

## BALANCING CAREER AND PARENTHOOD: THE FAMILY MEDICAL LEAVE ACT AND MATERNITY LEAVE

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*"Don't confuse having a career with having a life. They are not the same."*<sup>2</sup>

### I. INTRODUCTION

Women financially support nearly half of middle class families.<sup>3</sup> To accommodate this social and economic change, Congress enacted the Family and Medical Leave Act of 1993 (FMLA),<sup>4</sup> which provides men and women an opportunity to take twelve weeks of unpaid leave following a familial qualifying event.<sup>5</sup> Although Congress specifically stated its motivation for the policy, unexpected complications have arisen,<sup>6</sup> including judicial failure to universally interpret and apply the statute for maternity leave claims.

In applying the FMLA, one of the most controversial and vague terms for courts to interpret is “eligible employee,” especially in the context of maternity leave claims. A woman, or man, seeking FMLA maternity leave must meet certain prerequisites in order to be considered “eligible,” and thus “entitled” to receive FMLA’s protections.<sup>7</sup> However, to what extent those prerequisites actually orchestrate the statute’s implementation for maternity leave claims

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1. J.D. 2014, Widener University School of Law. I would like to thank my mom, dad, and brother for always believing in me with unwavering support and love. I would also like to thank Jason, whose patience and love keep me going every day. This article is dedicated to my Bubbie and Zadie.

2. Hillary Clinton, *Words of Wisdom for the Nation's Graduates*, N.Y. TIMES, May 27, 1998, at B9.

3. Susan Gregory Thomas, *When the Wife Has a Fatter Paycheck: Female breadwinners can make for frustrated husbands—unless the man holds his own with income*, WALL ST. J., July 21, 2012, at C2 (noting that of the top 20%, 34% of women financially supported families and 70% of women support their families in the bottom 20%). See also *America's Families and Living Arrangements: 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/families/files/cps2012/tabFG3-all.xls>.

4. See Charles L. Baum, *Has Family Leave Legislation Increased Leave-Taking?*, 15 WASH. U. J.L. & POL'Y, 2004, at 93, 93-95.

5. *Id.* at 93. See also Rafael Gely & Timothy D. Chandler, *Maternity Leave Under the FMLA: An Analysis of the Litigation Experience*, 15 WASH. U. J.L. & POL'Y, 2004, at 143, 156 (noting that while the FMLA is not gender specific in regards to family related leave, 70.3% involve a female's request for maternity leave while 27.3% were requests related to complications due to pregnancy).

6. Nina G. Golden, *Pregnancy and Maternity Leave: Taking Baby Steps Towards Effective Policies*, 8 J.L. & FAM. STUD. 1, 11-14 (2006). Other issues that have arisen include people's disfavor and unwillingness to utilize the FMLA because it does not provide paid leave and many cannot afford to take twelve weeks of unpaid leave, especially when starting (and supporting) a family. *Id.* at 11-12. Also, the FMLA applies only to large employers, who are most likely to have an established leave policy, and thus, the Act does not have any significant effect on individuals who work for smaller businesses. *Id.* at 12.

7. 29 U.S.C. §§ 2611(2)(A), 2612(a)(1) (2006).

remains disputed, specifically the question of pre-eligible women who would otherwise be entitled to FMLA benefits at the time they give birth. While this question was left unanswered by *Walker v. Elmore County Board of Education*,<sup>8</sup> the Eleventh Circuit Court of Appeals reacted and held that a pre-eligible woman seeking maternity leave before she met the eligibility requirements of the FMLA was entitled to post-eligible maternity leave.<sup>9</sup> The Eleventh Circuit held that the opposite holding would be contrary to legislative intent.<sup>10</sup>

The lingering debate remains about the extent to which courts should narrowly or broadly interpret “eligible employee” to determine whether a pre-eligible employee, man or woman, may request maternity leave and/or raise FMLA claims if he or she would be eligible at the time of leave.<sup>11</sup> This paper will argue that courts should adopt a broad definition of “eligible employee,” as relied upon in *Pereda*, so that an employee,<sup>12</sup> who has not been working for a particular employer for the statutory period of time, will nevertheless be eligible for FMLA maternity leave, and thus have standing to bring claims under the FMLA, because she will have met the FMLA’s required statutory period by the time she gives birth.

## II. FMLA’S REQUIREMENTS

Congress clearly identified its purpose when first enacting the FMLA in 1993. In order “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity[,]” the FMLA provided women and men an equal opportunity to create a balance between personal life and a career.<sup>13</sup> Even though Congress enacted the FMLA as a gender-neutral policy, discrimination against women who seek FMLA maternity leave continues to exist in the workplace alongside a stigma against

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8. 223 F. Supp. 2d 1255, 1260-61 (M.D. Ala. 2002), *aff’d but criticized*, 379 F.3d 1249, 1253 (11th Cir. 2004).

9. *Pereda v. Brookdale Senior Living Cmty., Inc.*, 666 F.3d 1269, 1272 (11th Cir. 2012).

10. *Id.* at 1273-76.

11. There are two types of claims that may be brought in the Eleventh Circuit under the FMLA: (1) the interference claim; and (2) the retaliation claim regarding 29 U.S.C. § 2615. *Johnson v. Morehouse Coll., Inc.*, 199 F. Supp. 2d 1345, 1353 (N.D. Ga. 2002). Interference claims may be brought when “employers burden or outright deny substantive statutory rights to which their employees are entitled,” while retaliation claims may be brought when “employers discharge employees for exercising their FMLA right to leave.” *Id.* Claims arising from requests for FMLA maternity leave include the following set of conditions, which should be explored during the course of litigation: “characteristics of employee-plaintiffs and employers; reasons provided for the leave request; alleged violations of the FMLA; additional statutory claims made by plaintiffs; the employer’s defense(s) to alleged violations; and the case outcome(s).” Gely & Chandler, *supra* note 5, at 154.

12. Even though the FMLA is gender-neutral and, therefore, men can also seek maternity leave under the FMLA, studies have shown that women primarily seek FMLA leave for maternity purposes. Gely & Chandler, *supra* note 5, at 156-57.

13. 29 U.S.C. § 2601(b)(1) (2006).

paternity leave.<sup>14</sup> To create a feasible balance for career driven women, and in the rare instance men, the FMLA provides employees an opportunity to take twelve weeks of unpaid leave following a familial qualifying event.<sup>15</sup> Although the language of the statute seems unambiguous, courts have interpreted the FMLA both narrowly and broadly, resulting in various applications of its many provisions. Specifically, the FMLA's prerequisite of "eligible employee" has spawned conflicting applications of the FMLA for purposes of maternity leave claims.

