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COMMENT

Constructive Notice Under the Family and Medical Leave Act

John Byrne had been a model employee for more than four years before he began to abandon his workstation to sleep on the job.[1] His employer, Avon Products, discovered his behavior and fired Byrne for misconduct when he failed to show up for a scheduled meeting to discuss it. The day of the missed meeting, Byrne hallucinated, attempted suicide, and was hospitalized. After two months of therapy, his "massive depression" had improved, but his employer would not rehire him.[2] He filed claims under the Americans with Disabilities Act (ADA)[3] and the Family and Medical Leave Act (FMLA).[4]

In *Byrne v. Avon Products, Inc.*, the Seventh Circuit allowed Byrne's FMLA claim to proceed despite Byrne's failure to give his employer timely actual notice that he needed leave,[5] as required by regulation.[6] The court developed the following test for "constructive notice" of an employee's need for FMLA leave:

> If a trier of fact believes either (a) that the [employee's] change in behavior was enough to notify a reasonable employer that [the employee] suffered from a serious health condition, or (b) that [the employee] was mentally unable either to work or give notice [in the

1. Byrne v. Avon Prods., Inc., 328 F.3d 379, 380 (7th Cir. 2003).
2. *Id.*
3. 42 U.S.C. §§ 12,101-12,213 (2000).
4. 29 U.S.C. §§ 2601-2654.
5. 328 F.3d at 382-83.
6. 29 C.F.R. § 825.303(a) (2008).

> time period of the bizarre behavior], then he would be entitled to FMLA leave [for that period]. These are independent possibilities.[7]

While the Seventh Circuit and district courts within its jurisdiction have applied the *Byrne* test in other cases,[8] no court outside of the Seventh Circuit has developed standards for constructive notice under the FMLA.[9] One district court outside of the Seventh Circuit has observed that allowing constructive notice seems incompatible with the governing FMLA regulations.[10]

This Comment argues that the *Byrne* constructive notice standard is a step in the right direction, but is ultimately unsatisfactory. Instead, constructive notice should be imputed to the employer only when the employee's behavior allows the employer to reasonably infer that an FMLA-qualifying health condition has *caused* the employee's failure to give the required notice. This proposal improves upon prong (a) of the *Byrne* test described above while leaving prong (b) untouched. The standard also should require a short time window for constructive notice in order to ease the burdens that the test imposes upon employers.

This Comment proceeds as follows. First, it discusses the importance of allowing constructive notice under the FMLA in order to allow employees with mental health conditions realistically to benefit from the statute. Second, it examines the Seventh Circuit's application of the *Byrne* test in another case, *Stevenson v. Hyre Electric Co.*,[11] which illustrates three aspects of the *Byrne* test that render the test unworkable and unfair. Finally, this Comment proposes a modified constructive notice standard.

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7. 328 F.3d at 382.

8. *See, e.g.*, Stevenson v. Hyre Elec. Co., 505 F.3d 720 (7th Cir. 2007); Burnett v. LFW Inc., 472 F.3d 471 (7th Cir. 2006); Phillips v. JP Morgan Chase, No. 06-C-3747, 2007 U.S. Dist. LEXIS 31608 (N.D. Ill. Apr. 30, 2007); Leonard v. Uhlich Children's Advantage Network, 481 F. Supp. 2d 931 (N.D. Ill. 2007); Lozano v. Kay Mfg. Co., No. 04-C-3784, 2005 U.S. Dist. LEXIS 26930 (N.D. Ill. Nov. 3, 2005).

9. The Eighth Circuit, however, has held that a jury can consider "the difficulty one suffering from depression has with communications, together with [an employer's] general knowledge of [her employee's] depression" in deciding whether an employer has received sufficient notice. Spangler v. Fed. Home Loan Bank, 278 F.3d 847, 853 (8th Cir. 2002).

10. *See* Conrad v. Eaton Corp., 303 F. Supp. 2d 987, 998 (N.D. Iowa 2004).

11. 505 F.3d 720.

