

The Employees' Quest for Medical Record Privacy Under the Family and Medical Leave Act

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The passage of the Family and Medical Leave Act (FMLA) was a boon to many workers as it afforded them the opportunity to take up to twelve weeks of unpaid work leave to address serious personal and family medical situations. In order to exercise the right to personal medical leave, however, the FMLA requires an employee to reveal to the employer sensitive personal medical record information. The release of this personal medical information invades the employee's privacy and subjects the employee to a risk of unauthorized disclosure to third parties, without materially assisting the employer in making a leave request decision. Consequently, Congress should amend the FMLA to only call for a statement from a medical doctor verifying that the employee has a "serious medical condition" as a condition of leave, thereby abandoning the current additional requirement that a physician provide the employer with the medical facts underlying the medical condition.

I. INTRODUCTION

The ease with which strangers may access personal information about others through the internet and other electronic sources has resulted in the conclusion that meaningful individual privacy no longer exists. This is felt nowhere more acutely than with personal medical records. Indeed, according to a 1999 Harris Equifax survey, "over 80% of public respondents felt they had 'lost all control' over their personal [medical] information."² This problem has led important players in the health care industry to conclude medical record privacy protection is "non-existent."³ In response to this concern, fifteen percent of Americans engage in privacy-protective behavior to shield themselves from

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2. Nathan J. Wills, *A Tripartite Threat to Medical Records Privacy: Technology, HIPAA's Privacy Rule and the USA Patriot Act*, 17 J.L. & HEALTH 271, 277 (2002-2003) (citing Lawrence O. Gostin et al., *Balancing Communal Goods and Personal Privacy Under a National Health Informational Privacy Rule*, 46 ST. LOUIS U. L.J. 5, 6 (2002)).

3. See Kevin B. Davis, *Privacy Rights in Personal Information: HIPAA and the Privacy Gap Between Fundamental Privacy Rights and Medical Information*, 19 J. MARSHALL J. COMPUTER & INFO. L. 535, 544 (2001).

unwanted disclosure of health information, including giving healthcare providers inaccurate information, paying out-of-pocket for medical care normally covered by insurance, doctor-hopping to avoid consolidation of records, or even avoiding healthcare altogether.⁴

While this may work for some, federal and state statutes often compel employees to disclose personal medical records to an employer in order to exercise the right to a statutory benefit. This is true under the Americans with Disabilities Act (ADA)⁵ and the Family and Medical Leave Act (FMLA).⁶ While these statutes provide for protection of medical privacy in the workplace, public confidence in the security of the medical records disclosed by employees to employers is low.⁷ Employees are justified in this disillusionment because once personal medical information is given to an employer, it is often released to third parties, and an employee may suffer negative personal consequences, which financial remedies do not adequately redress.

The case of *Doe v. United States Postal Service*⁸ illustrates this problem. John Doe, a maintenance worker for the United States Postal Service, missed several weeks of work due to an AIDS-related illness.⁹ Doe's supervisor informed him that he would need to submit a medical certification form, filled out by his health care provider, certifying that he suffered from a "serious health condition" and "describe[ing] the medical facts which support [the] condition."¹⁰ When Doe subsequently returned to work, he found that his previously unknown HIV status was known among his co-workers.¹¹

In order to protect his job, John Doe had to disclose personal medical records to his employer. The FMLA mandates that in order for an employee to obtain medical leave due to a serious health condition, the employee must reveal the "appropriate medical facts . . . regarding the condition."¹² Congress

4. See CALIFORNIA HEALTHCARE FOUNDATION, MEDICAL PRIVACY AND CONFIDENTIALITY SURVEY: SUMMARY AND OVERVIEW 2 (1999), <http://www.chcf.org/documents/ihealth/survey.pdf>.

5. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, 12112(d)(4)(B) (2006) (allowing covered employer to make inquiries into employee's medical history).

6. Family and Medical Leave Act, 29 U.S.C. §§ 2601, 2613(b)(3) (2006) (requiring health care provider to certify underlying medical facts pertaining to the condition).

7. See 42 U.S.C. § 12112(d)(3)(B).

8. 317 F.3d 339 (D.C. Cir. 2003).

9. See *id.* at 341.

10. See *id.*; see also 28 U.S.C. § 2613(b)(3); Dep't of Labor Form WH-380 (1999). Doe had five days to complete the form or else he could face disciplinary action for prolonged absence without leave. *Doe*, 317 F.3d at 341. Postal Service employees usually submit these forms to their direct supervisors; however, Doe did not like the idea of sharing his medical information with his direct supervisor. On his supervisor's recommendation, Doe submitted the form to the Postal Service administrative assistant. *Id.* at 341.