The FMLA provides that an individual who has worked for his or her employer "for at least 12 months" and "for at least 1,250 hours of service" is an "eligible employee."<sup>16</sup> Furthermore, the FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter."<sup>17</sup> This requirement that one be "eligible" in order to request FMLA leave has created discussion regarding the statute's specific language, "because of."<sup>18</sup>

Whether or not the employee provided the adequate notice is also pivotal in determining whether an employee may bring FMLA claims against an employer, because an employee's notice to his or employer is necessary to trigger the protection of FMLA rights.<sup>19</sup> Distinct from other qualifying events, having the opportunity to take maternity leave is unique for women who become pregnant while at a new job. The FMLA provides, "[i]n any case in which the necessity for leave . . . is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave . . . ." <sup>20</sup> Additionally, "if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable."<sup>21</sup> Consequentially, the notice requirement "becomes a trap for newer employees and extends to employers a significant exemption

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14. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1062-63 (1994).

15. 29 U.S.C. §§ 2601(b)(4), 2612(a)(1).

16. 29 U.S.C. § 2611(2)(A)(i)-(ii) (2006). There is also a worksite requirement, in which the employee must be employed at a business where there are fifty or more employees, living within seventy-five miles of the worksite. 29 U.S.C. § 2611(2)(B)(ii). However, this requirement has no bearing on the case at hand, and will thus not be discussed further in this article.

17. 29 U.S.C. § 2612(a)(1)-(a)(1)(A). *See id.* at § 2612(a)(1)(B)-(D) for additional qualifying events that trigger one's eligibility; however, they are outside the scope of this article and thus, will not be discussed further.

18. *See, e.g.,* Harley v. Health Ctr. of Coconut Creek, Inc., 487 F. Supp. 2d 1344, 1358 (S.D. Fla. 2006) (The court addresses the specific language of 29 U.S.C. § 2612(a)(1)(A), which led the court to conclude that "unless unique circumstances exist, a pregnant employee is only entitled to protection against interference with her FMLA rights once she delivers her baby and the circumstance of her needing leave arises").

19. 29 U.S.C. § 2612(e)(1); Gely & Chandler, *supra* note 5, at 150.

20. 29 U.S.C. § 2612(e)(1).

21. *Id.*

from liability.”<sup>22</sup> Whether Congress intended this disputable loophole is uncertain, but it is clear that the confusion has created inevitable hardships for those women seeking maternity leave prior to childbirth.

The Department of Labor’s (DOL) enactment of 29 Code of Federal Regulation Section 825 governing FMLA coverage further complicated the statutory interpretation of the FMLA. Although the purpose laid out is the same as the FMLA,<sup>23</sup> the DOL regulation provides that “[t]he determination of whether an employee . . . [meets FMLA qualifications] must be made as of the date the FMLA leave is to start.”<sup>24</sup> This regulation further complicates the FMLA because circuits have invalidated certain subsections of the Code of Federal Regulations,<sup>25</sup> and employers rely on this language as a loophole to prevent employees from raising FMLA claims who are not yet qualified as “eligible.”<sup>26</sup> Additionally, the regulation provides that “[i]ndividuals, and not merely employees, are protected from retaliation for opposing . . . any practice which is unlawful . . . .”<sup>27</sup> This subsection, read into the FMLA, suggests that broad interpretation is necessary to protect not only current employees, but also potential and former employees. Courts must analyze the FMLA and the Federal Regulation together because the interpretation of one is completely dependent on the other, illustrating the importance of broadly interpreting the FMLA.

### III. A WOMAN’S FIGHT FOR FMLA BENEFITS

The Eleventh Circuit has identified maternity leave as a “protected activity” for purposes of the FMLA.<sup>28</sup> Interpretation and application problems arise when employees wish to raise either an interference or retaliation claim under the FMLA.<sup>29</sup> One of the most recent cases, *Pereda v. Brookdale Senior Living Communities, Inc.*, depicts the fragmented state of the law on the question of

22. *Pereda v. Brookdale Senior Living Cmty., Inc.*, 666 F.3d 1269, 1274 (11th Cir. 2012) (citing *Beffert v. Pa. Dep’t of Pub. Welfare*, No. Civ. A. 05-43, 2005 WL 906362, at \*3 (E.D. Pa. Apr. 18, 2005)).

23. The Family Medical and Leave Act of 1993, 29 C.F.R. § 825.101 (2013).

24. 29 C.F.R. § 825.110(d).

25. *E.g.*, *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 582 (7th Cir. 2000); *Brungart v. BellSouth Telecomms., Inc.*, 231 F.3d 791, 797 (11th Cir. 2000) (holding that 29 C.F.R. § 825.110(d) is invalid because “it purports to extend the eligibility provisions of the FMLA to an otherwise ineligible employee who is not promptly notified after requesting leave that she is ineligible for it under the statute[.]”).

26. *See Potts v. Franklin Elec. Co.*, No. Civ. 05-433-JHP, 2006 WL 2474964, at \*3 (E.D. Ok. Aug. 24, 2006).

27. 29 C.F.R. § 825.220(e).

28. *See Pereda v. Brookdale Senior Living Cmty., Inc.*, 666 F.3d 1269, 1275 (11th Cir. 2012).

29. *See* 29 U.S.C. § 2615(a) (2006) (prohibiting employers from “interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise, any right provided” under the FMLA, and thus, causing problems with interpreting exactly what rights have been provided). *See also Pereda*, 666 F.3d at 1273. For an interference claim, the plaintiff has the burden of proving “by a preponderance of the evidence that she was denied a benefit to which she was entitled.” *Id.* at 1274 (citation omitted).

whether to broadly or narrowly interpret the FMLA for purposes of applying its policies for maternity leave claims.<sup>30</sup>

Brookdale hired Kathryn Pereda on October 5, 2008.<sup>31</sup> In June 2009, Pereda disclosed to her employer that she was pregnant and requested maternity leave under the FMLA to begin about the time of her due date, November 30, 2009.<sup>32</sup> Before giving birth, Pereda argued that Brookdale began to treat her differently, which led to pregnancy complications.<sup>33</sup> Pereda needed to take leave from work to care for herself and her unborn child because of these unexpected complications.<sup>34</sup> Brookdale terminated Pereda in September 2009, reasoning that she took leave before the birth of her child without giving proper notice to her department.<sup>35</sup>

Pereda alleged that her termination was a result of interference and retaliation by Brookdale.<sup>36</sup> Pereda's claims depended upon whether or not the FMLA protects a pre-eligible employee who seeks post-eligibility leave.<sup>37</sup> Although Pereda did not meet the requirements of 29 U.S.C. § 2611(2)(A)(i) and (ii) at the time she requested FMLA leave from her employer, she would have been eligible by her due date in November 2009, and thus, requested that the court broadly interpret the FMLA.<sup>38</sup> Brookdale, seeking a narrow interpretation of "eligible employee," argued that "employees are eligible for FMLA leave only upon the delivery of a child[ ]" because "[e]ligibility is but

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30. Pereda v. Brookdale Senior Living Cmty., Inc., 666 F.3d 1269 (11th Cir. 2012).

31. *Id.* at 1271.

32. *Id.*

33. *Id.*

34. *Id.* It is disputed whether Pereda properly notified Brookdale, yet the court neglected to spend time on this issue, focusing rather on whether she would have been eligible at the time her FMLA leave was scheduled to commence. *Id.* at 1272-73.

