁵ If any accommodations are needed to keep the employee safe and healthy at work, the doctor should also specify those accommodations in a manner consistent with ADA requirements.⁸⁶ Failure of the employee to provide a sufficient and timely certification allows the employer to deny FMLA leave.⁸⁷

⁷⁹ See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter FMLA2004-3-A (Oct. 4, 2004) [hereinafter FMLA2004-3-A].

⁸⁰ See The Family and Medical Leave Act of 1993, 60 Fed. Reg. at 2219 ("The purpose of this provision is to provide employees the opportunity to learn from their employers of the manner in which that employer intends to implement FMLA and what company policies and procedures are applicable so that employees may make FMLA plans fully aware of their rights and obligations.").

⁸¹ 29 U.S.C. § 2613(a) (2012).

⁸² *Id.* § 2613(b)(1).

⁸³ 29 C.F.R. § 825.301(d) (2015).

⁸⁴ 29 U.S.C. §§ 2613(b)(2)-(3).

⁸⁵ *Id.* § 2614(a)(4); 29 C.F.R. § 825.312(a).

⁸⁶ See 29 C.F.R. § 825.306(d); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>. The interplay between FMLA and the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101, is mentioned and implied throughout 29 C.F.R. pt. 825. *E.g.*, 29 C.F.R. §§ 825.123(a), 825.216(c), 825.218(d), 825.306(d), 825.312(h).

⁸⁷ *Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 771 (7th Cir. 2008); 29 C.F.R. § 825.306(e).

Without FMLA protection, the employer may take disciplinary action against the employee for unauthorized absences.⁸⁸

5. FMLA Accrued Leave Substitution Policies

There are two ways that accrued paid leave may be substituted for unpaid FMLA leave.⁸⁹ First, the employee may request to substitute accrued leave.⁹⁰ Second, the employer's policy may require all employees invoking FMLA protection to substitute available paid leave.⁹¹ If neither occurs, the employee retains all paid leave despite their FMLA-related absence.⁹² Generally, the employer requires employees to use FMLA-protected leave concurrently with accrued leave.⁹³ Further, employees generally do not contest the concurrent use of accrued leave. Since employers are not required to pay employees during FMLA absences,⁹⁴ most employees may not otherwise receive income during their absence. Concurrent use of leave both protects employees financially and provides a safeguard to the employer, as Congress intended.⁹⁵

6. Interaction Between FMLA with Individual State Laws and Employer Policies

Employers have responsibilities not only under FMLA, but also under state laws and their own individual leave policies.⁹⁶ In enacting FMLA, Congress created a minimum standard for family and medical leave.⁹⁷ The statute allows both states⁹⁸ and employers⁹⁹ to create

⁸⁸ *Ridings*, 537 F.3d at 771; 29 C.F.R. § 825.306(e).

⁸⁹ 29 C.F.R. § 825.207(a).

⁹⁰ The employee must meet the employer's normal leave policies to enforce this request. *Id.*; see also *id.* § 825.302(d). But see *Solovey v. Wyo. Valley Health Care Sys.-Hosp.*, 396 F. Supp. 2d 534, 538 (M.D. Pa. 2005) (holding that the employer's policy requiring two weeks' notice to substitute paid leave when the qualifying reason was unforeseeable chilled the invocation of the plaintiff's FMLA rights).

⁹¹ 29 C.F.R. § 825.207(a). This policy must be clearly communicated to employees. See *id.* § 825.300(c)(iii).

⁹² *Id.* § 825.207(b).

⁹³ See, e.g., *SHRM Sample Policy*, *supra* note 12, § G.

⁹⁴ 29 U.S.C. § 2612(d)(1) (2012).

⁹⁵ *Id.* § 2601(b)(1).

⁹⁶ *Id.* §§ 2651(b), 2652(a).

⁹⁷ See *id.* § 2653.

⁹⁸ "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." *Id.* § 2651(b); see also 29 C.F.R. § 825.701(a) (2015).

policies that offer greater benefits to employees. Courts judge employers against the standard that is most beneficial to the employee.¹⁰⁰

Currently, eleven states have family and medical leave statutes, including four within the Ninth Circuit.¹⁰¹ The California Family Rights Act,¹⁰² Hawaii Family and Medical Leave Act,¹⁰³ Oregon Family Leave Act,¹⁰⁴ and the Washington State Family Leave Act¹⁰⁵ mirror the federal statute while expanding employee rights. However, the procedures relevant to notice and substituted leave do not substantially differ from FMLA in any state within the Ninth Circuit.¹⁰⁶

⁹⁹ 29 U.S.C. § 2652(a); *see also* 29 C.F.R. §§ 825.700(a)–(b).

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

Id.

¹⁰⁰ *See* 29 U.S.C. §§ 2651(b), 2652(a).

¹⁰¹ California, Connecticut, Hawaii, Maine, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *Federal vs. State Family and Medical Leave Laws*, U.S. DEP'T LABOR, WAGE & HOUR DIV., <http://www.dol.gov/whd/state/fmla/> (last visited Oct. 23, 2015). The District of Columbia also has an individual family and medical leave law. *Id.*

¹⁰² CAL. GOV'T CODE § 12945.2 (West 2014 & Supp. 2015). For a comparison to FMLA, *see* CAL. DEP'T OF GEN. SERVS., FAMILY AND MEDICAL LEAVE ACT AND CALIFORNIA FAMILY RIGHTS ACT FMLA/CFRA POLICY AND PROCEDURES (2000), <http://www.documents.dgs.ca.gov/ohr/supervisor/DGSFMLAPolicyProcedures.pdf>.

¹⁰³ HAW. REV. STAT. §§ 398-1 to 398-29 (2012). For a comparison to FMLA, *see* WAGE STANDARDS DIV., HAW. DEP'T OF LABOR & INDUS. RELATIONS, HAWAII FAMILY LEAVE LAW (HFLL) AND THE FAMILY AND MEDICAL LEAVE ACT (FMLA) COMPARISON CHART (2013), <http://labor.hawaii.gov/wsd/files/2013/10/Family-Leave-Comparison-Chart-rev-10-29-2013.pdf>.

¹⁰⁴ OR. REV. STAT. §§ 659A.150–659A.186 (2013). For a comparison to FMLA, *see* OR. BUREAU OF LABOR & INDUS., *Technical Assistance for Employers: Oregon Family Leave Act (OFLA)*, OREGON.GOV, http://www.oregon.gov/boli/TA/pages/t_fa_oregon_family_leave_act_01-2011.aspx (last updated Aug. 2015).

¹⁰⁵ WASH. REV. CODE §§ 49.78.010–904 (2015); *see also* The Washington State Family Care Act, WASH. REV. CODE §§ 49.12.265–295 (2015). For a comparison to FMLA, *see* WASH. STATE DEP'T OF LABOR & INDUS., PROTECTED LEAVE LAWS (2015), <http://www.lni.wa.gov/WorkplaceRights/files/FamilyLeaveLawsTable.pdf>.

¹⁰⁶ *E.g.*, OR. BUREAU OF LABOR & INDUS., *Technical Assistance for Employers: Family Leave*, OREGON.GOV, http://www.oregon.gov/boli/TA/pages/t_fa_leave_laws_01-2011.aspx (last visited Nov. 27, 2015) (“Employers can also require that employees exhaust all accrued paid leave before taking some or all of the family leave as unpaid leave, and can dictate the order in which the leave is to be used.”).

Employers may also choose to expand the family and medical leave rights of their employees. FMLA allows employers to create their own policies for substitution of accrued leave so long as the policies meet the minimum requirements of the statute.¹⁰⁷ Throughout FMLA's accompanying regulations, the DOL provides examples of possible enhanced rights that employers could offer.¹⁰⁸ By allowing employees to retain accrued leave if substitution is neither requested nor required under employer policy,¹⁰⁹ the regulations logically imply that employers may offer an additional benefit to their employees through their FMLA policies. However, employers have no legal obligation to provide more beneficial policies than required by FMLA, such as allowing employees to subsequently use accrued and protected leave.¹¹⁰

B. Judicial Enforcement

If the employer fails to meet their obligations under FMLA, an employee may bring a cause of action against the employer. Congress created two causes of action under FMLA. First, Congress created an action for interfering or denying the exercise of FMLA leave,¹¹¹ and second, an action for retaliating against an employee for exercising his or her FMLA rights.¹¹² Since then, courts have further defined what actions constitute a violation under this framework, including whether an employee may refuse FMLA protection in certain circumstances.¹¹³ This Part discusses the different types of FMLA

¹⁰⁷ 29 U.S.C. §§ 2652(a), 2653 (2012); *see also* FMLA2004-3-A, *supra* note 79.