I. CONSTRUCTIVE NOTICE UNDER THE FAMILY AND MEDICAL LEAVE ACT

The FMLA guarantees covered employees up to twelve weeks of unpaid leave from work in any twelve-month period to care for a family member or for the employee's own serious health condition.[12] Though most commentators focus on the FMLA's caretaker provisions or its treatment of pregnancy as a serious health condition,[13] most employees who take FMLA leave use it to address their own serious health conditions other than pregnancy.[14]

The FMLA requires employees to give their employers fair notice that they need leave.[15] An employee must give notice thirty days in advance of the absence if the need for FMLA leave is foreseeable,[16] or "as soon as practicable under the facts and circumstances of the particular case" if it is unforeseeable.[17]

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12. 29 U.S.C. § 2612(a)(1) (2000).

13. *See, e.g.*, STEVEN K. WISENSALE, FAMILY LEAVE POLICY 158 (2001) (noting that "the primary reason" the FMLA was passed was to provide leave for "maternity reasons or to care for a newborn or adopted child").

14. More than half of the thirty-five million people who took FMLA leave between 1993 and 2000 did so to care for their own serious health conditions. *See* NAT'L P'SHIP FOR WOMEN & FAMILIES, HIGHLIGHTS OF THE 2000 U.S. DEPARTMENT OF LABOR REPORT: BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 3 (Nicole Casta ed., 2000), *available at* http://www.nationalpartnership.org/site/DocServer/2000DOL LaborReportHighlights.pdf?docID=954 (noting that 52% of people who take leave do so to care for their own serious illness, whereas 26% of people who take leave do so for a "new child or for maternity disability reasons").

15. To meet the notice requirement, an employee must give her employer information "sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." Brohm v. JH Props., Inc., 149 F.3d 517, 523 (6th Cir. 1998) (citations omitted). Stating that one is "sick," without more, is not sufficient notice. *See, e.g.*, Collins v. NTN-Bower Corp., 272 F.3d 1006, 1008-09 (7th Cir. 2001).

16. 29 C.F.R. § 825.302(a) (2008).

17. *Id.* § 825.303(a). This regulation now specifies further that "[i]t generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave." 73 Fed. Reg. 67,934, 68,099 (Nov. 17, 2008). The further specification replaces the formerly codified rule that the employee "give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible." 29 C.F.R. § 825.303(a). Courts had interpreted this rule to allow the employee no more than two days *after* an unforeseen absence to inform the employer that the absence was FMLA-qualifying. *See, e.g.*, Stevenson v. Hyre Elec. Co., 505 F.3d 720, 725 (7th Cir. 2007). While the cases cited in this Comment were decided under the former regulation, their force of law should not be lessened under the new regulation. The new regulation still allows for "unusual circumstances," in which case an employee would not be expected to comply with the employer's regular notice

Many employees who otherwise qualify for leave fail to fulfill the notice requirement and are barred from bringing claims.[18]

Some of these employees should have the benefit of constructive notice. Courts have recognized constructive notice in other areas of employment law,[19] and there is a particularly strong reason to recognize constructive notice in the FMLA context. The FMLA entitles employees with serious mental health conditions to leave on the same terms as those with physical ailments,[20] and there are many such employees in the United States.[21] In fact, the FMLA has become an important protection for the significant number of workers with mental or emotional disorders who are unable to obtain reasonable accommodations under the ADA.[22] Some of the conditions that would entitle an employee to FMLA leave, however, produce symptoms that may prevent the employee from providing the actual notice required by the FMLA regulations.[23]

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requirements. 73 Fed. Reg. at 68,100. It seems reasonable that the courts may interpret the new "unusual circumstances" language as they did the phrase "extraordinary circumstances where such notice is not feasible" in the former section. "The Department [of Labor] modified the standard from 'extraordinary circumstances' in the proposal to 'unusual circumstances' in the final rule to make the standard consistent with that used in [29 C.F.R.] § 825.302(d)." 73 Fed. Reg. at 68,009 (providing a section-by-section analysis of the final regulation).

18. *See, e.g.*, *Collins*, 272 F.3d at 1008 (affirming summary judgment for the employer despite the employee's qualifying medical condition because "notice is essential even for emergencies").

19. For example, constructive notice satisfies Title VII notice requirements in cases of hostile work environment harassment. *See* Note, *Notice in Hostile Environment Discrimination Law*, 112 HARV. L. REV. 1977, 1979-80 (1999).