35. *Id.* at 1271.

36. Pereda entered her complaint against Brookdale on May 11, 2010, alleging both an interference claim and a retaliation claim. *Pereda*, 666 F.3d at 1271.

37. *Id.* at 1275. The issue presented was raised, but not answered, in *Walker v. Elmore Cnty. Bd. of Educ.*, 379 F.3d 1249, 1253 (11th Cir. 2004). In *Walker*, a non-tenured teacher working less than one year before she requested maternity leave under the FMLA and was terminated. *Id.* at 1250-51. The teacher claimed that she was an eligible employee under the FMLA because she was paid for an entire year of work and her termination was a form of retaliation, while the school argued she was not tenured and therefore the school had no obligation to hire her as an employee. *Walker v. Elmore Cnty. Bd. of Educ.*, 223 F. Supp. 1255, 1257-58 (M.D. Ala. 2002). The court determined that "some retaliation claims by an employee not yet eligible for FMLA leave may be covered by the FMLA[.]" but did not conclude as to which retaliation claims may be brought by a pre-eligible employee for post-eligible leave. *Id.* at 1260. The Middle District of Alabama determined that Ms. Walker did not meet the FMLA's requirements because she could not satisfy the burden-shifting requirements developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and thus, could not bring a retaliation claim against her employer. *Id.* at 1261-62. On appeal, the Eleventh Circuit did not reach the question regarding whether the FMLA protects a pre-eligible employee who seeks post-eligibility leave, because the court determined that Walker would not have been an eligible employee at the time leave was requested. *Walker*, 379 F.3d at 1253.

38. *See Pereda*, 666 F.3d at 1273. *See also* 29 U.S.C. § 2611(2)(A)(i)-(ii) (2006) (requiring that an employee work for their employer for a period of at least twelve months and work for at least 1,250 hours within that one year to be eligible for FMLA leave).

one aspect of the regulation[.]” as the employee must also provide “[n]otice of a future trigger event . . . .”<sup>39</sup> Brookdale’s argument fails to recognize the underlying rationale promoted by Congress when the FMLA was first enacted. Such a narrow interpretation cannot be upheld if courts consider the Congressional intent and the explicit statutory language of the FMLA.

The Eleventh Circuit Court of Appeals reversed the district court’s denial of Pereda’s claim, reasoning “that allowing the district court’s ruling to stand would violate the purposes for which the FMLA was enacted[.]” because “a loophole is created whereby an employer has total freedom to terminate an employee before she can ever become eligible.”<sup>40</sup> The *Pereda* court held “that a pre-eligible request for post-eligible leave is protected activity because the FMLA aims to support both employees in the process of exercising their FMLA rights and employers in planning for the absence of employees . . . .”<sup>41</sup> Furthermore, the court acknowledged the uniqueness of maternity leave, stating that because “the very nature of the fact that a full-term pregnancy takes nine months to complete, not affording pre-eligible expecting parents any protection would leave them exposed to adverse action by their employer.”<sup>42</sup>

The *Pereda* court reasoned that Brookdale’s argument failed because “the FMLA scheme intends that a determination as to FMLA eligibility be made ‘as of the date the FMLA leave is to start.’”<sup>43</sup> *Pereda* did not expand FMLA’s eligibility requirements, but rather clarified that “a pre-eligible employee has a cause of action if an employer terminates her in order to avoid having to accommodate that employee with rightful FMLA leave rights once that employee becomes eligible.”<sup>44</sup>

#### IV. BROAD VERSUS NARROW INTERPRETATION

To determine whether to interpret “eligible employee” narrowly or broadly for purposes of maternity leave eligibility under the FMLA, we must determine the definition of “employee.” Although case law provides insufficient means of determining the scope of an “eligible employee” for purposes of seeking FMLA maternity leave, courts from various circuits have determined the scope of “employee” for other types of claims. The court’s determination is crucial because a narrow interpretation would give employers the opportunity to use the FMLA against their employees rather than promote its stated purpose,

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39. *Pereda*, 666 F.3d at 1274.

40. *Id.* at 1273.

41. *Id.* at 1276. *See also* *Williams v. Crown Liquors of Broward, Inc.*, 878 F. Supp. 2d 1307, 1310-11 (S.D. Fla. 2012) (suggesting that had Pereda not given birth, she would still be entitled to her retaliation claim because “it is not necessary for the triggering event to ultimately occur for a pre-entitlement request to be protected activity[.]”).

42. *Pereda*, 666 F.3d at 1275.

43. *Id.* at 1274 (quoting 29 C.F.R. § 825.110(d)).

44. *Id.* at 1275.

which is to protect the rights of those employees experiencing significant familial events.<sup>45</sup>

*A. The Broad Interpretation*

Since little case law exists regarding the interpretation of the FMLA for maternity leave claims, other FMLA qualifying events must also be analyzed to determine what constitutes “eligible employee.” The broad interpretation is primarily premised on legislative intent. Promoters of a broad interpretation argue that congressional intent demonstrates that “[l]ogic requires that the FMLA be read to require that that employee be permitted to make a charge against the employer for an adverse employment action.”<sup>46</sup> When read in conjunction with the notice requirement, it is argued that “eligible employee” must be read broadly in order to protect those employees who anticipated FMLA leave months prior to the event.<sup>47</sup> In fact, 29 U.S.C. § 2612(e) requires that employees must notify employers regarding “foreseeable” qualifying events to invoke his or her FMLA rights.<sup>48</sup> This suggests that those seeking maternity leave may be required, by the FMLA, to notify her employer before the qualifying event to comply with FMLA regulations.

The First Circuit broadly interprets “employee” for purposes of the FMLA. In *Duckworth v. Pratt & Whitney, Inc.*, the First Circuit held that legislative intent, legislative history, and the interpretation of “employee” in other congressionally enacted employment statutes provide the rationale to maintain broad statutory interpretation of the FMLA.<sup>49</sup> The court focused on legislative intent by specifically comparing the FMLA to other statutes that provide a definition of employee for purposes of taking a leave of absence.<sup>50</sup> By referencing these other statutes, the court determined that “legislative history reveals that Congress, at the time it enacted the FMLA, was aware of the breadth of the FLSA definition and purposely chose to adopt that definition.”<sup>51</sup>

Additionally, the Eleventh Circuit relied upon a broad interpretation of “employee” for purposes of the FMLA in *Smith v. BellSouth Telecommunications*.<sup>52</sup> The Eleventh Circuit rejected the narrow interpretation of “employee” in *BellSouth Telecommunications* because a narrow “interpretation would permit an employer to evade the Act by blacklisting employees who have used leave in

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45. Gely & Chandler, *supra* note 5, at 167. The FMLA’s ambiguity provides employers with “defenses” against employee complaints. *Id.* at 168.