¹⁰⁸ Several subparts of 29 C.F.R. Part 825 allow employers to grant increased benefits to their employees through internal policies. *E.g.*, 29 C.F.R. § 825.210(c)(5) (2015) (allowing employers and employees to reach a mutual agreement on prepayment of insurance premiums); *id.* § 825.304(e) (allowing employers to grant FMLA protection despite the employee's lack of proper notice).

¹⁰⁹ *Id.* § 825.207(b).

¹¹⁰ *Id.* § 825.207(a).

¹¹¹ 29 U.S.C. § 2615(a)(1).

¹¹² "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." *Id.* § 2615(a)(2). Retaliation claims will not be further addressed in this Note. For more information on retaliation claims, see John Bourdeau, Annotation, *Establishing Employer's Discriminatory Motive in Action to Recover for Employer's Retaliation for Employee's Exercise of Rights Under Family and Medical Leave Act, in Violation of § 105(a) of Act (29 U.S.C.A. § 2615(a))*, 190 A.L.R. Fed. 491 (2003) (explaining federal claims under FMLA); *Court Expands Oregon Family Leave to Include Prohibition on Retaliation*, OR. EMP. L. LETTER (Nov. 1, 2004), <http://www.hrlaws.com/node/1052057> (explaining Oregon state claims under OFLA).

¹¹³ *E.g.*, *Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 771 (7th Cir. 2008).

interference claims, waiver of FMLA rights, and the judicial precedent for refusal of FMLA protection.

1. Judicial Rights of Action: Interference Claims

Interference claims arise when an employer “interfere[s] with, restrain[s], or den[ies] the exercise of or the attempt to exercise, any right under [FMLA].”¹¹⁴ An employer’s liability does not depend upon a subjective belief, even if held by both parties, that the leave was protected.¹¹⁵ Rather, liability is simply based upon whether the employee can objectively prove the elements of a prima facie interference case.¹¹⁶ To meet this prima facie burden, a plaintiff must establish by preponderance of the evidence that “(1) he is an [e]ligible employee,”¹¹⁷ “(2) the defendant is an [e]mployer,”¹¹⁸ “(3) the employee was entitled to leave under the FMLA,”¹¹⁹ “(4) the employee gave the employer notice of his intention to take leave,”¹²⁰ “and (5) the employer denied the employee FMLA benefits to which he was entitled.”¹²¹ The most common element at issue is the fifth: whether the employee was denied entitled leave.¹²²

Interfering with or restraining the free exercise of FMLA rights includes using FMLA leave as a “negative factor” when making employment decisions.¹²³ If the employee can show that the use of FMLA leave was the basis, even in part, of an adverse employment

¹¹⁴ 29 U.S.C. § 2615(a)(1); *see also* 29 C.F.R. § 825.220(a).

¹¹⁵ *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001).

¹¹⁶ *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014); *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 447 (6th Cir. 2007).

¹¹⁷ *Wysong*, 503 F.3d at 447 (alteration in original). Subject to exclusions and specific industry qualifications, an “eligible employee” is a person who was employed at least twelve months before requesting leave and fulfilled at least 1250 hours of service to the employer in the previous twelve-month period. 29 U.S.C. § 2611(2).

¹¹⁸ *Wysong*, 503 F.3d at 447 (alteration in original). A covered “employer” is any public agency, or “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding year.” 29 U.S.C. § 2611(4)(A).

¹¹⁹ *Wysong*, 503 F.3d at 447. For an explanation of who is entitled to leave, see 29 U.S.C. § 2612(a)(1).

¹²⁰ *Wysong*, 503 F.3d at 447. When the need for leave is foreseeable, an employee must provide at least thirty days’ notice to the employer of the intention to invoke FMLA leave. 29 U.S.C. § 2612(e)(1).

¹²¹ *Wysong*, 503 F.3d at 447.

¹²² *E.g., id.*

¹²³ 29 C.F.R. § 825.220(c) (2015).

action, courts will find the employer denied the employee's FMLA rights.¹²⁴ This denial provides grounds for an interference claim.¹²⁵ Even the perception that negative consequences follow the invocation of protected rights is actionable as interference because it could have a "chilling effect" on employees' future exercise of their FMLA rights.¹²⁶ Thus, using FMLA as a negative factor is strictly prohibited.¹²⁷

Employers may also be held liable for FMLA interference under an involuntary leave claim.¹²⁸ Involuntary leave claims arise when the employer forces the employee to take FMLA leave despite no "serious health condition" which would prevent the employee from working.¹²⁹ However, the employee simply being involuntarily placed on FMLA-leave without a qualifying reason is not enough to give rise to a viable claim.¹³⁰ A viable involuntary leave claim does not arise until the employer later denies qualified-FMLA leave due to unavailability of the employee's entitlement for that year.¹³¹

It is important to note that an employer may designate leave as FMLA-protected without the employee's intention to invoke FMLA.¹³² So long as the employer has a legitimate and documented reason for the designation, the employee cannot bar the use of the employee's FMLA entitlement.¹³³ In *Harvender v. Norton Co.*, a New York district court stated that:

The plaintiff's argument that she did not request to be placed on FMLA leave [was] irrelevant. Nowhere in the Act does it provide that FMLA leave must be granted only when the employee wishes it

¹²⁴ *E.g.*, *Wysong*, 503 F.3d at 447.

¹²⁵ *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1123–24 (9th Cir. 2001).

¹²⁶ The Ninth Circuit imported the "chilling effect" principle from previous interpretation of the National Labor Relations Act, 29 U.S.C. §§ 151–169, to better understand interference and restraint of employee rights. *Id.*

¹²⁷ *Id.*

¹²⁸ *See generally* Blomquist, *supra* note 72.

¹²⁹ *Wysong*, 503 F.3d at 449.

¹³⁰ *Id.*

¹³¹ *Huffman v. Speedway LLC*, Nos. 14-1668, 14-2468, 2015 WL 3973325, at *4 (6th Cir. July 1, 2015) ("In this case, Huffman never requested FMLA leave and so her involuntary-leave claim remains unripe."), *petition for cert. filed* (U.S. Nov. 13, 2015) (No. 15-634); *Wysong*, 503 F.3d at 449.

¹³² *Harvender v. Norton Co.*, No. 96-CV-653 (LEK/RWS), 1997 WL 793085, at *7 (N.D.N.Y. Dec. 15, 1997).

¹³³ FMLA-83, *supra* note 76.

to be granted. On the contrary, the FMLA only provides that leave must be given when certain conditions are present.¹³⁴

In *Harvender*, a laboratory technician provided a doctor's note recommending that she avoid using certain chemicals during her pregnancy.¹³⁵ The company did not have alternative employment or light duty available at that time, so the company placed her on FMLA leave.¹³⁶ The court upheld the designation,¹³⁷ finding that the employer was given information that the employee could no longer perform an essential function of the position—dealing with chemicals—due to a health condition.¹³⁸ This is a FMLA-qualifying reason for leave.¹³⁹ Therefore, the employee's intent to preserve FMLA until a later date did not bar the employer's designation.¹⁴⁰

The title of this type of interference claim as “involuntary” can easily create a misperception about the nature of this claim. Involuntary in this sense does not simply mean against the employee's will.¹⁴¹ Involuntary claims are not based on the employee's intentions.¹⁴² Rather, these claims protect employees who are harmed by a prior incorrect designation of leave after a statutorily-recognized need later arises.¹⁴³

2. *An Employee's Ability to Waive FMLA Claims*

Under 29 C.F.R. § 825.220(d), “[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA.” The regulation specifies that a union, or other collective bargaining representative, cannot cede FMLA leave as part

¹³⁴ *Harvender*, 1997 WL 793085, at *7.