11. See *Doe*, 317 F.3d at 341.

12. 28 U.S.C. § 2613(b)(3); see also The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.306(b) (2006). The regulation provides further explanation, stating the certification should include "the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition [of the serious health condition]." 29 C.F.R. § 825.306(b)(1). The regulation also notes that this information should be completed by health care providers and filled out in Department of Labor Form WH-

designed the requirement with the intent of protecting an employer from potential abuse of leave by an employee not worthy of leave.¹³

This Article argues that the requirement under § 2613(b)(3) that an employee disclose specific facts underlying medical conditions to an employer as a condition of obtaining FMLA leave goes too far and should be removed from the regulations for the following reasons. First, providing an employer with the personal medical facts that underlie a serious medical condition for FMLA leave is unnecessary because it serves no legitimate business purpose of the employer. Second, the medical information disclosure requirement of the FMLA places employees at unnecessary risk of adverse employment actions. Third, the benefits of disclosing the medical condition to the employer are outweighed by the risk of unnecessary or unauthorized release of medical records to third parties, for which no adequate remedy exists. Fourth, disclosure requirements are unjustified under federal statutes governing privacy of personal medical records. Fifth, the disclosure requirements undermine the purposes of the FMLA.

To illustrate these points, this Article proceeds in the following manner: Section II gives an overview of the FMLA; Section III discusses the specific problems with current FMLA medical disclosure requirements under 29 U.S.C. § 2613(a); and Section IV offers a recommended modification of the FMLA designed to protect employee privacy while furthering the purposes of the FMLA.

II. THE FAMILY AND MEDICAL LEAVE ACT

A. *The Purpose of the FMLA*

In the early 1990s, Congress concluded that “the United States ha[d] experienced a demographic revolution in the composition of the workforce, with profound consequences for the lives of working men and women and their families.”¹⁴ Indeed, over the preceding forty years the number of women in the workforce and the number of single parent households had increased dramatically.¹⁵ A Senate report on the issue noted a more than 200% increase in the female civilian labor force since 1950.¹⁶ In addition, Congress was concerned with “another dramatic demographic shift: the aging of the American population,” recognizing that an estimated “20 to 25 percent of the more than 100 million American workers have some care giving responsibility

380. *Id.* § 825.306(b).

13. See 29 U.S.C. § 2601(b) (listing purpose behind Family and Medical Leave Act of 1993).

14. S. REP. NO. 103-3, at 5 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 7.

15. Jane Rigler, *Analysis and Understanding of the Family Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457, 459-60 (1995).

16. S. REP. NO. 103-3, at 5 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 7-8.

for an older relative.”¹⁷ Congress also concluded that private employers had “failed to adequately respond to . . . economic and social changes that . . . intensified the tensions between work and family.”¹⁸

Following seven years of Congressional debate and two vetoes by previous presidents, President Clinton finally signed the FMLA on February 15, 1993.¹⁹ “Enactment of the FMLA was predicated on two overarching concerns—the needs of the American workforce, and the development of high-performance work organizations.”²⁰ Congress intended for the FMLA to provide job security as well as a proper balance between work and family life for employees, resulting in increased worker productivity for employers.²¹ Specifically, the FMLA entitled qualifying employees to twelve workweeks of unpaid family or medical leave in a twelve-month period with guaranteed job restoration upon return.²² Qualifying employees need to have worked for a private employer of fifty or more employees for at least twelve months and 1,250 hours.²³ The employee must predicate the leave on either a serious health condition,²⁴ his own or that of a family member,²⁵ or on the birth,

17. S. REP. NO. 103-3, at 5 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 8-9.

18. S. REP. NO. 103-3, at 5 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 6.

19. Jeffrey J. Fraser, *An Overview of the Family and Medical Leave Act*, 70 U. DET. MERCY L. REV. 691, 691 (1993). The provisions of the act became effective six months later on August 5, 1993. *Id.*

20. The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.101(b) (1993).

21. *Id.* § 825.101(a); see also Rigler, *supra* note 15, at 469 (stating “[t]he essence of the FMLA is the concept of job security”). Congress further intended the FMLA to address the problem of sex discrimination in the workplace. 29 C.F.R. § 825.101(a) (2007). In the past, realities of the workplace often forced female employees to choose between family and work responsibilities. See Stephanie C. Bovee, Note, *The Family and Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection*, 7 WM. & MARY J. WOMEN & L. 1011, 1015 (2001). While the FMLA seeks to aid women in this situation by giving them the same employment opportunities as men, this is a gender-neutral act in that working fathers also qualify. One policy report submitted to Congress noted that since the enactment of the FMLA, men have accounted for 41.8% of the leave taken. Robin R. Cockey & Deborah A. Jeon, *The Family and Medical Leave Act at Work: Getting Employers to Value Families*, 4 VA. J. SOC. POL’Y & L. 225, 230 (1996) (relying on COMMISSION ON FAMILY AND MEDICAL LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 75 (1995)). Congress also designed the FMLA to assist men and women faced with the challenge of caring for their elderly relatives, who are increasingly “dependent upon family members who must spend long hours at work.” 29 C.F.R. 825.101(b).