46. Reynolds v. Inter-Indus. Conference on Auto Collision Repair, 594 F. Supp. 2d 925, 928 (N.D. Ill. 2009).

47. Beffert v. Pa. Dep’t of Pub. Welfare, No. Civ. A. 05-43, 2005 WL 906362, at \*3 (E.D. Pa. Apr. 18, 2005).

48. See Skrjanc v. Great Lakes Power Serv. Co., 272 F.3d 309, 314 (6th Cir. 2001).

49. Duckworth v. Pratt & Whitney, Inc., 152 F.3d 1, 6-7 (1st Cir. 1998).

50. *Id.* at 6.

51. *Id.* at 7.

52. Smith v. BellSouth Telecomms., Inc., 273 F.3d 1303, 1313 (11th Cir. 2001).

the past or by refusing to hire prospective employees if the employer suspects they might take advantage of the Act.”<sup>53</sup>

District court opinions have also broadly interpreted “eligible employee” to comply with the purposes and findings stated in the FMLA. For instance, in *Beffert v. Pennsylvania Department of Public Welfare*, the court determined that Congress did not intend the FMLA to provide a loophole for employers to defend themselves through FMLA’s notice provision.<sup>54</sup> The court reasoned that because the “FMLA contemplates notice of leave in advance of becoming an eligible employee, the statute necessarily must protect from retaliation those currently non-eligible employees who give such notice of leave to commence once they become eligible employees.”<sup>55</sup> Specifically, the court referenced the language of 29 U.S.C. § 2612(e)(1), which uses the term “employee” rather than “eligible employee.”<sup>56</sup> This language suggests Congress intended that some employees who wish to request FMLA leave must do so before a qualifying event to accommodate employers.<sup>57</sup>

Other district courts have also held in favor of expansive applications of the FMLA in cases of maternity leave. For example, in *Reynolds v. Inter-Industry Conference on Auto Collision Repair*, the court determined that “[a]n employee need not meet the initial eligibility requirements in order to suffer retaliation[,]” and thus, a pre-eligible employee may have a valid FMLA claim so long as he or she has worked the requisite time before the leave date.<sup>58</sup> These cases demonstrate that courts do not restrict employees who are pre-eligible from maintaining valid claims against an employer. Courts must continue to be objective and recognize that the scope of the FMLA extends to those who are, and will be, eligible at the time of leave.

### B. The Narrow Interpretation

Most employers ask courts to narrowly interpret the FMLA to prevent claims against them. Often, employers rely on 29 U.S.C. § 2611(2)(A)(i), which proposes that an employee must be employed for one year to be eligible for FMLA benefits.<sup>59</sup> Proponents of a narrow interpretation argue that the

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53. *Id.* at 1307 (quoting *Duckworth*, 152 F.3d at 11); *Pereda v. Brookdale Senior Living Cmty., Inc.*, 666 F.3d 1269, 1275 (11th Cir. 2012).

54. *Beffert v. Pa. Dep’t of Pub. Welfare*, No. Civ. A. 05-43, 2005 WL 906362, at \*3 (E.D. Pa. Apr. 18, 2005).

55. *Id.* See also *Reynolds v. Inter-Indus. Conference on Auto Collision Repair*, 594 F. Supp. 2d 925, 930 (N.D. Ill. 2009); *Potts v. Franklin Elec. Co.*, No. Civ. 05-433-JHP, 2006 WL 2474964, at \*3 (E.D. Ok. Aug. 24, 2006); *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 314 (6th Cir. 2001).

56. *Beffert*, 2005 WL 906362, at \*3.

57. *Id.*

58. *Reynolds*, 594 F. Supp. 2d at 929. Employers cannot retaliate against an employee who requests FMLA leave even though he or she has not worked the requisite period of time so long as the employee will be eligible and entitled by the date the leave is to begin. See *id.* at 929-30.

59. *E.g.*, *McInerney v. Moyer Lumber & Hardware, Inc.*, 244 F. Supp. 2d 393, 399 (E.D. Pa. 2002).

qualifying event, the actual birth of the child, is necessary to trigger the benefits of the FMLA in addition to complying with the notice requirement as provided in the FMLA and its parallel regulation.<sup>60</sup> Brookdale, the employer in *Pereda*, argued for a narrow interpretation of the FMLA based upon 29 C.F.R. § 825.112(d).<sup>61</sup> Although the Eleventh Circuit denied Brookdale's motion for summary judgment in *Pereda*, other courts have understood the FMLA narrowly and applied it as such.

The Court of Appeals for the Seventh Circuit interpreted "eligible employee" narrowly in *Aubuchon v. Knauf Fiberglass*, determining that the eligibility requirements were structured to minimize the disruption to the employer that will be caused by the absence of the employee, and thus the employee was required to abide by FMLA's qualification requirements.<sup>62</sup> Also, in *Johnson v. Morehouse College*, the court determined that the starting date for an employee's FMLA maternity leave began on the day she gave birth, and not at any point prior to the triggering event.<sup>63</sup> Reluctance to extend the FMLA to pre-eligible employees has nothing to do with protecting the employee; rather, these courts focus on protecting the welfare of the employer. This emphasis is contrary to the purpose of the FMLA.

District courts also have interpreted the FMLA narrowly, such as in *Harley v. Health Center of Coconut Creek*.<sup>64</sup> In *Harley*, the court determined that eligibility is only triggered following the birth of the child and thus, because notice is also required under the FMLA, a woman seeking maternity leave cannot provide notice until the time of the actual childbirth, consequently making it impossible to be qualified.<sup>65</sup> The court specifically focused its analysis on the words "because of" in 29 U.S.C. § 2912(a)(1)(A), reasoning that "unless unique circumstances exist, a pregnant employee is only entitled to protection against

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60. See *Harley v. Health Ctr. of Coconut Creek, Inc.*, 487 F. Supp. 2d 1344, 1358 (S.D. Fla. 2006).

61. *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1274 (11th Cir. 2012).

62. See *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 951 (7th Cir. 2004). A husband requested FMLA leave two days before his wife delivered their child because she had been experiencing pregnancy complications, but his employer denied the FMLA leave, and he was terminated when he never returned to work. *Id.* at 952-53. The court held that had the husband provided a physician note explaining the medical complications of his wife's pregnancy, the employer would have been properly notified of the qualifying FMLA event and he would have been eligible and entitled to FMLA leave. *Id.* at 953.

63. See *Johnson v. Morehouse Coll., Inc.*, 199 F. Supp. 2d 1345, 1353-54, 1358 (N.D. Ga. 2002). The issue in *Johnson* is not the same as in *Pereda*, as it applied to the number of weeks the employee was permitted to take, but *Johnson* nevertheless illustrates what courts analyze to determine an employer's FMLA claim. *Id.* at 1355-58.

64. 487 F. Supp. 2d 1344, 1359 (S.D. Fla. 2006).