¹³⁵ *Id.* at *1. Ms. Harvender, the plaintiff-employee in this suit, miscarried her baby and brought claims against her employer for intentional infliction of emotional distress, breach of employment contract, and violation of her FMLA rights after the employer forced her to take unpaid leave during her pregnancy. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at *8.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Compare *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 449 (6th Cir. 2007) with *Involuntary*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2007) (defining involuntary as “done contrary to or without choice”).

¹⁴² See *Wysong*, 503 F.3d at 449.

¹⁴³ See *id.*

of a labor contract negotiation.¹⁴⁴ Further, it specifies that an employee's voluntary decision to accept light duty in lieu of FMLA leave "does not constitute a waiver of the employee's prospective [FMLA] rights."¹⁴⁵

An employee, however, may waive his or her rights as part of a settlement involving an existing FMLA violation.¹⁴⁶ Courts have identified that "prospective" is the key word for evaluating the word "waiver" under 29 C.F.R. § 825.220(d).¹⁴⁷ For example, the Eleventh Circuit upheld a severance agreement in which the employee waived all then-existing FMLA claims against the employer.¹⁴⁸ In *Paylor v. Hartford Fire Insurance Co.*, the employer allegedly did not properly respond to the employee's FMLA request.¹⁴⁹ The employee's request came at the same time that the employer was preparing a negative performance evaluation and considering terminating the employee.¹⁵⁰ The employer offered a severance agreement that compensated the employee and provided benefits for thirteen weeks.¹⁵¹ In exchange, the employee agreed to waive all potential FMLA claims that occurred during her tenure.¹⁵² When the employee later joined coworkers in a FMLA-related lawsuit against the employer,¹⁵³ the district court granted summary judgment against the employee based on the severance agreement, removing her from her coworkers' suit.¹⁵⁴

To decide the validity of the severance agreement provision to waive FMLA claims, the Eleventh Circuit examined the history of 29 C.F.R. § 825.220(d).¹⁵⁵ Due to a circuit split between 2003 and 2007, the DOL added the word "prospective" to the regulation in 2009.¹⁵⁶ After determining that "prospective" was a key part of the analysis of 29 C.F.R. § 825.220(d), the court defined what this word meant.¹⁵⁷

¹⁴⁴ 29 C.F.R. § 825.220(d) (2015).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 1122–23 (11th Cir. 2014).

¹⁴⁸ *Id.* at 1124.

¹⁴⁹ *Id.* at 1120.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1121.

¹⁵⁵ *Id.* at 1122–23.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1123.

First, the court determined that it was too broad to define a prospective right as simply an unexercised right that may be used in the future.¹⁵⁸ Instead, the court determined that “§ 825.220(d)’s prohibition of ‘prospective’ waiver means only that an employee may not waive FMLA rights, in advance, for violations of the statute that have yet to occur.”¹⁵⁹ In this case, the alleged violation of the employee’s FMLA rights occurred prior to her acceptance of the severance agreement.¹⁶⁰ Therefore, the court held that her claims were effectively barred by the contract.¹⁶¹

3. An Employee’s Ability to Refuse FMLA Protection

Employees may not only waive existing FMLA claims, but through their actions they may waive FMLA protection of qualifying leave after they have been properly notified of their FMLA rights.¹⁶² Courts across the country have affirmed an employer’s ability to take disciplinary action against a notified employee in certain circumstances.¹⁶³ Even if the employer is aware of a FMLA-qualifying reason for the absence, so long as it has fulfilled its statutory obligations it may discipline a notified employee who fails to provide the medical certification required by 29 C.F.R. § 825.313.¹⁶⁴

In *Ridings v. Riverside Medical Center*, an employee developed a serious health condition.¹⁶⁵ Without permission, she began working limited hours on-site due to fatigue.¹⁶⁶ The employer informed her of

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1124. “An employer could not, for example, offer all new employees a one-time cash payment in exchange for a waiver of any future FMLA claims.” *Id.* at 1123.

¹⁶⁰ *Id.* at 1124.

¹⁶¹ *Id.*

¹⁶² *See, e.g.,* *Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 771 (7th Cir. 2008).

¹⁶³ *E.g.,* *Ridings*, 537 F.3d at 771; *Hunt v. Altec Indus., Inc.*, No. 2:14-cv-1626-JHH, 2015 WL 5602437, at *7 (N.D. Ala. Sept. 22, 2015) (“[The employee] understood the policy and he failed to follow it. [The employee’s] failure to fulfill his obligations under [the employer’s] procedural requirements to apply for FMLA leave forecloses his ability to bring an FMLA interference claim.”); *Nurse v. Windham Cmty. Mem’l Hosp.*, No. 3:10-CV-00177 CSH, 2012 WL 6727620, at *11 (D. Conn. Dec. 28, 2012) (“FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA claims.”) (quoting *Basso v. Potter*, 596 F. Supp. 2d 324, 336 n.4 (D. Conn. 2009)).

¹⁶⁴ *See Ridings*, 537 F.3d at 771.

¹⁶⁵ *Id.* at 759.

¹⁶⁶ *Id.*

her FMLA rights and requested several times that she either work on-site for eight hours each day or complete a request for intermittent FMLA leave.¹⁶⁷ The employee did not complete the paperwork and continued to leave early.¹⁶⁸ After multiple requests over several months, the employer began a progressive discipline process that resulted in her termination.¹⁶⁹

The employee sued,¹⁷⁰ but the district court granted summary judgment for the employer on the FMLA interference claim because the employee did not complete the medical certification and thus effectively rejected FMLA leave.¹⁷¹ Her rejection was clear on the face of her complaint, with statements such as “[she] did not desire to take medical leave under FMLA,” and that “[she] refused to apply for FMLA leave.”¹⁷² The Seventh Circuit affirmed the district court’s decision.¹⁷³ There was no question that the employer had fulfilled its notice obligations and had provided ample opportunity for the employee to provide the appropriate documentation to invoke FMLA.¹⁷⁴ More significantly to analyzing *Escriba*, the court found that the employee’s intentional refusal to invoke FMLA protection precluded her from bringing a later FMLA interference claim.¹⁷⁵

II

BACKGROUND: *ESCRIBA V. FOSTER POULTRY FARMS, INC.*

The issue of whether an employee may refuse FMLA-protected leave reached the Ninth Circuit in 2014 in *Escriba v. Foster Poultry Farms, Inc.*¹⁷⁶ Maria Escriba was terminated from Foster Poultry Farms (Foster Farms) after eighteen years of working there without any attendance issues for violating the “three day no-show, no-call

¹⁶⁷ *Id.* at 759–60.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 760.

¹⁷⁰ *Id.* at 758.

¹⁷¹ *See id.* at 771, 775.

¹⁷² *Id.* at 766 (quoting the employee’s deposition).

¹⁷³ *Id.* at 771.

¹⁷⁴ *See id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014). The Eastern District of California granted Ms. Escriba an exception to the otherwise mandatory attorney fee payments because her case was a matter of public importance. *Escriba v. Foster Poultry Farms*, No. 1:09-CV-1878 LJO MJS, 2012 WL 174847, at *4–5 (E.D. Cal. Jan. 20, 2012) (denying Foster Farms’ motion to recover costs). While the parties’ arguments and Ninth Circuit decision discussed whether this designation was appropriate, *e.g.*, *Escriba*, 743 F.3d at 1247–49, it is beyond the scope of this analysis.

rule.”¹⁷⁷ Ms. Escriba claimed her FMLA rights were violated because she was terminated while absent for a FMLA-qualifying reason.¹⁷⁸ A jury found otherwise and the claim was dismissed.¹⁷⁹

Escriba appealed on a variety of issues. The most significant were whether Foster Farms provided proper notice of her FMLA rights, whether she could legally refuse FMLA, and whether evidence of her prior FMLA use was properly admitted to the jury.¹⁸⁰ The Ninth Circuit affirmed the district court's determinations on all issues submitted for appeal.¹⁸¹

A single sentence in the *Escriba* opinion has created uncertainty about employer FMLA policies across the Ninth Circuit. The court's statement, that “an employee can affirmatively decline to use FMLA leave,”¹⁸² echoes the Seventh Circuit's ruling in *Ridings*. However, when read in context with DOL guidelines and other judicial precedent, it becomes clear that the phrase should read: “an employee can affirmatively decline to use FMLA leave *when the employer's policy allows the employee to do so.*”

A. Factual Background

Ms. Escriba was a low-wage worker at Foster Farms who spoke little English and had a third-grade education.¹⁸³ She had previously invoked FMLA-protected leave fifteen times during her eighteen-year career with Foster Farms.¹⁸⁴ Contrary to the written policy, Foster Farms allowed employees to initially decline FMLA leave, and wait to invoke the entitlement until after they had exhausted their accrued leave.¹⁸⁵ Ms. Escriba was aware of this policy.¹⁸⁶

¹⁷⁷ *Escriba*, 743 F.3d at 1239; Appellant's Opening Brief at 9, *Escriba*, 743 F.3d 1236 (9th Cir. 2014) (No. 1:09-cv-01878-LJO-MJS). For further description of the “three-day, no-show, no-call” rule, see *infra* text accompanying note 196.