20. *See* 29 C.F.R. § 825.114(a).

21. *See* NIMH – The Numbers Count: Mental Disorders in America, http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america.shtml (noting that 26.2% of adults in the United States suffer from a diagnosable mental disorder and 6% suffer from a serious mental illness) (last visited Oct. 13, 2008).

22. *See* David L. Hudson, Jr., *Changing Act: Family Leave Law Taking Center Stage from Disabilities Act in Litigation*, A.B.A. J., Sept. 2003, at 15 (noting that employers overwhelmingly win dispositive motions in ADA cases but that courts interpret "serious health condition" broadly, allowing employees to survive summary judgment in FMLA cases); Miranda W. Turner, *Psychiatric Disabilities in the Federal Workplace: Employment Law Considerations*, 55 A.F. L. REV. 313, 314-15 (2004) (describing the difficulty that psychiatrically disabled employees have in attempting to show that they are members of the protected class and in negotiating reasonable accommodations under the ADA and the Rehabilitation Act).

23. For example, delirium may cause incoherent speech and an impaired ability to articulate, and acute stress disorder may cause distress that interferes with normal functioning and the ability to pursue necessary tasks. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 136-37, 472 (4th ed. 2000) [hereinafter DSM-IV]. These symptoms would likely

As a result, not allowing constructive notice would contradict the FMLA's purpose to broadly protect employees with serious health conditions[24] by depriving many employees of much-needed leave. It would also favor employees who are temporarily or periodically unable to work due to physical ailments over employees with psychological ailments who suffer the same degree of limitation. If constructive notice were available to employees who could not satisfy actual notice requirements, more workers would receive the medical help they need to remain productive members of the workforce in the long term.

II. THREE SHORTCOMINGS OF THE *BYRNE* TEST

The *Byrne* constructive notice test has two prongs. If either is satisfied, the court permits the employee's claim to proceed. The "behavioral" prong inquires whether the employee exhibited a "dramatic change in behavior" that was "enough to notify a reasonable employer that [the employee] suffered from a serious health condition."[25] The behavior change may constitute notice "even if the employee is lucid: someone who breaks an arm obviously requires leave."[26] The "infeasibility" prong inquires whether the employee is "powerless to communicate his condition effectively" or "mentally unable either to work or give notice."[27] If the behavioral prong is satisfied, the employee has given constructive notice of his or her need for FMLA leave; if the infeasibility prong is satisfied, the notice requirement is waived.

interfere with an employee's ability to coherently notify his or her employer that he or she needs leave based on a serious health condition. *See also* Turner, *supra* note 23, at 322 (noting that denial is often an aspect of mental impairments).

24. *See* WISENSALE, *supra* note 13, at 136-37. An early model version of the FMLA, called the Family Employment Security Act (FESA) of 1984, was "a new bill aimed not at maternity leaves alone but at a broad and ambitious array of employee rights all rooted in the principle of equal treatment." *Id.* at 136. Drafters of the bill later introduced as the Parental and Disability Leave Act of 1985, which would later become the FMLA, "were in full agreement with the original FESA supporters that any proposed leave legislation should be broad-based in coverage." *Id.* at 137.

25. Byrne v. Avon Prods., Inc., 328 F.3d 379, 381-82 (7th Cir. 2003).

26. *Id.*

27. *Id.* at 382. The infeasibility prong was codified in the former 29 C.F.R. § 825.303(a) (2008). The new revisions to that regulation do not use the same language, but do indicate that an employee's spokesperson may give notice on that person's behalf "if the employee is unable to do so personally." 73 Fed. Reg. 67,934, 68,099 (Nov. 17, 2008). The phrasing indicates that the notion of infeasibility remains.

This test has three shortcomings. First, the *Byrne* court's use of examples of physical ailments to explain its application of the test to mental disorders makes the test unworkable. Second, the test does not anticipate scenarios in which an employee exhibits inconsistent behavior. Finally, the test provides no guidance to employers about the time period during which constructive notice may be given.