65. See *id.* at 1358. The plaintiff brought an interference claim against her employer arguing that she was wrongfully terminated soon after she asked her employer about taking maternity leave after giving birth. *Id.* at 1356. Defendant's motion for summary judgment was granted because the plaintiff did not raise any genuine issue of fact, since she never actually requested FMLA leave before she was eligible, but rather only inquired as to her eligibility rights and how she would go about requesting for FMLA leave at a later date. *Id.* at 1359.

interference with her FMLA rights once she delivers her baby and the circumstance of her needing leave arises.”<sup>66</sup>

If statutory uncertainty continues, claims such as those offered by Pereda will eventually come before the Supreme Court. Whether or not state and lower federal courts take a broad or narrow approach in interpreting and applying the FMLA, it is ultimately the statutory language coupled with legislative intent that will prevail. Nevertheless, courts do have the discretion to determine, within their particular jurisdiction, to what extent the FMLA governs maternity leave claims. In examining the two ways the FMLA has been interpreted and applied by various courts, it is nevertheless important for these courts to consider other similar policies enforced by Congress.

#### V. POLICIES INFLUENCING FMLA

Courts must consider the unique circumstances that take place before and after childbirth, in conjunction with legislative intent, when interpreting “eligible employee” under the FMLA; however, the lack of precedent guiding courts in this area complicates the application of the FMLA. Furthermore, social change must be considered because “[e]ven when both parents are employed outside the home, women tend to carry the predominant responsibility for child care.”<sup>67</sup> Accordingly, it is necessary to examine how courts interpret other legislative regulations, aside from the FMLA, that include comparable terminology and legislative intent in order to determine the breadth of the FMLA for maternity leave claims.

The four primary regulations that courts refer to when interpreting “employee” in a similar way to the FMLA include: (1) the Age Discrimination Employment Act (ADEA); (2) the National Labor Relations Act (NLRA); (3) Title VII; and (4) the Fair Labor Standards Act (FLSA). In analyzing how courts extensively enforce these policies, it is reasonable to conclude that courts must also broadly interpret “employee” for purposes of FMLA maternity leave claims. Nevertheless, one must consider that terminology varies among statutes, and possibly within the same statute, and thus it is important to acknowledge the specific context of the terminology and specific claim.<sup>68</sup> Therefore, even though these policies may provide sensible guidelines for courts to interpret the FMLA, the overall context must also be examined when determining the extensiveness of a policy.

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66. *Harley*, 487 F. Supp. 2d at 1358.

67. Malin, *supra* note 14, at 1047-48.

68. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1310 (11th Cir. 2001).

A. *Age Discrimination Employment Act and National Labor Relations Act*

Congress enacted other types of regulations to prevent employee discrimination through the Age Discrimination Employment Act (ADEA) and the National Labor Relations Act (NLRA).<sup>69</sup> The ADEA defines “employee” as “an individual employed by any employer[.]”<sup>70</sup> The NLRA states that an “‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer[ ] . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute[.] . . .”<sup>71</sup> The application of these definitions suggests courts must expansively interpret “employee” for claims brought by current and former employees.

The Eleventh Circuit referenced these two particular acts when determining the breadth of the FMLA in *Smith v. BellSouth Telecommunications*.<sup>72</sup> The court opined that Congress intended a broad reading of “employee” for purposes of interpreting and applying these acts.<sup>73</sup> In *Smith*, the court disagreed with the defendant’s arguments that the application of these regulations cannot be compared to the FMLA.<sup>74</sup> In so holding, the Eleventh Circuit ultimately determined the policy’s terminology is “ambiguous,” yet because the agency’s interpretation of the FMLA was “reasonable,” the plaintiff had standing to bring a retaliation claim against his previous employer.<sup>75</sup> This case demonstrates the significance of a specific case’s unique set of facts and the need to draw upon the interpretation of other similar regulations to understand the breadth of the FMLA.

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69. *See, e.g.*, 29 U.S.C. § 621(b) (2006) (“It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age[ ] [and] to prohibit arbitrary age discrimination in employment[.] . . .”); 29 U.S.C. § 151 (declaring that the policy’s purpose is to protect employees’ right to organize and bargain collectively by prohibiting employers from preventing or obstructing such organization).

70. 29 U.S.C. § 630(f) (2006).

71. 29 U.S.C. § 152(3).

72. 273 F.3d at 1309-10.

73. *Id.* The Eleventh Circuit noted specific cases to demonstrate the ADEA and the NLRA impact on the way the FMLA should be interpreted. *Id.* In regard to the ADEA, the Eleventh Circuit cited to *Passer v. Am. Chem. Soc’y*, 935 F.2d 322, 330 (D.C. Cir. 1991) and *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088 (5th Cir. 1987). *Id.* at 1309. In regard to the NLRA, the Eleventh Circuit cited to *N.L.R.B. v. George D. Aucter Co.*, 209 F.2d 273, 277 (5th Cir. 1954). *Id.* at 1310. All three cases held the regulations definition of “employee” must be broadly interpreted.

74. *Id.* at 1310-12. The Eleventh Circuit instead relied upon the First Circuit’s holding in *Duckworth*, which held that Congress would not restrict who may bring a valid claim to only current employees. *Id.* at 1311-12.

75. *Id.* at 1313. To determine whether a specific agency in this case legitimately interpreted the FMLA, the Eleventh Circuit relied upon the *Chevron* test, as first suggested in *Chevron U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 842-45 (1984). *Id.* at 1307. The *Chevron* analysis has two parts: (1) “whether Congress has directly spoken to the precise question at issue[.]” which is truly a question of “ambiguity;” and (2) “whether the agency’s construction of the statute is reasonable.” *Id.* (citation omitted).

### B. Title VII

Congress enacted Title VII to prevent employee discrimination, and similarly to the ADEA and the NLRA, courts reference the policy when interpreting the FMLA. To clarify the statute's vague terminology, the Supreme Court determined in *Robinson v. Shell Oil Company* that an expansive definition of "employees" included former employees for purposes of applying Title VII.<sup>76</sup> Concluding the term is "ambiguous" for interpretation purposes, the Supreme Court relied upon other sections of Title VII to conclude that a more expansive statutory interpretation is "more consistent with the broader context of Title VII and the primary purpose [of the applicable subsection]. . . ."<sup>77</sup> The Court supported, agreeing with the petitioner, that Title VII must apply to former, as well as current, employees because Title VII was enacted to provide "unfettered access to statutory remedial mechanisms" and "to hold otherwise would effectively vitiate much of the protection afforded by [the subsection]."<sup>78</sup> In summary, the Supreme Court, in its interpretation and application, broadly interprets "employee" under Title VII.<sup>79</sup>

This broad interpretation of "employee" for purposes of Title VII transfers to the FMLA.<sup>80</sup> As suggested by the Supreme Court in *Robinson*, there are instances when "employee" is explicitly defined and can be applied as such by the courts, but it nevertheless remains that a majority of the statute's terminology remains ambiguous.<sup>81</sup> Much like the Supreme Court's analysis in *Robinson*, courts at every level should analyze the FMLA in a similar manner.

### C. Fair Labor Standards Act

The Supreme Court and the Eleventh Circuit Court of Appeals relied upon an expansive reading of "employees" in their interpretation of the Fair Labor Standards Act in order to determine the breadth of "employee" for purposes of the FMLA. Thus, in addition to the significant role legislative intent plays

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76. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). See *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 6 (1st Cir. 1998) (holding that a former employee had standing to bring a claim under the FMLA).