¹⁷⁸ *Escriba*, 743 F.3d at 1239.

¹⁷⁹ *Id.*

¹⁸⁰ See Appellant's Opening Brief, *supra* note 177, at 3–4.

¹⁸¹ *Escriba*, 743 F.3d at 1249.

¹⁸² *Id.* at 1244.

¹⁸³ Appellant's Opening Brief, *supra* note 177, at 8. Escriba earned \$9.71 per hour. *Id.* at 9.

¹⁸⁴ Second Stage Brief for Foster Poultry Farms, Inc. at 8, *Escriba*, 743 F.3d 1236 (9th Cir. 2014) (No. 1:09-cv-1878) [hereinafter Appellee's Opening Brief]; see also discussion *infra* Part II.B.

¹⁸⁵ See Appellee's Opening Brief, *supra* note 184, at 7.

¹⁸⁶ *Id.* at 8.

Ms. Escriba knew that she needed to take leave to visit her ailing father in October 2007.¹⁸⁷ At that time, her daughter booked her a round-trip ticket to visit Guatemala from late November to late December 2007.¹⁸⁸

Days before her intended departure date, Ms. Escriba asked her supervisor for her two weeks of accrued vacation leave to visit her sick father.¹⁸⁹ Since her direct supervisor did not speak Spanish, another supervisor confirmed in Ms. Escriba's native language that she wanted "strictly . . . vacation time and not family leave."¹⁹⁰ Each time Ms. Escriba responded that she only wanted to request her two weeks of vacation.¹⁹¹ Her supervisors did not inform her of her FMLA rights at that time.¹⁹² However, her Spanish-speaking supervisor told her that she could request more time off to care for her father by contacting the Foster Farms Human Resources Department and providing a doctor's note verifying her father's health issues.¹⁹³

While in Guatemala Ms. Escriba determined that she would need to extend her stay for two weeks longer than she had requested from Foster Farms, but in line with her initial plane ticket.¹⁹⁴ Neither she nor her husband, another Foster Farms employee who she spoke to several times on the telephone while she was visiting her father, notified Foster Farms of her extended absence.¹⁹⁵ Ms. Escriba's employment was terminated in December 2007 under the "three day no-show, no-call rule."¹⁹⁶

¹⁸⁷ *Id.* at 4.

¹⁸⁸ *Escriba*, 743 F.3d at 1240.

¹⁸⁹ *Id.* This is a FMLA-qualifying reason for leave. *Id.* at 1240.

¹⁹⁰ *Id.* at 1240–41 (internal quotations omitted).

¹⁹¹ *Id.* at 1240.

¹⁹² *Id.* at 1241.

¹⁹³ *Id.* Ms. Escriba denies that this advice was ever given. *Escriba v. Foster Poultry Farms*, 793 F. Supp. 2d 1147, 1154 (E.D. Cal. 2011) (disputed facts Nos. 21–22). The Ninth Circuit applied the facts found by the jury during the trial. *See Escriba*, 743 F.3d at 1242–44.

¹⁹⁴ *Escriba*, 743 F.3d at 1240, 1242–44. Ms. Escriba's return plane ticket did not change. *See id.* at 1240.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* Under this rule, an employee who did not report to work for three days without notifying Foster Farms of an approved reason, such as a need for unforeseeable FMLA-qualifying leave, would be automatically terminated. Appellee's Opening Brief, *supra* note 184, at 10. This rule was negotiated between the union and Foster Farms in the collective bargaining process. *Id.* at 9–10.

B. Foster Farms' FMLA Policy

Foster Farms gave an additional benefit to its employees through their FMLA substitution policy. While its policy required concurrent use of substituted leave if paid leave had not previously been exhausted, Foster Farms still allowed employees to exhaust their paid leave before invoking their FMLA entitlement.¹⁹⁷ Foster Farms mistakenly believed that it could not “force” employees to take protected leave, so it allowed employees to expressly decline FMLA before they requested an additional twelve weeks of protected unpaid leave later.¹⁹⁸ This provided an additional benefit to its employees, and employees frequently chose to take advantage of this benefit by initially declining FMLA in order to preserve their protected leave for a later date.¹⁹⁹

C. District Court Decision

Ms. Escriba's union filed a grievance on her behalf, but the Board of Adjustment upheld her termination under the Collective Bargaining Agreement (CBA).²⁰⁰ The union chose not to take her appeal to the National Labor Relations Board (NLRB).²⁰¹ Ms. Escriba individually challenged the union's decision to the NLRB, but the NLRB upheld the union's decision against further pursuing the grievance.²⁰² Since she had exhausted her administrative remedies,²⁰³ she filed an interference claim under both the Family Medical Leave Act and the California Family Rights Act.²⁰⁴

At trial, the jury found for Foster Farms.²⁰⁵ Escriba challenged the verdict.²⁰⁶ She claimed that as a matter of law she could not decline

¹⁹⁷ *Id.* at 7.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Escriba v. Foster Poultry Farms*, 793 F. Supp. 2d 1147, 1155 (E.D. Cal. 2011).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ However, FMLA, unlike many other labor issues, does not require exhaustion of administrative remedies prior to filing a civil suit. *See* 29 U.S.C. § 2617 (2012).

²⁰⁴ *Escriba*, 793 F. Supp. 2d at 1152. As discussed in Part I.A.6, the California Family Rights Act's applicable provisions are similar to FMLA. *See supra* note 102. Therefore, the court's analysis determines each of Ms. Escriba's claims under FMLA.

²⁰⁵ *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1239 (9th Cir. 2014). Foster Farms cross-appealed regarding costs. Appellee's Opening Brief, *supra* note 184, at 3. The

FMLA, that she had not been provided proper notice of her FMLA rights, and that evidence of her prior FMLA use was unduly prejudicial.²⁰⁷ The court dismissed her motion for a new trial.²⁰⁸ The court upheld its evidentiary ruling because Ms. Escriba's prior use of FMLA leave was relevant to determine whether or not she intended to invoke FMLA in this circumstance.²⁰⁹ Also, the court had instructed the jury to only use Ms. Escriba's prior FMLA leave to determine whether she intended to invoke FMLA protection.²¹⁰ Since there is a strong presumption that the jury will "follow the instructions given to it," the evidence did not unduly prejudice the jury against her.²¹¹

D. Parties' Arguments

Both parties presented arguments about several issues. These issues included whether 29 C.F.R. § 825.220(d) statutorily forbade Ms. Escriba from declining FMLA protection,²¹² whether Ms. Escriba provided proper notice to trigger her FMLA rights,²¹³ and whether evidence that Ms. Escriba had previously taken FMLA leave was properly admitted to the jury.²¹⁴

part of the *Escriba* opinion about costs is not relevant to this article's analysis and therefore not discussed any further.

²⁰⁶ *Escriba v. Foster Poultry Farms*, No. 1:09-CV-1878 OWW MJS, 2011 WL 4565857, at *1 (E.D. Cal. Sept. 29, 2011).