22. See 29 C.F.R. § 825.100(a) (2007) (setting forth entitlement to leave); *id.* § 825.100(c) (requiring employer to return employee to same or equivalent position upon employee’s return from leave). As family needs vary in length of time, the statute does not require employees to take the entire twelve weeks of leave all at once; rather, they can take leave intermittently according to the particular need. See 29 C.F.R. § 825.203(a).

23. See 29 C.F.R. § 825.110(a) (detailing eligibility requirements for both employees and employers). Also, employees must have worked 1,250 hours in the past twelve months and the employee must be employed at a worksite at which fifty or more employees are employed by the employer within seventy-five miles of that worksite. *Id.*

24. See 29 C.F.R. § 825.114(a)(1). A “serious health condition entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that” requires inpatient care or continuing treatment by a health care provider. *Id.* § 825.114(a). Continuing treatment includes “[a] period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition) of more than three consecutive calendar days” or treatment on two or more occasions by a health care provider. *Id.* § 825.114(a)(2). An employee must be unable to perform the functions of the position if he

adoption, or placement of a child.²⁶ The FMLA guarantees continued health benefits during the leave, as well as the return of the employee's prior position upon the conclusion of leave.²⁷ Employers are not allowed to interfere with, restrain, or deny employees the ability to exercise their FMLA rights.²⁸ In order to qualify for medical leave under the FMLA, employees must submit evidence of a serious health condition, known as medical certification, to the employer.²⁹

B. *The Medical Certification Requirements of the FMLA*

While its primary purpose is to assist the worker, the FMLA also seeks to protect employers from "employee abuse of [FMLA] leave provisions."³⁰ To this end, the FMLA permits employers to require employees to verify that the need for FMLA leave is legitimate.³¹ When an employee requests FMLA leave due to a serious medical condition, an employee's healthcare provider must disclose, upon the employer's request, the category of serious health conditions to which the employee's condition belongs, its probable duration, and a description of "the medical facts which support the certification."³² The Department of Labor developed Form WH-380, which requires the healthcare provider to furnish the employee's personal medical information.³³ If the

is to be guaranteed FMLA leave. *Id.* § 825.115.

An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform even one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12101, and the regulations at 29 C.F.R. § 1630.2(n).

29 C.F.R. § 825.115.

25. *See* 29 C.F.R. § 825.100(a) (defining a family member as a spouse, parent, or child); *see also id.* § 825.113(c) (noting child can be "biological, adopted, or foster child, a stepchild, [or] a legal ward").

26. *See id.* § 825.100(a).

27. *See id.* §§ 825.100(b), 825.100(c). Upon return from leave, the employer must give the employee a position equivalent in pay, benefits, and other conditions of employment. *Id.* § 825.100(c). The only time an employer need not allow an employee to return to work in an equivalent position occurs when the employer considered the employee a "key employee" before the FMLA leave was taken. *Id.* § 825.217(a). A "key employee" is a salaried FMLA-eligible employee who is amongst the highest paid ten percent of all the employees within seventy-five miles of the employee's worksite. *Id.* § 825.217(a). To deny restoration of a "key employee," the employer must show that the restoration of an employee will cause "substantial and grievous economic injury" to the nature of the business. *Id.* § 825.218(a).

28. *See* 29 U.S.C. § 2615(a)(1) (2006). Additionally, employers are required to post a notice explaining the Act, providing information on how to file complaints for violations of the Act. 29 C.F.R. § 825.300.

29. *See* 29 C.F.R. § 825.300.

30. *See* Jessica Beckett-McWalter, *The Definition of "Serious Medical Condition" Under the Family and Medical Leave Act*, 55 HASTINGS L.J. 451, 451 (2003) (citing S. Rep. No. 103-3, at 25 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 27).

31. *See* S. REP. NO. 103-3, at 26 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 28.

32. 29 C.F.R. § 825.306(b)(1); *see also* 29 C.F.R. app. B, D.O.L. Form WH-380.