The Seventh Circuit's application of the *Byrne* test in *Stevenson v. Hyre Electric Co.*[28] illustrates these weaknesses. In *Stevenson*, a stray dog entered the company's warehouse and approached Beverly Stevenson's desk. Stevenson became agitated and screamed profanities at coworkers and the company president.[29] She was medicated for "anxiety and stress"[30] and called in "sick" for three days. When she returned to work to find her personal belongings moved to another desk, she called the police, and then left. She gave a supervisor a report from her doctor before leaving.[31] Through the course of these events, Stevenson met with union representatives several times about returning to work. Her employer, Hyre Electric Company, fired her a few days later.[32] The Seventh Circuit concluded that a reasonable trier of fact could decide that Stevenson's behavior on the day of the incident, her confrontation with the company president, and her phone call to the police several days later provided constructive notice to her employer under the behavioral prong of the *Byrne* test.[33]

The *Byrne* test's first major flaw is that by defining the behavioral prong only by analogy to physical ailments,[34] the court made the test difficult to apply to mental disorders. The erratic behavior that a serious mental health condition might cause is not likely to be a sudden, obvious, one-time event, akin to a broken arm or a heart attack.[35] The analogies are not apt. Thus, judges cannot easily extract any principles to apply to cases involving mental health conditions. Instead, the test encourages judges to decide cases without

28. 505 F.3d 720 (7th Cir. 2007).

29. *Id.* at 722.

30. *Id.* at 723.

31. *Id.*

32. *Id.* at 724.

33. *Id.* at 727.

34. Byrne v. Avon Prods., Inc., 328 F.3d 379, 381 (7th Cir. 2003) (explaining that the fact that a dramatic change in behavior can serve as notice of a medical problem is "clear enough if a worker *collapses*: an employer might suspect a *stroke*, or a *heart attack*, or *insulin deficiency*" (emphasis added)).

35. *See, e.g.*, DSM-IV, *supra* note 23, at 356 (explaining that the diagnosis of major depressive episodes requires that five or more symptoms are present in a two-week period).

developing any consistent theory about what behavior should constitute constructive notice. For example, the difficult question in *Stevenson* was whether an employee's FMLA-qualifying health condition must cause the employee's failure to give notice, or whether abnormal behavior is sufficient to constitute constructive notice even where there is contradictory evidence.[36] The *Stevenson* appellate court ignored the question entirely. It decided the case without reaching this issue by relying on the instruction in *Byrne* that a lucid employee's sudden physical injury can provide constructive notice.[37] The court concluded that Stevenson's behavior alone could constitute notice, even though the factual context was distinguishable.

The *Byrne* test's second failing is that it does not anticipate situations in which the employee's behavior is inconsistently abnormal during the notice period. In *Byrne*, after the dramatic change where the plaintiff began to sleep during his shifts, his behavior became more and more erratic until he ultimately required hospitalization.[38] In that case, the court's statement that "no employer would be allowed to say 'I fired this stricken person for shirking on company time, and by the time the physician arrived and told me why the worker was unconscious it was too late to claim FMLA leave'"[39] implies that the court had in mind a person who was suddenly stricken, and who remained entirely incapacitated throughout some relevant period. But Stevenson's outbursts were separated by rational behavior that may have confused her employer about whether she was suffering from a serious health condition that was preventing her from complying with regulations. Stevenson saw her doctor, told her employer her diagnosis, and met with union officials about returning to work. The *Byrne* test fails to provide specific guidance when an employee's behavior sends inconsistent signals about that individual's ability to comply with the notice regulations in the face of a serious health condition.

The *Byrne* test's third flaw is its failure to define a time period during which constructive notice can satisfy notice requirements. The need for a fixed time period is illustrated by the fact that, in *Stevenson*, the plaintiff gave her supervisor the emergency room diagnosis on the same day she called the police. The court considered her call to the police in its analysis of unusual behavior

36. In analyzing *Byrne*, the *Stevenson* lower court opinion mentioned that "the FMLA-qualifying condition was itself the source of [Byrne's] inability to communicate," but did not hold that causation was necessary for constructive notice. Stevenson v. Hyre Elec. Co., 2006 WL 2497783, at *7 (N.D. Ill. Aug. 24, 2006). This Comment argues that causation should be necessary for constructive notice.