²⁰⁷ *Id.* at *1, *4 n.4.

²⁰⁸ *Id.* at *10.

²⁰⁹ *Id.* at *4 n.4.

²¹⁰ *See Escriba*, 743 F.3d at 1246.

²¹¹ *Id.* at 1246. The jury was instructed "that these prior leaves are not and may not be presented to suggest that Ms. Escriba took too many leaves or for any other negative conclusion about Ms. Escriba's leave history." *Id.* at 1246.

²¹² Appellant's Opening Brief, *supra* note 177, at 25–30; Appellee's Opening Brief, *supra* note 184, at 40–48. The regulations state, in relevant part, that "[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer." 29 C.F.R. § 825.220(d) (2015). During the appeal, the parties presented the same arguments under 29 C.F.R. § 825.208, which has been removed from the updated version of the regulations effective in 2009. Appellant's Opening Brief, *supra* note 177, at 25–30; Appellee's Opening Brief, *supra* note 184, at 40–48; *see also* 29 C.F.R. pt. 825.

²¹³ Appellant's Opening Brief, *supra* note 177, at 18–23; Appellee's Opening Brief, *supra* note 184, at 31–36.

²¹⁴ Appellant's Opening Brief, *supra* note 177, at 39–42; Appellee's Opening Brief, *supra* note 184, at 49–51.

1. *Escriba's Arguments*

Escriba argued that, as a matter of law, an employee cannot “refuse to exercise” her FMLA rights” because it is waiving the FMLA entitlement.²¹⁵ Waiver is forbidden under 29 C.F.R. § 825.220(d), and it is the *employer's* responsibility to recognize and designate FMLA leave.²¹⁶ This was Foster Farms’ obligation and it did not fulfill that obligation.²¹⁷ Escriba further argued that Congress intended to protect employees’ jobs during all qualified absences.²¹⁸ Allowing employees to refuse FMLA protection directly contradicts that intent.²¹⁹ Instead of creating a right of refusal, Congress gave each party duties under FMLA.²²⁰ The employee has a duty to notify the employer of a FMLA-qualifying reason for leave.²²¹ The employer, on the other hand, has a duty to appropriately designate the absence as FMLA-protected.²²² Further, Escriba argued, the employee’s intention to invoke FMLA is not a consideration under the statute, the regulations, or Ninth Circuit jurisprudence.²²³

Escriba next addressed the failure to provide notice claim.²²⁴ She reminded the court that FMLA only requires the employee to notify the employer of a qualifying reason for leave.²²⁵ It is the employer’s responsibility to recognize the reason as FMLA-qualifying,²²⁶ to counsel the employee on their FMLA rights and the consequences of not fulfilling their FMLA obligations,²²⁷ and to designate the leave as FMLA-protected.²²⁸ In this case, she argued, she fulfilled her responsibilities, but Foster Farms did not.²²⁹ In telling her supervisor that she needed to care for her ailing father in Guatemala, she gave

²¹⁵ Appellant’s Opening Brief, *supra* note 177, at 25.

²¹⁶ *Id.* at 25–26.

²¹⁷ *See id.*

²¹⁸ *Id.* at 27, 29.

²¹⁹ *Id.* at 29.

²²⁰ *Id.* at 28–29.

²²¹ *See id.* at 28.

²²² *Id.* at 28–29.

²²³ *Id.* at 29.

²²⁴ *Id.* at 18–23.

²²⁵ *Id.* at 18.

²²⁶ *Id.*

²²⁷ *Id.* at 32.

²²⁸ *Id.* at 18.

²²⁹ *Id.* at 23.

her employer notice of a qualifying reason for FMLA protected leave.²³⁰ In response, her supervisor did not recognize that this invoked FMLA.²³¹ By the supervisor's own admission during the trial, he was not even aware that the leave qualified for FMLA protection.²³² Ms. Escriba did not receive notice of her rights in either writing or her own language prior to this absence.²³³ Foster Farms should have recognized and designated the leave as FMLA protected.²³⁴ It did not.²³⁵ As a result, Foster Farms interfered with her FMLA rights.²³⁶

Escriba also argued that the evidence of her prior invocation of FMLA was improperly admitted to the jury.²³⁷ Evidence may only be admitted if it is relevant to the circumstances at issue, and, she argued, this evidence was irrelevant.²³⁸ Ms. Escriba was not required to follow Foster Farms' internal policies to trigger her FMLA rights—so her familiarity with Foster Farms' regular FMLA procedure did not bear on whether proper notice was provided.²³⁹ Therefore, she argued that the only effect of this evidence was to prejudice the jury against her.²⁴⁰ By introducing the jury to her prior leaves, the jury's attention was focused on facts that had no bearing on the legal outcome.²⁴¹ This evidence allowed Foster Farms to “mislead” the jury.²⁴²

2. *Foster Farms' Arguments*

Foster Farms asked the Ninth Circuit to uphold the jury's verdict that Ms. Escriba could decline FMLA leave.²⁴³ First, Foster Farms addressed Escriba's waiver argument.²⁴⁴ It argued the issue was precluded from review because Escriba did not raise the issue during

²³⁰ *Id.* at 20–21.

²³¹ *Id.* at 32.

²³² *Id.* at 10.

²³³ *Id.* at 33–34.

²³⁴ *Id.* at 32.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 39–42.

²³⁸ *Id.* at 39–41.

²³⁹ *Id.* at 41–42.

²⁴⁰ *Id.* at 42.

²⁴¹ *Id.*

²⁴² *Id.* at 43.

²⁴³ Appellee's Opening Brief, *supra* note 184, at 36.

²⁴⁴ *Id.* at 37.

the initial trial.²⁴⁵ However, Foster Farms continued, if the argument was permitted, Ms. Escriba was allowed to—and a reasonable jury found that she did—decline FMLA protection.²⁴⁶ When 29 C.F.R. § 825.220(d) is read alongside the rest of the section, this regulation does not prohibit an employee from declining FMLA.²⁴⁷ Rather, the regulation prohibits employers from using FMLA as a bargaining subject.²⁴⁸

Foster Farms also focused its argument upon its leave policy.²⁴⁹ The FMLA policy allowed employees to enjoy an additional benefit by using paid and unpaid leave consecutively rather than concurrently.²⁵⁰ Foster Farms maintained that neither FMLA nor the DOL regulations prevent an employee from refusing FMLA protection.²⁵¹ The regulations *allow* an employer to place an employee on FMLA-protected leave without the employee's consent; however, they *do not require* an employer to do so.²⁵² A jury found that Ms. Escriba knew about her rights and intentionally took action to only take vacation leave.²⁵³ Foster Farms argued that the evidence supported the jury's conclusion that Ms. Escriba affirmatively declined FMLA protection, and therefore the verdict should not be disturbed.²⁵⁴

Next, Foster Farms responded to Escriba's notice argument.²⁵⁵ Its response centered on the jury's determination that Ms. Escriba did not provide proper notice for her FMLA needs.²⁵⁶ Foreseeable leave requires either thirty days' notice or notice as soon as practicable.²⁵⁷ Despite planning her trip to Guatemala in late October—more than thirty days before needing leave—Ms. Escriba did not inform her

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 40.

²⁴⁷ *See id.* at 40–41.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 41.

²⁵⁰ *See id.*

²⁵¹ *Id.* at 44.

²⁵² *Id.* at 43.

²⁵³ *Id.* at 46–47. For example, Ms. Escriba requested leave from her direct supervisors rather than from Human Resources and told her supervisors twice that she did not want family leave. *Id.*

²⁵⁴ *Id.* at 46–48.

²⁵⁵ *Id.* at 32–36.

²⁵⁶ *Id.* at 31–36.