33. *See* 29 C.F.R. § 825.306(a). While this form is optional, the employer is entitled to receive from the employee answers to these questions, however, employees do not have to furnish any other information. *Id.* §

employer determines the information provided is suspect, it may require, at its own expense, the employee to obtain a second opinion.³⁴ If both opinions differ, a binding third opinion from an agreed-upon health care provider may be required.³⁵ While envisioned as a voluntary form, because the employer will not grant the FMLA leave request without the form, the medical disclosure certification, or some version thereof, is de facto mandatory.³⁶

III. THE FMLA'S REQUIREMENT THAT AN EMPLOYEE PROVIDE AN EMPLOYER WITH THE "MEDICAL FACTS" UNDERLYING A SERIOUS HEALTH CONDITION IN ORDER TO OBTAIN MEDICAL LEAVE IS UNWARRANTED

While the FMLA is based upon sound principles, it is flawed because it requires an unnecessary over disclosure of an employee's personal medical information as a condition of obtaining leave. Indeed, the requirement does not benefit the employer and infringes upon the employee's rights in several important ways.

A. Providing an Employer with the Personal Medical Facts that Underlie a Serious Medical Condition Is Unnecessary Because It Does Not Serve an Employer's Legitimate Business Purpose

When an employee makes a request for personal medical leave pursuant to the FMLA, the employer must determine whether the request qualifies for leave because the employee has a serious medical condition. If the employer receives a report from a medical doctor showing that the employee does indeed have a serious medical condition, then the question is answered. There is no legitimate need for the employer to know the underlying medical facts which

825.306(a).

34. See *id.* § 825.307(a)(2). Alternatively, if the employer desires further information to clarify and verify the certification, one of its health care representatives may contact the employee's health care provider with the employee's permission. *Id.* § 825.307(a).

35. *Id.* § 825.307(c).

36. See *id.* §§ 825.306(a), 825.306(b) (explaining DOL Form WH-380); see also *id.* § 825.311(b). The employer need not grant FMLA leave if the employee fails to submit valid certification and the employee will be subject to all disciplinary actions the employer applies to unexcused absences. *Id.* § 825.311(b). Additionally, the employee must submit the medical certification form to the employer within a time period designated by the employer, which must be at least fifteen days. *Id.* § 825.311. When returning to work, the employee must provide either a fitness-for-duty certification or a new medical certification for a serious health condition, or the employer may terminate the employee. *Id.* § 825.311(c). In *Doe v. United States Postal Service*, discussed briefly at the start of this Article, the court held that Doe's employer violated his rights by disclosing medical information contained within the certification form. 317 F.3d 339, 341 (D.C. Cir. 2003). Doe's employer required him to submit DOL Form WH-380 within five days or face disciplinary action from his supervisor for unexcused absence from work. *Id.* at 341. The United States Postal Service argued that, if concerned with possible disclosure of his condition, Doe could have forgone seeking FMLA leave. *Id.* at 344. The court rejected this argument as it would "force employees to choose between waiving their right to avoid being publicly identified as having a disability and exercising their statutory . . . right to FMLA leave," which would negate Congress's reasoning for enacting the FMLA in the first place. *Id.* at 344.

have produced the serious medical condition, only that one exists. The employer would only need to know the facts of an underlying medical condition if the employee sought some accommodation under the ADA.³⁷ The statute and relevant regulations provide for that information to be proffered to the employer.

The medical disclosure rules of the FMLA are also flawed because the human resource manager who evaluates the FMLA request for medical leave is usually not a trained medical professional and will not have the skill, beyond that of a lay person, to determine whether the underlying facts support the serious medical condition conclusion. Since the human resource manager possesses no skills to analyze the legitimacy of a medical doctor's conclusion that an employee has a serious medical condition, why should it be necessary to provide it? In other words, because a medically-trained professional has already concluded that an employee has a serious medical condition, it serves no purpose for the human resource manager, who has no such medical training, to know the details or underlying facts of that condition. Of course, the concern is that an employee may work in concert with a willing doctor to engage in a fraudulent application for leave. The FMLA, however, expressly protects against such fraud by authorizing the employer to seek a second opinion of the employee's medical condition if the employer "has reason to doubt" the conclusion of the medical doctor.³⁸ Moreover, Congress properly envisioned a safety net for employers against FMLA abuse by providing this option. Under this scenario, a second reviewing doctor would have access to relevant medical records of the employee from the first doctor who concluded a serious medical condition existed. The exchange of the personal medical records would be among and between the employee and the two medical professionals, who must uphold confidentiality, not the employer. Certainly human resource managers often know employees well enough to make conclusions regarding when a second or third medical opinion will be necessary.