37. *Byrne*, 328 F.3d at 381-82.

38. *Byrne*, No. 00-C-5378, 2002 U.S. Dist. LEXIS 9252, at *4-6, *11 (N.D. Ill. May 22, 2002).

39. *Byrne*, 328 F.3d at 381.

that might support a constructive notice argument, but acknowledged that under the regulations it was too late for Stevenson to give actual notice.[40] Under the current rule, employers have no way of knowing how long before an employee's absence they should look for erratic behavior that could constitute constructive notice. This uncertainty unfairly burdens employers, who would have to maintain documentation of all unusual behavior out of a fear that, in the distant future, the employee may take leave without notice or permission and point to that incident as constructive notice.

III. A NEW TEST FOR CONSTRUCTIVE NOTICE

This Comment proposes that an employee's behavior should constitute constructive notice only when the employer can reasonably infer from the employee's behavior that an FMLA-qualifying health condition prevented the employee from giving actual notice. It also advocates for a clear time window during which constructive notice may be given. The proposed constructive notice standard improves on the *Byrne* test in three ways. First, requiring that the FMLA-qualifying health condition *cause* the employee's failure to give actual notice keeps the constructive notice exception narrow. Second, including a causation requirement would also better address cases involving inconsistent behavior. Third, a clear time window for constructive notice would make this test easier for employers to apply.

Using causation as a limiting principle improves the constructive notice standard because constructive notice should be a narrow exception to the much-preferred methods of actual notice specified by the FMLA regulations. As it stands, the *Byrne* test is overinclusive. With actual notice, the employer is not responsible for any independent monitoring of its employees. The *Byrne* standard, on the other hand, requires an employer to meet its obligations under the statute[41] any time that the employer believes the employee has a serious health condition. Whether an employee has a serious health condition, however, is at best a rough approximation of the employee's ability to give actual notice. In addition, the *Byrne* test requires employers to make decisions based on their understanding of medical conditions, an area outside their expertise. On the other hand, the proposed causation requirement asks an employer, once it believes an employee may have a serious health condition, to focus on how the observed behavior changes the employee's ability to communicate with superiors about the employee's ability to do his or her job.

40. Stevenson v. Hyre Elec. Co., 505 F.3d 720, 727 (7th Cir. 2007).

41. *See infra* note 48 and accompanying text.

The employer can then confront the employee about changes in job performance. In the course of this discussion, the employer provides the employee the opportunity to give direct notice if able. Based on this interaction, the employer can infer whether the employee's dramatic behavior change appears to be disrupting the employee's ability to communicate information about his or her well-being to the employer.

Adopting this Comment's proposed causation requirement would not completely collapse the two prongs of the *Byrne* test, though it does focus the inquiry solely on infeasibility. The difference between the proposed standard regarding the employee's behavior and the *Byrne* test's infeasibility prong is how the employer arrives at the reasonable inference that the employee was unable to give actual notice. The proposed standard does not require that an employee be diagnosed with a condition that renders the employee medically unable to give notice;[42] it requires only that the employee's behavior *evince*, to a reasonable employer, that the employee had a serious mental illness that actually prevented him or her from giving notice. This allows judges and employers to focus on employee behavior—an inquiry within their competences—instead of medical questions.

A causation requirement also would address cases of inconsistently abnormal behavior better than the *Byrne* test does. Inconsistent behavior raises the question of whether the employee truly is unable to give actual notice. Three examples will illustrate. First, consider Byrne, whose depression arguably rendered him medically unable to give his employer notice.[43] The notice requirement was waived in his case because giving notice was infeasible.[44] Second, consider an employee who begins to submit garbled, paranoid reports instead of his usual work product but insists that he is not ill and defends his work. This employee's situation satisfies the *Byrne* test's behavioral prong as well as this Comment's proposed constructive notice

42. The infeasibility prong as articulated in *Byrne* and left unmodified here offers little aid to employers because an employer cannot truly know whether notice is infeasible unless the employee provides a medical diagnosis or is completely incapacitated. Short of this extreme scenario, there is a large gray area where employers would be left guessing how incapacitated an employee had to seem before notice was "infeasible." By encouraging employers to engage in a dialogue with employees about dramatic behavior changes, this Comment's proposal would reduce the reliance on this less helpful prong.