²⁵⁷ *Id.* at 32.

employer of her need until mid-November.²⁵⁸ The employer is not required to grant FMLA leave until thirty days after the request in a non-emergency situation.²⁵⁹ This was not an emergency situation.²⁶⁰ Even if the court found that Ms. Escriba could not refuse FMLA, she did not fulfill her notice obligations.²⁶¹ Therefore, her absences were still unauthorized and Foster Farms had the right to terminate her under the CBA.²⁶²

Finally, Foster Farms asserted that the evidence of Ms. Escriba's fifteen prior leaves was properly admitted to the jury.²⁶³ The evidence was relevant because it proved that she knew about FMLA leave and how to obtain it.²⁶⁴ While Ms. Escriba was not required to follow any specific employer procedure to initially request FMLA leave, the evidence showed that she intended to only take her accrued vacation leave.²⁶⁵ Further, Foster Farms argued, even if the evidence was improperly admitted to the jury, the limiting instruction given by the judge prevented any prejudice against Ms. Escriba.²⁶⁶ This instruction directed the jury to only consider the previous absences as evidence that Ms. Escriba intended to refuse FMLA-protected leave.²⁶⁷ Thus, if an error existed, it was harmless.²⁶⁸

III NINTH CIRCUIT RATIONALE

The Ninth Circuit affirmed the district court's rulings on all issues presented for appeal.²⁶⁹ The court did not directly address whether Foster Farms had met its notice obligations. Nor was the timing of Ms. Escriba's leave request discussed. Instead, the court reviewed the case in light of the jury's decision,²⁷⁰ which found for Foster

²⁵⁸ *Id.* at 32–33.

²⁵⁹ *Id.* at 36.

²⁶⁰ *Id.* at 35.

²⁶¹ *Id.* at 36.

²⁶² *See id.*

²⁶³ *Id.* at 49–50.

²⁶⁴ *Id.*

²⁶⁵ *Id.* Foster Farms argued that Ms. Escriba was simply trying to confuse the issues. *Id.* at 50.

²⁶⁶ *Id.* at 50–51.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1249 (9th Cir. 2014).

²⁷⁰ *Id.* at 1242.

Farms.²⁷¹ This Part first outlines the court's reasoning in determining that an employee may decline FMLA leave. Then, it discusses why the court found that admission of Ms. Escriba's previous FMLA leave was proper.

A. The Right to Decline FMLA Protection

The Ninth Circuit affirmed the district court's decision that an employee may statutorily decline FMLA protection.²⁷² Specifically, the court found that the evidence showed Ms. Escriba did decline FMLA protection.²⁷³ While the statute is silent on whether an employee may defer FMLA, the court determined that DOL guidance implies that an employee can.²⁷⁴ The DOL implicitly places the burden of consent on the employee by requiring the employee to provide additional information through a medical certification.²⁷⁵ The certification is essential to the FMLA designation process because it protects employers against involuntary leave claims.²⁷⁶ Further, the court emphasized that employers should inquire "*whether FMLA leave is being sought by the employee*" if the employee requests leave for a FMLA-qualifying reason.²⁷⁷ Therefore, the court found that DOL guidance and previous judicial interpretation "suggest[]" that employees may "affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection."²⁷⁸

Next the court addressed the meaning of waiver under 29 C.F.R. § 825.220(d).²⁷⁹ First, the court noted the context of the cited

²⁷¹ *Escriba v. Foster Poultry Farms*, 793 F. Supp. 2d 1147, 1170 (E.D. Cal. 2011).

²⁷² *Escriba*, 743 F.3d at 1244 (citing *Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 769 n.3 (7th Cir. 2008)).

²⁷³ *Id.* at 1244–45.

²⁷⁴ *Id.* at 1243–44. "[N]othing in the FMLA precludes an employee from deferring the exercise of his or her FMLA rights and . . . the preservation of future FMLA leave is a compelling practical reason why an employee might wish to do so." *Id.* at 1247.

²⁷⁵ *See id.* at 1243–44. Medical certification was not directly mentioned by the court. Instead, the court discussed an employee's obligation to provide more information to confirm that their desire is to invoke FMLA protection. *Id.*

²⁷⁶ *Id.* at 1244.

²⁷⁷ *Id.* (quoting *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130–31 (9th Cir. 2001)).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

sentence.²⁸⁰ This provision, in its entirety, applies primarily to negotiating benefits packages.²⁸¹ Further, the definition of waiver defeats Ms. Escriba's argument.²⁸² Waiver, as used in the regulation, constitutes the permanent and "voluntary relinquishment of a known right,"²⁸³ and later use is not a permanent relinquishment of the right.²⁸⁴ In this case, the employer's policy allowed Ms. Escriba to exhaust her paid leave before invoking her FMLA rights, and the jury found that Ms. Escriba refused FMLA protection so she could invoke the entitlement at a later date.²⁸⁵ Based on the jury's findings, the Ninth Circuit approved of the district court's ruling: that Ms. Escriba had "unequivocally refused to exercise [her FMLA] right."²⁸⁶

B. Admission of Prior Leave for Jury Consideration

The Ninth Circuit found the district court did not abuse its discretion by allowing evidence of Ms. Escriba's prior FMLA use to be admitted to the jury.²⁸⁷ The court also found her evidentiary objection was legally unfounded, and, even if it was not, the district court's jury instruction rendered the admission harmless.²⁸⁸

Evidence is admissible if it tends to prove or disprove an essential fact.²⁸⁹ Foster Farms submitted this evidence to show that Ms. Escriba intended to preserve her leave for future use and purposefully requested only vacation leave.²⁹⁰ Ms. Escriba's evidentiary contention was not legally founded since the court held that she could

²⁸⁰ *Id.*

²⁸¹ *Id.* The prohibition on waiving FMLA rights applies to unions who collectively bargain for their member-employees. *See* *Bhd. of Maint. of Way Emps. v. CSX Transp., Inc.*, 478 F.3d 814, 820 (7th Cir. 2007).

²⁸² *Escriba*, 743 F.3d at 1244.

²⁸³ *Id.* (quoting *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1119 (9th Cir. 2009)). The Ninth Circuit adopted this definition of "waiver" from Delaware case law to resolve a credit card fee dispute. *See Hauk*, 552 F.3d at 1119 (quoting *Klein v. Am. Luggage Works, Inc.*, 158 A.2d 814, 818 (Del. 1960)).

²⁸⁴ *Escriba*, 743 F.3d at 1244.

²⁸⁵ *Id.* at 1244–45.

²⁸⁶ *Id.* (quoting *Escriba v. Foster Poultry Farms*, No. 1:09-CV-1878 OWW MJS, 2011 WL 4565857, at *1, *7 (E.D. Cal. Sept. 29, 2011)).

²⁸⁷ *Id.* at 1246–47. The jury instruction is quoted *supra* note 211.

²⁸⁸ *Id.* The jury was instructed that it may not draw "negative conclusion[s]" from her prior invocation of FMLA. *Id.* at 1246.

²⁸⁹ *Id.* at 1246 (citing FED. R. EVID. 401(b)).

²⁹⁰ *Id.* at 1246–47.

refuse FMLA leave.²⁹¹ Without a legal basis for the evidentiary challenge, the court affirmed the district court's ruling.²⁹²

The court further found that even if her argument was permitted, the error was harmless.²⁹³ An error is harmless when it does not unduly prejudice the opposing party.²⁹⁴ Since the jury is strongly "presumed to follow the instructions given to it,"²⁹⁵ the jury instruction—which prohibited jurors from drawing a negative inference based on her prior use of FMLA—properly mitigated any prejudice against Ms. Escriba based upon her previous leave.²⁹⁶

The Ninth Circuit affirmed the district court's decision on all grounds.²⁹⁷ Depending upon how this case is interpreted—especially the court's statement that "an employee affirmatively decline to use FMLA leave"²⁹⁸—*Escriba* could have a lasting impact on the administration of FMLA policy. Throughout the Ninth Circuit, this case has sparked conversation on whether it is the employer's or the employee's right to choose if leave is designated as FMLA.²⁹⁹

IV

IMPLICATIONS OF THE NINTH CIRCUIT'S *ESCRIBA* DECISION

Escriba has instigated discussion among employment attorneys about whether FMLA policies must be amended to allow employees to decline FMLA protection.³⁰⁰ This Part discusses the judicial decisions that have interpreted *Escriba*, although the interpretation

²⁹¹ *Id.* at 1247.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ The Constitution does not guarantee a perfect, error-free trial—it guarantees a fair one. *United States v. Hasting*, 461 U.S. 499, 508–09 (1983). Errors are assessed for harmlessness by determining whether the type of error, the impact upon the trial, and the strength of the opposition's case without the error. *See generally* Charles S. Chapel, Comment, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501 (1998) (discussing the evolution of harmless error review and its application in different types of cases). If the error prejudiced the moving party, the case should be remanded for a new trial untainted by the error. *See Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

²⁹⁵ *Escriba*, 743 F.3d at 1247 (quoting *United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007) (en banc)).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 1249.