Again, there is simply no legitimate business purpose for the employer to know the reason underlying an employee's serious medical condition. An employer's knowledge of why an employee is sick will not alter the calculus of the FMLA leave request because that question is not essential to the inquiry. The case at the beginning of this Article highlights this notion. It was unnecessary for the employer to know that the worker was afflicted with HIV.³⁹ All the information the human resource manager needed to know to grant the leave was that the employee suffered a serious medical condition.⁴⁰ Providing

37. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, 12112(d)(4)(B) (2006) (allowing a covered employer to make inquiries into an employee's medical history).

38. 29 U.S.C. § 2613(c) (2006).

39. See *Doe*, 317 F.3d at 341.

40. See 29 C.F.R. § 825.306(a).

the employer with the underlying medical facts constituted only cumulative information not central to the decision regarding FMLA leave. Furthermore, it placed the employee at a tremendous risk of harm to his privacy and work environment, which did materialize when his condition became known amongst his colleagues.⁴¹ When the lack of benefit to the employer in disclosing medical facts under the FMLA is juxtaposed against the substantial risk disclosure presents to the employee, the inadvisability of requiring such disclosure is patent.

B. The Medical Information Disclosure Requirement Places Employees at Unnecessary Risk of Adverse Employment Actions

The FMLA's medical disclosure requirements place employees at risk of negative employment actions. Studies show that up to half of employers will use health information to make employment-related decisions.⁴² Though it is illegal to base an employment decision on information acquired from an FMLA leave request, it can happen, and possibly with a degree of impunity. For example, in *Chandler v. Specialty Tires of America (Tennessee), Inc.*,⁴³ an employee was fired because of an FMLA-related medical disclosure to a manager.⁴⁴

In that case, Chandler worked for Specialty Tires of America when, while off duty, she attempted suicide.⁴⁵ She was taken to the hospital, where she "kept in close contact with the plant manager," who placed her on paid medical leave.⁴⁶ Once her manager discovered Chandler's attempted suicide, he terminated her after concluding she could no longer handle the duties of her position.⁴⁷ Chandler's manager denied her request to be returned to her former position, and she filed suit, claiming a violation of her FMLA rights.⁴⁸ Specialty Tires claimed Chandler was fired for irresponsible behavior and not for FMLA leave.⁴⁹ The court held otherwise, stating that because Chandler's

41. See *Doe*, 317 F.3d at 344 (noting plaintiff's attempt to avoid public knowledge of his disability).

42. See David F. Linowes & Ray C. Spencer, *Privacy: The Workplace Issue of the '90s*, 23 J. MARSHALL L. REV. 591, 594 (1990) (detailing employers' use of medical records).

43. 283 F.3d 818 (6th Cir. 2002).

44. See *id.* at 821-22.

45. See *id.* at 821.

46. *Id.* Chandler was rushed to the emergency room and then transferred the next day to Woodridge hospital where she received her week-long treatment. *Id.*

47. See *Chandler*, 283 F.3d at 821.

48. See *id.* at 821-22.

49. See *Chandler v. Specialty Tires of Am. (Tenn.), Inc.*, 283 F.3d 818, 821 (6th Cir. 2002). The defendant tried to rely upon *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 848 (6th Cir. 1995), where "an assistant coach was fired for outrageous public behavior while intoxicated." *Chandler*, 283 F.3d at 826. The court noted that in *Maddox*, the coach was fired for his behavior and not his alcoholic disability. *Id.* The defendant also quoted *Doe v. King County*, No. 97-35876, 1999 WL 50860, at *2 (9th Cir. 1999), where a superior court judge fired his bailiff after the bailiff took leave for cocaine addiction. *Chandler*, 283 F.3d at 826. The judge fired the bailiff for using illegal drugs, not for taking leave. The court rejected Specialty's use of these cases, as

periodic reviews showed she was an excellent employee, it would be hard to conclude Specialty Tires fired her for irresponsible behavior.⁵⁰ Chandler would likely not have been fired had she only told her employer she suffered from a serious medical condition, and not revealed the specific fact that she had attempted suicide by taking an overdose of pills. Consequently, as *Chandler* illustrates, FMLA's requirement that the employee disclose the facts associated with the medical condition places the employee at risk of adverse employment actions even when job performance is excellent.⁵¹

C. The Benefits of the Medical Condition Disclosures to the Employer Are Outweighed by Risk of Unnecessary or Unauthorized Release of Medical Records to Third Parties for Which There Exists No Adequate Remedy

Generally, workers base a large part of their social universe in the workplace.⁵² Preserving that environment as a socially *safe* place to work is very important. Although the FMLA protects information communicated to a supervisor,⁵³ the risk always exists that disclosure may result in an unauthorized dissemination of one's medical condition to co-workers, as was the case in *Doe v. United States Postal Service*.⁵⁴ As discussed above, Doe provided his employer with the required medical certification form and, upon returning from his FMLA leave, found his previously undisclosed HIV/AIDS condition was known at work.⁵⁵ The unauthorized disclosure to co-workers of sensitive medical information can have damaging effects to the employee, particularly if it reveals a stigmatic condition such as HIV or AIDS.⁵⁶

Moreover, the unauthorized disclosure of personal medical information to co-workers can create a hostile work environment for the employee.⁵⁷ An

the plaintiff in *Maddox* premised his suit on the ADA, not the FMLA, and refused to give precedential value to *King County*, an unpublished Ninth Circuit decision. *Id.* at 826-27.