43. 328 F.3d at 382 (considering why Byrne did not give notice at the beginning of his behavior change, and deciding, "[t]hat poses a medical question: Was someone in Byrne's state *able* to give notice?").

44. *Id.* The *Byrne* test was designed, however, such that Byrne satisfied both prongs independently, and thus it is difficult to infer from the court's opinion in which situations a plaintiff might satisfy one prong but not the other.

standard, because the employer would be able to reasonably infer that, despite the employee's protestations, his behavior was highly unusual and he did not seem to realize it (and therefore would not ask for leave). Finally, Stevenson was unlike either of these first two examples because her acknowledgement that her outbursts were abnormal (by submitting medical information to Hyre) undermined the inference that she might have a serious health condition that prevented her from giving notice.[45] This Comment's proposed requirement would take into account conflicting evidence regarding the employee's ability to give notice. Allowing employers to balance competing information before making their reasonable inference more accurately reflects the spectrum of probable factual scenarios and would address the concerns of the lower court in *Stevenson* who ruled against the plaintiff because "she maintained an ability to relate her symptoms and feelings at length."[46]

Finally, the test should define a time period during which constructive notice may be imputed to the employer in order to clarify employer responsibilities under the FMLA. Designing a clear but fair rule for that time period is not easy, however, because an unforeseen need for leave is precisely that—not knowable in advance. One possible rule would be the following: if an employee's behavior is highly abnormal within one to two days before that employee takes leave, then the employer should consider whether the abnormal behavior gave constructive notice.[47] If adequate constructive notice is given in that time period, the employer must provide the employee with information about FMLA policies and requirements.[48] This rule would likely have to be codified alongside the rule for actual notice in 29 C.F.R. § 825.303.[49] Requiring

45. Armed with union representation and doctors' notes, Stevenson is more like an employee who fails to give adequate factual information when calling in "sick." *See supra* note 15.

46. Stevenson v. Hyre Elec. Co., 2006 WL 2497783, at *7 (N.D. Ill. Aug. 24, 2006).

47. This one-to-two day window is derived from the former 29 C.F.R. § 825.303(a) (2008), which allowed an employee to give an employer notice that an unforeseen absence was FMLA-qualifying within one to two days of the beginning of the absence. Since this regulation has been revised to require employees to follow the employer's regular notice requirements, *see supra* note 17, one might argue that any time window should also be tailored to existing workplace standards. A concrete time period that is uniform across employers, however, would provide employees with the benefits of constructive notice while giving employers a bright-line rule that is easy to follow. In contrast, a rule tailored to workplace requirements would not guarantee the possibility of constructive notice to any employee.

48. *See* 29 C.F.R. § 825.301(c).

49. *See* Conrad v. Eaton Corp., 303 F. Supp. 2d 987, 998 (N.D. Iowa 2004) (suggesting that constructive notice is incompatible with the current regulations that define the notice period).

the employer to notice a dramatic behavior change before the employee takes leave is an unavoidable consequence of any constructive notice regime, but a short, specific notice period strikes a fairer balance between helping a set of employees who most need FMLA protection and overburdening employers with FMLA requirements.

CONCLUSION

Constructive notice is necessary to give effect to the FMLA's purpose of allowing workers to care for themselves without worrying about choosing health over continued employment.[50] Some argue that *any* concept of constructive notice is unfair to employers because it requires them to be clairvoyant.[51] However, far from requiring clairvoyance, the proposed standard requires employers to draw reasonable inferences from observed behavior, and no more. It protects vulnerable workers by granting employees with mental health conditions access to the same benefits as employees who suffer from physical injury or illness. At the same time, it adds protections for employers in the form of a discrete time window and the limitation that constructive notice is only available when actual notice is infeasible.

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50. *See* 29 C.F.R. § 825.101.

51. Kenza Bemis Nelson, Note, *Employer Difficulty in FMLA Implementation: A Look at Eighth Circuit Interpretation of "Serious Health Condition" and Employee Notice Requirements*, 30 J. CORP. L. 609, 620 (2005).