²⁹⁸ *Id.* at 1244.

²⁹⁹ *E.g.*, Jones, *supra* note 14; Nowak, *supra* note 14.

³⁰⁰ *E.g.*, Jones, *supra* note 14; Nowak, *supra* note 14.

thus far has not been meaningful. Then, this Part proposes why it matters to employment attorneys and FMLA policy makers whether an employee declines FMLA, and, finally, this Part concludes the Note by discussing the practical effects of the decision on employer FMLA policies and arguing that no substantive change is required.

A. Subsequent Judicial Decisions

Since the *Escriba* decision, courts across the nation have cited the case; however most citing decisions do not reference an employee's ability to decline FMLA protection.³⁰¹ Instead, the cases cite *Escriba* as authority which outlines the elements of a prima facie case for FMLA interference,³⁰² indicates a strong presumption that the jury will follow instructions,³⁰³ or retains costs to the prevailing party under certain circumstances.³⁰⁴ Thus far, however, no judicial opinion has discussed *Escriba*'s allowance of FMLA refusal in a way that provides meaningful guidance to employers in policy formation.³⁰⁵ However, a few district court opinions have flirted with the concept.

In *Fitzgerald v. Shore Memorial Hospital*, the District Court of New Jersey determined that whether an employee intended to refuse FMLA is a question of fact for the jury.³⁰⁶ After being approved for a one-year period of intermittent FMLA leave, the employee was absent several times without providing a doctor's note.³⁰⁷ Her employer counseled her about her absences, and later terminated her.³⁰⁸ When she sued, she presented evidence that her absences were related to a heart condition.³⁰⁹ In defense to her FMLA interference claim, the employer argued that *Escriba* allowed the court to conclude that she

³⁰¹ According to a Westlaw "Citing References" report conducted on September 7, 2015, thirty-one cases have cited *Escriba*.

³⁰² *E.g.*, *Golez v. U.S. Postal Serv.*, 585 F. App'x 365, 366 (9th Cir. 2014).

³⁰³ *E.g.*, *Arnold v. Pfizer, Inc.*, No. 3:10-cv-01025-AC, 2015 WL 268967, at *13 (D. Or. Jan. 21, 2015).

³⁰⁴ *E.g.*, *Marugame v. Johnson*, No. 11-00710 LEK-BMK, 2015 WL 456549, at *2 (D. Haw. Feb. 2, 2015).

³⁰⁵ One judicial order did reject the plaintiff's claim that he was unable to refuse FMLA leave and cited *Escriba*; however, like *Foster Farms*, it appears that the employer allowed the employee to decline his FMLA entitlement instead of mandating that the employee use his FMLA concurrently. *Hudson v. Tyson Fresh Meats, Inc.*, No. 12-CV-2079-LRR, 2015 WL 4742052, at *3 (N.D. Iowa, Aug. 11, 2015).

³⁰⁶ *Fitzgerald v. Shore Mem'l Hosp.*, 92 F. Supp. 3d 214, 230 (D.N.J. 2015).

³⁰⁷ *Id.* at 223.

³⁰⁸ *Id.*

³⁰⁹ *See id.* at 224.

knew how to invoke FMLA and chose not to do so.³¹⁰ However, the court found that summary judgment was not appropriate.³¹¹ Instead, it contrasted the case with *Escriba*, focusing on whether there was an express desire to refuse FMLA protection and determining that the jury was the appropriate fact-finder.³¹² The opinion does not mention whether or not the employer's FMLA policy allowed employees to decline the protection provided by FMLA.³¹³

Two more cases discuss *Escriba's* warning against involuntary leave. In *Clink v. Oregon Health and Science University*, the District Court of Oregon read *Escriba* as a prohibition against employers forcing unwilling employees to "burn up" their FMLA leave.³¹⁴ Specifically, the court warned about potential involuntary leave liability for the employer.³¹⁵ In *Clink*, however, the court never reached either the issue of involuntary leave or the employee's right to refuse FMLA protection because the employee could not establish a prima facie case for FMLA interference.³¹⁶ Since the employee could no longer perform the essential functions of his position, he was not entitled to FMLA leave.³¹⁷

The other case that discussed refusal of FMLA protection under *Escriba* did so in dicta. The dissent in *Livingood v. Unemployment Compensation Board of Review*, a Pennsylvania worker's compensation case, interpreted *Escriba* as "an employee benefit, not an employer benefit."³¹⁸ The dissent cited *Escriba* as legal precedent that the invocation of FMLA is optional and taken at the request of the employee only.³¹⁹ Further, it emphasized that the Ninth Circuit stated that forcing an employee to take FMLA leave could create employer liability for an involuntary leave claim since an employee may affirmatively decline this protection.³²⁰ This dissent, like the

³¹⁰ *Id.* at 229.

³¹¹ *Id.* at 230.

³¹² *Id.* at 229–30.

³¹³ *See id.* at 221–22.

³¹⁴ *Clink v. Or. Health & Sci. Univ.*, No. 3:13-cv-01323-SI, 2014 WL 3850013, at *5 (D. Or. Aug. 5, 2014).

³¹⁵ *Id.*

³¹⁶ *Id.* at *5–6.

³¹⁷ *Id.*

³¹⁸ *Livingood v. Unemployment Comp. Bd. of Review*, No. 1818 C.D.2013, 2014 WL 4461048, at *6 (Pa. Commw. Ct. Sept. 11, 2014) (Pellegrini, J., dissenting).

³¹⁹ *Id.* at *7

³²⁰ *Id.*

discussion in *Clink*, fails to appreciate the elements of a FMLA involuntary leave claim.

Involuntary leave is not a broad net that creates a right of action for any employee placed on FMLA leave who did not make a specific request for it.³²¹ Involuntary leave claims require first, that no qualifying reason existed for the designation, and second, that the designation later prevented the employee from obtaining FMLA leave when a qualifying need arose.³²² It is *only* when both of these requirements are met that the employee's FMLA rights have been interfered with.³²³

FMLA and its accompanying regulations allow employer flexibility in administering FMLA leave, including determining whether a qualifying reason exists for the designation.³²⁴ So long as a qualifying reason for the absence existed and the employer properly documented the reason for the absence, the employer may place the employee on leave regardless of the employee's wishes and is not liable for an involuntary leave claim.³²⁵ Understanding what constitutes an involuntary leave claim is important for both employers and courts in a post-*Escriba* world.

B. Why It Matters if Employees Decline FMLA Protection

During the deliberations over FMLA, the U.S. House of Representatives debated about the meaning of FMLA to employers and employees.³²⁶ One aspect of the discussion focused on whether employees would abuse the entitlement.³²⁷ Enraged, Representative Mink (D-Haw.) declared, "[i]t is ridiculous to assume that people will abuse this law. Who in the world is going to take leave without pay for other than the most serious of all reasons?"³²⁸ Is this aggravating accusation the reason *Escriba's* effect on FMLA matters to employment attorneys and FMLA policy makers? Put another way: is there a patent mistrust of employees to responsibly determine if they

³²¹ See discussion *supra* Part I.B.1.

³²² *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 449 (6th Cir. 2007).

³²³ *Id.*

³²⁴ See The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2207 (Jan. 6, 1995) (supplementary information to regulations).

³²⁵ *Harvender v. Norton Co.*, No. 96-CV-653 (LEK/RWS), 1997 WL 793085, at *8 (N.D.N.Y. Dec. 15, 1997).

³²⁶ See generally 139 CONG. REC. 1958–2048 (1993).

³²⁷ *Id.* at 1982 (statement of Rep. Dornan).

³²⁸ *Id.* at 1986.

want to concurrently use their FMLA leave without them being tempted to abuse the right?