50. See *Chandler*, 283 F.3d at 826.

51. See *id.* at 825; see also The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.306 (2007) (requiring employee to submit certain information to employer).

52. See Mark Auslander, *Rituals of the Workplace* (2003), available at http://wfnetwork.bc.edu/encyclopedia_template.php?id=254 (discussing nature of work environments as "ritually and symbolically elaborated" and coequal with the domestic and religious aspects of life).

53. 29 C.F.R. § 825.500(g) (requiring medical records be kept in separate medical files).

54. *Doe v. United States Postal Serv.*, 317 F.3d 339 (D.C. Cir. 2003).

55. See *id.* at 341.

56. See Eric Wymore, *It's 1998, Do You Know Where Your Medical Records Are? Medical Record Privacy After the Implementation of the Health Insurance Portability and Accountability Act of 1996*, 19 HAMLIN J. PUB. L. & POL'Y 553, 554 (1998) (giving examples of harmful disclosures of personal medical information).

57. A hostile work environment may result if the employee's serious medical condition can be classified as a disability. Federal courts are currently confronted with the question of whether the ADA prohibits disability-based harassment in the workplace in the same way that Title VII prohibits harassment based on race, color, religion, sex, and national origin. Some courts have approved a cause of action for disability-based hostile work environments. See *Miranda v. Wisconsin Power & Light Co.*, 91 F.3d 1011, 1016 (7th Cir. 1996); *Rodriguez v. Loctite Puerto Rico, Inc.*, 967 F. Supp. 653, 662-63 (D.P.R. 1997); *In re Leslie Fay Companies*,

employee's serious medical condition can sometimes qualify as a disability under the ADA. The ADA states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . terms, conditions, and privileges of employment."⁵⁸ Some circuits have held that such discrimination can serve as the basis for a hostile work environment claim.⁵⁹ A court analyzes an ADA hostile work environment claim in the same manner as it would a violation of Title VII of the Civil Rights Act.⁶⁰ The Supreme Court, describing the standard for a hostile work environment under Title VII, declared, "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII [and in this case the ADA] is violated."⁶¹ There need not be "tangible psychological injury" to the employee; rather, the environment must be hostile or abusive from the perspective of a reasonable person, and the employee must perceive it as such.⁶²

If the medical records of an employee are disclosed to co-workers, a workplace could become sufficiently hostile to sustain a claim for a hostile work environment under the ADA. Depending on the professionalism of the employee's co-workers, the level of abuse can be significant. Taunting, jokes, and covert or overt hostility based on the employee's serious medical condition over time can rise to the level of "extreme, severe, or pervasive conduct" when viewed in its totality.⁶³ The employee would likely perceive it as such, particularly if he or she were aware that the employer disclosed personal medical information to co-workers. The employer would be responsible for the harassment because it disclosed the private information, cementing the causal link. In sum, much harm can come to the employee as a result of the employer disclosing medical information to the employee's co-workers when the employer receives virtually no benefit from such information, as the case of the unfortunate postal worker illustrates.

Inc., 212 B.R. 747, 789 (S.D.N.Y. 1997), *aff'd on other grounds*, No. 98-5051, 1999 WL 464992 (2d Cir. 1999); see also Brian L. Proto, *Actions Under Americans With Disabilities Act (42 U.S.C.A. §§ 12101 et seq.), to Remedy Alleged Harassment or Hostile Work Environment*, 162 A.L.R. FED. 603 (2005).

58. 42 U.S.C. § 12112(a) (2006).

59. See *Fox v. Gen. Motors*, 247 F.3d 169, 176 (4th Cir. 2001) (stating "we have little difficulty in concluding that the ADA, like Title VII, creates a cause of action for hostile work environment harassment"); *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 235 (5th Cir. 2001) (stating "we find that a cause of action for disability-based harassment is viable under the ADA").

60. See *Miranda*, 91 F.3d at 1017 ("[I]n analyzing claims under the ADA, it is appropriate to borrow from our approach to the respective analog under Title VII").

61. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

62. See *id.*

63. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998). Another factor that courts have looked to when making determinations regarding a hostile work environment is whether the conduct substantially affects the productivity of the employee. *Harris*, 510 U.S. at 22.

Moreover, even if the employer never disseminates the information intentionally or negligently to co-workers, there still exists an unnecessary potential risk of harm to the personal and working relationship between employee and employer. For example, if an employee's supervisor is apprised of specific facts associated with a serious medical condition, the employee's relationship with his supervisor could be undermined unnecessarily, as was seen in *Chandler*.⁶⁴ This would surely diminish productivity, and thereby counter one of the FMLA's goals of increased productivity through "family friendly" leave laws.⁶⁵ Further, if the employer misuses the employee's medical information, as was the case in *Doe* and *Chandler*, the gulf created between the employee and employer could become irreconcilably large.⁶⁶ The only way to ensure against the real risk of unauthorized disclosure is to eliminate the requirement that an employee disclose the facts underlying a serious medical condition to his employer when applying for FMLA leave.

D. Disclosure Requirements Are Unjustified Under Decisional Law and Other Federal Statutes Governing Privacy of Personal Medical Records

The medical record disclosure requirements of the FMLA should be eliminated because they do not comport with general employee privacy protections established by Congress under the ADA and the Health Insurance Portability and Accountability Act (HIPAA).⁶⁷

1. The Medical Records Privacy Protections of the Americans with Disabilities Act

Under the ADA, employers can access employee medical records when there is a job-related need that is consistent with a legitimate business purpose.⁶⁸ Further, because the ADA requires employers to reasonably accommodate employees' specific disabilities,⁶⁹ employers have a legitimate business interest in knowing the specific medical facts related to their employees' disabilities so they can provide adequate accommodations.⁷⁰ Accordingly, the disclosure of an employee's specific medical facts to the employer is allowed.⁷¹

64. See *Chandler v. Specialty Tires of Am. (Tenn.), Inc.*, 283 F.3d 818, 821 (6th Cir. 2002) (noting supervisor's reaction when learning of employee's condition).

65. The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.101 (2007).

66. See *Doe v. United States Postal Serv.*, 317 F.3d 339, 341 (D.C. Cir. 2003); *Chandler*, 283 F.3d at 821.

67. See HHS Security and Privacy, 45 C.F.R. § 164.502(b) (2007).

68. 42 U.S.C. § 12112(d)(4)(A) (2006).

69. *Id.* § 12112(b)(5). Reasonable accommodations can include: making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position. *Id.* § 12111(9).

70. *Id.* § 12112(d)(3)(B)(i).

71. *Id.*

The situation is different under the FMLA. When an employee requests FMLA leave, an employer is not asked to accommodate a particular disability, but must only allow the employee time off work.⁷² The employer's legitimate business interest exists only in knowing the particulars of the leave—the likely length of the leave, whether the employee will be able to work part-time, and the likely recurrence of a need for leave—so that they may adequately prepare for the leave.⁷³ As discussed above, however, the additional requirement that the employee must disclose specific facts underlying the employee's medical condition to a medically untrained manager goes beyond the scope of any legitimate business purpose. Applying the principles of the ADA, the lack of a legitimate business purpose for which the non-medically trained human resource manager needs the facts underlying the serious medical condition, should negate the requirement that such records be disclosed.

2. *Medical Record Disclosure Under the Health Insurance Portability and Accountability Act*

Under HIPAA, medical providers must make reasonable efforts to limit medical disclosures of protected information to those minimally necessary to accomplish the intended purpose of the disclosure.⁷⁴ Applying HIPAA's privacy principle to the request for medical leave situation under the FMLA, the minimum disclosure necessary to achieve the purposes of the act is to have a medically-trained doctor certify that the employ has a serious medical condition warranting leave. No further disclosure would be necessary or warranted under an FMLA request. Indeed, because knowing the additional facts underlying a serious medical condition is of no help to a medically untrained manager in making a leave request determination, requiring such disclosure to the employer falls outside the scope of the "minimum necessary" requirements.

E. *The Medical Facts Disclosure Requirements Undermine the Purposes of the FMLA*

The FMLA's requirement to disclose underlying medical facts to the employer when requesting FMLA leave not only unjustifiably infringes on an employee's privacy but also undermines Congress's purposes for enacting the legislation. Congress noted "workplaces that accommodate workers' family responsibilities have more productive employees."⁷⁵ Though highly effective in many respects, a thorn in the legislation is that FMLA medical disclosure

72. See The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.100(a) (2007).

73. See *id.* § 825.306(b)(2).

74. HHS Security and Privacy, 45 C.F.R. § 164.502(b) (2007). This does not apply with respect to treatment, where full disclosure is allowed. *Id.* § 164.502(b)(2)(i).