77. *Robinson*, 519 U.S. at 346.

78. *Id.* at 345-46. Specifically, the Supreme Court provided three reasons for its holding: (1) "there is no temporal qualifier in the statute such as would make plain that [the subsection] protects only persons still employed at the time of retaliation[.]" (2) "Title VII's definition of 'employee' likewise lacks any temporal qualifier and is consistent with either current or past employment[.]" and (3) "a number of other provisions in Title VII use the term 'employees' to mean something more inclusive or different than 'current employees.'" *Id.* at 341-42.

79. *Id.* at 344-46 (finding that "employee" is an ambiguous term; the Supreme Court continued its analysis in its finding that the statute is meant to protect those who have valid retaliations claims against employers, and therefore, it would be contrary to the legislative policy's underlying foundation if the courts narrowly interpreted its provisions).

80. *Smith*, 273 F.3d at 1309.

81. *Robinson*, 519 U.S. at 343-44.

in the analysis of the FMLA, it is undeniable that courts must recognize the importance, and the need, to broadly interpret the term “employees” to maintain the protections Congress sought to initiate, as many other regulations have previously done.

In *Smith v. BellSouth Telecommunications*, the Eleventh Circuit compared the FMLA to the broad interpretation given to “employee” in the FLSA.<sup>82</sup> In showing the parallels between the regulations, the court noted, “[t]he FMLA defines the term ‘employee’ by reference to the definition in the FLSA. . . .”<sup>83</sup> The Eleventh Circuit recognized that “[w]hen Congress chose to incorporate the FLSA definition of employee into the FMLA, it presumably was aware of how broadly courts had interpreted the FLSA definition.”<sup>84</sup> Even the Supreme Court believed that “the FLSA definition that Congress chose to incorporate into the FMLA [was] ‘exceedingly broad.’”<sup>85</sup> Just as the Supreme Court understood the significance of an “exceedingly broad” interpretation of the FMLA, as interpreted in conjunction with the FLSA, other federal and states courts must also continue to favor an expansive FMLA interpretation in their application of the FMLA to pre-eligible women seeking maternity leave prior to the birth of their children.

## VI. LEGISLATIVE INTENT

It is indisputable that Congress specifically enacted the FMLA for a particular purpose. The statute explicitly states, “[i]t is the purpose of this Act . . . to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. . . .”<sup>86</sup> Not even the best attorney could raise a valid argument that these words mean anything to the contrary. Congress arguably intended that “the FMLA would lead to more progressive legislation in the future, and that it might do this by forging family leave benefits onto the national scene as an expected and important benefit . . . . Mandating family leave would ultimately change employee expectations and employer perceptions about the workplace. . . .”<sup>87</sup> Nevertheless, precedent clearly demonstrates that courts greatly consider legislative intent when attempting to interpret and apply statutes such as the FMLA.

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82. *Smith*, 273 F.3d at 1307-08. See also *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 147 (6th Cir. 1977) (holding that the employee who terminated his employment is protected by FLSA and thus could raise a claim against the previous employer).

83. *Smith*, 273 F.3d at 1307.

84. *Id.* at 1308. This case addressed whether one may bring a retaliation claim under the FMLA as a former employee. *Id.* at 1305. After being denied re-employment, Smith argued that his employer based their decision to not rehire on his previous FMLA leave. *Id.*

85. *Id.* at 1308 (quoting *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 295 (1985)).

86. 29 U.S.C. § 2601(b)(1) (2006). See § 2601(b)(2)-(5) (providing four other congressional rationales).

87. Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL’Y, 2004, at 65, 84.

An emphasis on legislative intent is overwhelmingly significant when courts must interpret statutory language. Even the Supreme Court has recognized the significance of congressional intent.<sup>88</sup> For example, Chief Justice Rehnquist confirmed the FMLA had a specific purpose in *Nevada Department of Human Resources v. Hibbs*.<sup>89</sup> The Supreme Court “reaffirmed that the FMLA’s drafters intended to remedy the discrimination still experienced by women in the workplace” and “Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees . . . .”<sup>90</sup> As specifically acknowledged by the Supreme Court, it is quite evident that Congress had a specific goal in mind when enacting the FMLA. It is indisputable that the motivation to initiate the FMLA was specific, and precisely intended to transcend nationwide.

In *Reynolds v. Inter-Industry Conference on Auto Collision Repair*, the court referenced the significance of the purposes specified by Congress within the statute itself.<sup>91</sup> Acknowledging that Congress explicitly provided its rationale for enacting the FMLA, the court argued in favor of employees who have not, but will, meet the requirements as of the date of leave:

An employer has no legitimate interest in being able to terminate an eleventh month-employee for simply requesting foreseeable leave for which he is eligible, when that employer would be clearly prohibited from making that same decision a months later—or . . . a mere nine days later. If the protections of the FMLA are to serve the Act’s purpose, they must be read to cover [such scenarios]. Otherwise, a female employee who becomes pregnant in her eleventh month of employment—and who scrupulously follows the § 2612 notice requirement for foreseeable leave by giving her employer nine months of notice—could be fired immediately because she has requested the leave she will be entitled to take when her pregnancy is carried to term. Such an outcome would clearly defy the purposes for which the FMLA was enacted.<sup>92</sup>

Based upon the explicit legislative intent, the court reasonably interpreted FMLA rights to apply to those who are pre-eligible so long as the employee would meet the other prerequisites at the time he or she is to take leave.<sup>93</sup> Ultimately, the court held, “an employer may not terminate an employee who has worked less than twelve months for requesting foreseeable future leave that the employee will be eligible for and entitled to at the time the leave is to begin.”<sup>94</sup> Recognizing the narrow, manipulative manner employers were interpreting the FMLA, this court refused to let employers continue to take advantage of the FMLA. Rather, the court steadfastly maintained that Congress did not intend for women in such a position to be denied their right

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88. Golden, *supra* note 6, at 10-11.

89. *Id.* at 10.

90. *Id.* at 10-11.

91. *Reynolds v. Inter-Indus. Conference on Auto Collision Repair*, 594 F. Supp. 2d 925, 930 (N.D. Ill. 2009).

92. *Id.*

93. *Id.* at 929.

94. *Id.* at 930.

to maternity leave, and thus, such discrimination against women must cease. Thus, a broad interpretation of the FMLA is necessary to ensure that promotion of the underlying policy concerns remain a forefront concern of employers and the courts.

Additionally, the First Circuit highlighted in *Duckworth v. Pratt & Whitney, Inc.* that Congress considered the purpose of the FLSA when constructing the FMLA.<sup>95</sup> The First Circuit argued, “[t]he legislative history reveals that Congress, at the time it enacted the FMLA, was aware of the breadth of the FLSA definition and purposely chose to adopt that definition.”<sup>96</sup> The First Circuit’s recognition that the definitions employed by the FLSA are applicable to the FMLA demonstrates that Congress purposely enacted both statutes with the same intent; to protect the stability of the family unit, as is explicitly defined in the policy.