Yes and no. Any right may be abused, and unfortunately only circumstances where either the employer or the employee has allegedly wronged the other party are brought to the public's attention. When the employer and employee work together to balance both parties' needs, there is not a court case or newspaper article. *Escriba's* effects matter because, while there can never be certainty regarding an employer's workforce due to unexpected illness, accidents, retirement, or an employee taking an offer for another position, having certainty about how long the absence is expected to last creates more stability for the employer. This stability allows employers to remain flexible with other employee's scheduling requests, and to plan for workflow and hiring. The other side of the FMLA equation—the employer's needs—should not be ignored.

C. Effects Upon Employer Policies

Employers with clearly written FMLA policies do not need to amend their current substitution procedures in response to the *Escriba* decision. However, it is advisable that the employer's policy regarding refusal of FMLA leave be explicitly stated in the policy. This may be as simple as the following statement: "If [employer] becomes aware of any qualifying reason for FMLA leave, [employer] will designate it as such. An employee may not refuse FMLA protection under [employer]'s policy."

There is a clear distinction between the policies of most employers and Foster Farms. Foster Farms' FMLA policy, at least in practice, allowed employees to expressly decline FMLA leave and defer invocation of their FMLA entitlement until after they had exhausted all of their available accrued leave.³²⁹ Most employers do not allow this.³³⁰ Rather, if the employer is aware that a qualifying reason exists, it retroactively designates the leave as FMLA under 29 C.F.R. § 825.301(d). Foster Farms, however, did not believe that it could retroactively designate employee leave as FMLA.³³¹ Instead, it

³²⁹ Appellee's Opening Brief, *supra* note 184, at 7.

³³⁰ See e.g., *SHRM Sample Policy*, *supra* note 12, § G.

³³¹ Appellee's Opening Brief, *supra* note 184, at 7.

consistently offered its employees the additional benefit of stacking accrued and FMLA leave.³³²

Employers who require concurrent use of FMLA and accrued leave do not need to amend their FMLA policies to allow employees to decline FMLA. The statute and the regulations are designed to give employers maximum flexibility while still protecting the ability of employees to care for personal needs. This intention is shown through the options given to employers. One option is that an employer may create a FMLA policy that allows employees to initially refuse FMLA-protected leave despite a qualifying reason. Foster Farms, in practice, had a policy that did just that.³³³ Employees commonly refused FMLA until their accrued leave was exhausted and then invoked their FMLA leave at a later date.³³⁴ Foster Farms' mistaken belief that it could not retroactively designate qualifying leave as FMLA and the resulting informal FMLA leave policy is what led to this litigation, and ultimately to this statement by the Ninth Circuit. This decision does not have sweeping implications that limit employers' administration of FMLA. Instead, this decision affirmed the ability of employers to offer more generous leave options to its employees than federal law requires.

The court's statement in *Escriba* relied upon the decision in *Ridings*,³³⁵ which expanded employer flexibility in FMLA administration.³³⁶ *Ridings* affirmed that employers may discipline employees who are absent for qualifying reasons but have refused to participate in the FMLA designation process.³³⁷ Because the employee in *Ridings* never completed the paperwork to request FMLA—which would have identified the date the medical issue began and thus allowed the employer to retroactively designate her absences as FMLA leave—the specific FMLA policies of the employer were not assessed.³³⁸

The Ninth Circuit reasoning further supports employer administrative flexibility. The court stated that DOL guidance suggests that an employee can refuse FMLA protection.³³⁹ It found

³³² *Id.*

³³³ *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1245–46 (9th Cir. 2014).

³³⁴ Appellee's Opening Brief, *supra* note 184, at 7.

³³⁵ *Escriba*, 743 F.3d at 1244.

³³⁶ *See Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 771 (7th Cir. 2008).

³³⁷ *Id.*

³³⁸ *See id.*

³³⁹ *Escriba*, 743 F.3d at 1243.

that the regulations implicitly place a burden on the employee to consent to FMLA designation,³⁴⁰ and that previous judicial decisions allow an employer to inquire about the employee's intentions to seek FMLA leave.³⁴¹ However, none of these statements by the court *require* an employer to create a policy allowing employees to decline FMLA. Courts need not inquire into employee intentions,³⁴² nor should they. Instead, courts should examine whether a qualifying reason existed, whether the proper procedures were followed, and whether an adverse decision was taken against the employee for invoking their entitlement.³⁴³

The DOL uses the regulations to protect employees against too much discretion by employers in the administration of leave. Employers are required to notify employees of their FMLA rights,³⁴⁴ and clearly communicate their leave policies.³⁴⁵ Further, employers are held to the highest standard available under FMLA, the state's family and medical leave law, or their own policy.³⁴⁶ Employees, meanwhile, have a right to bring action against an employer who violates these rights.³⁴⁷ The regulations recognize that employer policies may change and that each employer may have a policy that is unique to their operation.³⁴⁸ An employer may not keep an employee "in the dark."³⁴⁹ Instead, an employer must allow the employee to

³⁴⁰ *See id.*

³⁴¹ *Id.*

³⁴² Harvender v. Norton Co., No. 96-CV-653 (LEK/RWS), 1997 WL 793085, at *8 (N.D.N.Y. Dec. 15, 1997).

³⁴³ These are rights of action given by Congress under 29 U.S.C. § 2615(a) (2012).

³⁴⁴ The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2219 (Jan. 6, 1995) (supplementary information to regulations).

E]mployees [must be given] the opportunity to learn from their employers of the manner in which that employer intends to implement FMLA and what company policies and procedures are applicable so that employees may make FMLA plans fully aware of their rights and obligations. It was anticipated that to some large degree these policies would be peculiar to that employer.

Id.

³⁴⁵ 29 C.F.R. § 825.300(a) (2015). Distribution of this information may also occur electronically. *Id.*

³⁴⁶ 29 U.S.C. §§ 2651(b), 2652(a).

³⁴⁷ *See supra* Part I.B.1.

³⁴⁸ *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1128 (9th Cir. 2001); *see also* The Family and Medical Leave Act of 1993, 60 Fed. Reg. at 2219.

³⁴⁹ *Bachelder*, 259 F.3d at 1128.

effectively plan for FMLA-related absences if necessary by clearly communicating its FMLA policy.³⁵⁰

While not stated by the court, *Escriba* presented a factually-specific case. FMLA allows employers to provide additional benefits to their employees.³⁵¹ If the employer chooses to do so, FMLA requires the courts to hold the employer to the standard that is objectively better for the employee.³⁵² Since it is objectively better for employees to have the option of extending their leave, the Ninth Circuit correctly held Foster Farms to its own FMLA policy, which allowed an employee to decline FMLA leave. Thus, an employee may affirmatively decline FMLA protection *when allowed under the employer's FMLA policy*.

The implication of the *Escriba* decision is that employers actually have more flexibility. Employers not only have the ability to offer additional leave benefits to their employees, but the court also reaffirmed that employers have the flexibility to pursue disciplinary action against employees who do not choose to actively participate in the designation process with the employer.³⁵³ Moving forward from *Escriba*, employers should ensure that their FMLA policies specifically address whether the employer will allow the employee to refuse FMLA leave. That policy decision, however, is wholly the employer's.

CONCLUSION

For many Americans, everyday life depends upon managing both professional and familial commitments. FMLA and DOL regulations have helped to make the balancing of these commitments less onerous. *Escriba v. Foster Poultry Farms, Inc.* articulated an employee's ability to affirmatively refuse the protections provided by FMLA. While an employee may affirmatively decline FMLA, the employee may only do so in the narrow confines of the employer's policy. Following the *Escriba* decision, employers should address whether or not employees may refuse FMLA protection in their written FMLA policy. However, *Escriba* does not require employers to allow employees to decline FMLA protection.

³⁵⁰ *Id.*

³⁵¹ See FMLA2004-3-A, *supra* note 79.

³⁵² 29 U.S.C. § 2652(a) (2012).

³⁵³ Disciplining employees who did not properly complete the required paperwork is valid because the employee refused his FMLA rights. *Ridings v. Riverside Med. Ctr.*, 537 F.3d 755, 771 (7th Cir. 2008).