75. See H.R. REP. NO. 103-8, pt. 1, at 17 (1993).

requirements deter needful employee applicants from requesting leave due to their reluctance to disclose personal medical information to employers.

These medical disclosure requirements place employees at risk of adverse employment decisions, embarrassment resulting from the disclosure of personal medical information to co-workers, and the creation of a hostile working environment. Rather than dealing with the risk of divulging personal medical information to employers, qualifying employees may choose not to request necessary FMLA leave.⁷⁶ For those employees, the situation will revert back before the passage of the FMLA, when the demands of family and the commitment to work remained unbalanced. The medical disclosure requirements as currently written undermine Congress's intent in enacting the FMLA.

IV. RECOMMENDATION

Following the passage of the FMLA in 1993, authors John Tysse and Kimberly Japinga stated, "Before the FMLA can be considered a success, we submit that technical amendments to the FMLA . . . will be necessary to make the FMLA a workable mandate for employers and to achieve the goal articulated by President Clinton when he signed it into law."⁷⁷ These words still hold true today. The FMLA and relevant federal regulations should be amended because employees are forced to choose between claiming FMLA benefits and keeping private medical information undisclosed. Specifically, Congress should amend 29 U.S.C. § 2613(b)(3) and 29 C.F.R. § 825.306(b)(1) in order to eliminate the medical record disclosure requirement.⁷⁸ The medical certification Form WH-380 should also be amended to remove question number four, which asks the healthcare provider to "[d]escribe the medical facts which support your certification, including a brief statement as to how the medical facts meet the criteria of one of these categories."⁷⁹ Thus, medical doctors will disclose only the information necessary for employers to know. That is, whether or not the employee has a serious medical condition; and, without disclosing specific medical facts, the doctor will disclose any other

76. In addition to undermining the purposes of the FMLA, the disclosure could inadvertently create an internal inconsistency in the statute. A cause of action exists within the FMLA against employers who "interfere with, restrain, or deny the exercise of or the attempt to exercise, any [FMLA] right." 29 U.S.C. § 2615(a)(1) (2006). Because of the chilling effect that the disclosure requirements have on employees, the FMLA requirement to disclose unnecessary sensitive personal medical information interferes with the employee's attempt to exercise her FMLA rights. *Id.* § 2615(a)(1).

77. G. John Tysse & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361, 362 (1994).

78. See 29 U.S.C. § 2613(b)(3) (2006) (requiring disclosure of medical facts concerning health condition); The Family and Medical Leave Act of 1993, 29 C.F.R. § 825.306(b)(1) (2007) (mandating certification form should include "medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition").

79. 29 C.F.R. app. B, D.O.L. Form WH-380.

information in which the employer has a legitimate business interest in knowing, such as length of treatment, likelihood of recurrence, and ability to work intermittently.⁸⁰ By implementing these changes, Congress will protect employee privacy rights, preserve employer interest, and affirm the original purposes of the FMLA.

V. CONCLUSION

Employee medical records, including those provided to an employer for FMLA leave, contain sensitive information, which employers should treat with care. While the FMLA has been largely effective in achieving its goals of balancing workers' needs to meet family obligations in exigent circumstance, it allows for too much infringement on employee privacy as a condition of seeking leave. As a consequence of the FMLA's requirement that employees disclose the medical facts which underlie serious medical conditions, employees are needlessly subject to the risk of adverse employment actions, disclosures of personal information to co-workers, and the potential creation of hostile work environments. The disclosure requirement fails the standards imbedded in the ADA and HIPAA to determine the appropriateness of medical disclosures to third parties. Because the disclosure requirements discourage needful employees from requesting FMLA leave, the requirements work counter to Congress's intent in enacting the legislation. For these reasons, it is necessary to modify 29 U.S.C. § 2613(a), 29 C.F.R. § 825.306(b), and Department of Labor Form WH-380 by removing the requirement that an employee must inform an employer of the medical facts underlying a serious medical condition in order to qualify for medical leave under the FMLA.

80. The employer will still retain the option to request a second opinion by a health care provider of its choosing if it is not satisfied by the initial medical certification. This appropriately places the decision of whether an employee qualifies for FMLA leave on a trained medical doctor rather than an untrained human relations manager susceptible to arbitrary and discriminatory determinations, as is currently the status quo. *See* 29 C.F.R. § 825.307(a). Relaying specifics of the health problems to an employer will only be required if the employee makes a claim for accommodations under the ADA. 42 U.S.C. § 12112(d) (2006).