The notice provision is often considered when determining what constitutes as “eligible” for purposes of applying the FMLA.<sup>97</sup> Citing the Seventh Circuit Court of Appeals, a Pennsylvania District Court poignantly noted that the FMLA’s requirement of at least thirty days’ notice is solely meant “to minimize the disruption to the employer that will be caused by the absence of the employee.”<sup>98</sup> Nevertheless, the court espoused that the FMLA’s explicit use of the language “employee,” rather than “eligible employee[:]”

is a recognition that some employees will and should give notice of future leave before they have been on the job for twelve months. Since the FMLA contemplates notice of leave in advance of becoming an eligible employee, the statute necessarily must protect from retaliation those currently non-eligible employees who give such notice of leave to commence once they become eligible employees . . . . Otherwise, the advance notice requirement under 29 U.S.C. § 2612(e) becomes a trap for newer employees who comply with this provision of the FMLA and affords a significant exemption from liability for employers. We do not think Congress intended this anomalous result.<sup>99</sup>

The court ultimately held that a pre-eligible employee had standing to bring a claim under the FMLA so long as he or she would be eligible at the time of leave.<sup>100</sup> In so concluding, the United States District Court for the Eastern District of Pennsylvania reaffirmed that the FMLA must be applied to pre-

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95. *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 7 (1st Cir. 1998).

96. *Id.*

97. There is a separate argument, outside the scope of this article, which discusses an agency’s interpretation of the notice requirement. See *Aubuchon v. Knauf Fiberglass GmbH*, 359 F.3d 950, 952-53 (7th Cir. 2004). For a discussion on the United States Supreme Court’s two-step analysis, utilized to determine whether an agency’s interpretation of a particular statute is valid, see *Chevron U.S.A., Inc., v. N.R.D.C.*, 467 U.S. 837, 842-43 (1984).

98. *Beffert v. Pa. Dep’t of Pub. Welfare*, No. Civ. A. 05-43, 2005 WL 906362, at \*3 (E.D. Pa. Apr. 18, 2005). See also 29 U.S.C. § 2612(e)(1) (2006).

99. *Beffert*, 2005 WL 906362, at \*3.

100. *Id.* The court’s holding was solely related to the question of standing and did not determine, or imply, whether the plaintiff’s claim would ultimately prevail on the merits. *Id.*

eligible employees in order to promote, and protect, the statute's purpose as stated by Congress.

## VII. POLICY AND LEGISLATIVE INTENT, AS APPLIED TO PEREDA

### A. Was Pereda an "Eligible Employee?"

Black's Law Dictionary defines "employee" as "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."<sup>101</sup> This definition provides a starting point to analyze the FMLA; however, Brookdale's argument was not that Pereda failed to meet the requirements that constitute an "employee," but rather that the company could not grant her maternity leave under the FMLA because she was not qualified as an "eligible employee." This is because, as highlighted earlier, for an employee to receive the benefits of the FMLA, she or he must be both "eligible" and "entitled,"<sup>102</sup> in addition to meeting the notice requirement.<sup>103</sup> It is absolutely impossible for a pregnant woman to meet all these requirements,<sup>104</sup> and thus courts must broadly construe the FMLA to grant pre-eligible expecting mothers the rights guaranteed to them through the FMLA. It is inconceivable that Congress intended pregnant women to be denied maternity leave, as it is common knowledge that it takes nine months to carry a baby to full term and some women begin a job within that time period.<sup>105</sup>

The First Circuit,<sup>106</sup> the Eleventh Circuit,<sup>107</sup> an Illinois District Court,<sup>108</sup> and a Pennsylvania District Court<sup>109</sup> have broadly interpreted the FMLA for purposes of applying its provisions to pre-eligible employees because they acknowledge legislative intent and the need to grant expecting mothers FMLA leave. Having applied an extensive definition of "employee" in these cases, these courts safeguarded employees entitled to FMLA leave because taking leave to care for a newborn child is a protected activity under the FMLA.<sup>110</sup> As opposed to those courts that have adopted the narrower interpretation of

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101. BLACK'S LAW DICTIONARY 602 (9th ed. 2009).

102. 29 U.S.C. §§ 2611(2), 2612(a)(1) (2006).

103. 29 U.S.C. § 2612(e)(1).

104. Even if a woman has met all of the requisite hours, she is nevertheless not "entitled" because the qualifying event (the birth of the child) has yet to occur. *See supra* Part III.

105. *Pereda v. Brookdale Senior Living Cmty., Inc.*, 666 F.3d 1269, 1275 (11th Cir. 2012).

106. *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1, 10-11 (1st Cir. 1998).

107. *Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1313 (11th Cir. 2001).

108. *Reynolds v. Inter-Indus. Conference on Auto Collision Repair*, 594 F. Supp. 2d 925, 930 (N.D. Ill. 2009).

109. *Beffert v. Pa. Dep't of Pub. Welfare*, No. Civ. A. 05-43, 2005 WL 906362, at \*3 (E.D. Pa. Apr. 18, 2005).

110. *Pereda*, 666 F.3d at 1276.

the FMLA,<sup>111</sup> the Eleventh Circuit must continue to include pre-eligible employees as protected individuals and protest other courts' failure to consider not only legislative intent, but also the foundations of the family unit so crucial to the continuance of our nation.

There was no dispute Brookdale hired Pereda as an employee, that she worked at Brookdale when she inquired into FMLA maternity leave, that at the time of her maternity leave Pereda would not have been "eligible" according to the narrow interpretation of "employee,"<sup>112</sup> and that at the time she requested FMLA leave, she was not yet "eligible" or "entitled" because she had not worked the requisite number of hours and had not yet give birth.<sup>113</sup> Nevertheless, an expansive interpretation of the FMLA would grant Pereda the right to request maternity leave prior to these two events. As the earlier cases have demonstrated, a broad interpretation of policy must not only comply with the statutory language, but also with Congressional intent. Such as in the cases of the ADEA, the NLRA, Title VII, and FLSA, Pereda's claims demonstrate the need to broadly interpret the statute to comply with legislative intent and the uniqueness of childbirth. Otherwise, courts would do an injustice to the legislative system and the rights entitled to employees seeking FMLA leave.

#### *B. The Claims: Interference and Retaliation*

Pereda raised two types of claims against Brookdale, interference and retaliation. First, her FMLA interference claim hinges upon FMLA's notice requirement.<sup>114</sup> As stated earlier, supporters of a narrow reading of "employee" seek to prevent women requesting maternity leave from being granted that right prior to the birth of the child.<sup>115</sup> If the triggering event must occur in order to be eligible, it would be impossible for any woman, or man, to warn his employer that she or he intends to request FMLA leave.<sup>116</sup> But, as the Eleventh Circuit suggests, if the FMLA's provisions were read narrowly, it would fail to protect those who Congress intended to protect.<sup>117</sup> If courts continue to interpret the FMLA narrowly, the essence of the FMLA will be lost forever.

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111. *E.g.*, *Harley v. Health Ctr. of Coconut Creek, Inc.*, 487 F. Supp. 2d 1344, 1359 (S.D. Fla. 2006).

112. *Pereda*, 666 F.3d at 1272.

113. *Id.*

114. 29 U.S.C. § 2612(e)(1) (2006).

115. *See supra* Part IV. b.

116. *See Walker v. Elmore Cnty. Bd. of Educ.*, 223 F. Supp. 2d 1255, 1261 (M.D. Ala. 2002), *aff'd but criticized*, 379 F.3d 1249, 1253 (11th Cir. 2004) (stating that "[b]y the clear language of the FMLA, [the employee] was required to give notice . . . of her impending need for FMLA *before* she was an eligible employee [and] [a]s such, it would be both unjust and contrary to the structure of the FMLA to prohibit a person [in her] position from pursuing a retaliation claim[ ]").

117. *Pereda*, 666 F.3d at 1274.

The court did not dispute that there is little, if no, precedent considered when determining the breadth of “employee” for purposes of interpreting the FMLA.<sup>118</sup> Nevertheless, by drawing upon the cases that do interpret similar statutes expansively, the court legitimately determined that the FMLA should also be read expansively.<sup>119</sup> The court took into consideration the uniqueness of childbearing, because it is known that many complications could precede and follow such an event.<sup>120</sup> As demonstrated by *Pereda* and similar policy interpretation, the extent to which the FMLA affects women seeking maternity leave is unquestionably expansive.<sup>121</sup> To comply with Congressional intent, and reality, anything but an expansive reading of the FMLA for maternity leave claims is incomprehensible.

In regard to her retaliation claim, the court set the notice provision aside and considered the employee’s actions.<sup>122</sup> The DOL’s enactment of 29 Code of Federal Regulation Section 825 suggests any individual, whether or not they meet the definition of “employee,” may bring a retaliation claim against an employer. Therefore, so long as *Pereda* can demonstrate that Brookdale retaliated against her, she has a valid claim and does not necessarily have to prove that she was an “eligible employee” or any sort of “employee.” Furthermore, she may have a valid claim under the FMLA because the policy prevents employers from retaliating against those employees seeking protected leave.<sup>123</sup> The Eleventh Circuit remanded the case to the District Court to settle undetermined issues of fact in the claim.<sup>124</sup> Nevertheless, the court did acknowledge that the FMLA does, in fact, protect *Pereda* if the district court does find that she has a legitimate retaliation claim.<sup>125</sup>

*Pereda* demonstrates the underlying debate regarding the expansiveness of FMLA’s protection. For claims specifically pertaining to pre-eligible employees seeking maternity leave, an employee who will be eligible as of the time of his or her leave should be entitled to FMLA leave when there is no dispute that she will have met the requisite number of working hours and given birth at the date she begins her maternity leave. Should this case continue through the judicial system, courts must utilize the analytical structure from similar cases and policies. It remained *Pereda*’s, and many other claimants’, burden to prove that the FMLA protects her as a pre-eligible employee by a preponderance of the evidence.

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118. *Pereda*, 666 F.3d at 1275.

119. *Id.*

120. *See id.*

121. *See, e.g.,* Golden, *supra* note 6, at 13 (suggesting a grave problem of smaller businesses is that the FMLA does not apply to them because of their size, and therefore, women cannot take any sort of maternity leave without fear of definite termination as a result of the negative impact and cost it would have on her employer). Such drawbacks of the FMLA continue to haunt many women who work for such companies, showing the FMLA does not even cover the breadth of women that are in need of such time off from work. *Id.* at 14.

122. *Pereda*, 666 F.3d at 1275.

123. 29 U.S.C. § 2615(a)(1) (2006).

124. *Pereda*, 666 F.3d at 1276-77.

125. *Id.*

*C. Framework to Construe FMLA*

For cases of maternity leave, courts should broadly interpret the FMLA. If courts are to take into account the analysis of similar statutes, such as the few previously described, it is indisputable that the FMLA protects pre-eligible employees. The Eleventh Circuit does not dispute that the *Pereda* holding is narrow.<sup>126</sup> Nevertheless, the court did expand the breadth of coverage not often attributed to FMLA maternity leave claims.<sup>127</sup> In recognizing that “a pre-eligible request for post-eligible leave is protected activity[.]” the court demonstrates that the FMLA, just as the FLSA, the ADEA, the NLRA, and Title VII, must be applied as Congress intended.<sup>128</sup>

Just as courts have determined that Congress enacted those guidelines to protect discrimination in the workplace and precedent broadly interprets “employee” for purposes of applying its policies, the Eleventh Circuit’s holding in *Pereda* reconfirms those convictions. More so, it is undeniable that the definitions provided in the FLSA formed the basis of the FMLA.<sup>129</sup> The breadth of “eligible employee” for purposes of the FMLA, therefore, must extend to pre-eligible employees in order to comply not only with legislative intent, but to parallel other polices that were enacted for the same purpose of the FMLA.

Precedent reconfirms the FMLA’s purpose of protecting pre-eligible employees. Just as is stated by the court in *Reynolds*, *Pereda*’s compliance with FMLA’s notice requirement mandated that she inform Brookdale of her maternity leave prior to the qualifying event, the birth of her child.<sup>130</sup> If construed narrowly, the FMLA would prevent women, just like *Pereda*, from ever notifying her employer without the definite probability of termination. Therefore, courts must protect pre-eligible employees from the loophole employers have created to punish employees from complying with FMLA’s notice provision, even though the qualifying event has yet to occur.

In its decision-making process, the Eleventh Circuit valued Congress’s explicit rationale provided in the statutory language. Specifically, the court noted that “we must construe *Pereda* as ‘eligible’ for protection if we are to honor the purpose for which FMLA was enacted.”<sup>131</sup> Drawing upon earlier

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126. *Pereda*, 666 F.3d at 1275. The court explained that the holding “does not expand FMLA coverage to a new class of employees.” *Id.* Also, the court did not dispute that there are other valid reasons why an employer could terminate an employee. *Id.* at 1276.

127. *Id.* at 1275.

128. *Id.* at 1276.

129. *Smith v. BellSouth Telecomms., Inc.*, 273 F.3d 1303, 1307-08 (11th Cir. 2001).

130. *See Reynolds v. Inter-Indus. Conference on Auto Collision Repair*, 594 F. Supp. 2d 925, 928 (N.D. Ill. 2009). *See also Walker v. Elmore Cnty. Bd. of Educ.*, 223 F. Supp. 2d 1255, 1260 (M.D. Ala. 2002), *aff’d but criticized*, 379 F.3d 1249, 1253 (11th Cir. 2004). *Pereda* not only clarifies the holding of *Walker*, but the Eleventh Circuit also relies upon similar rationale as the *Walker* court. Notably, *Walker* also relied on legislative intent in its reasoning. *Id.* Specifically, the court stated, “[i]t would be illogical to interpret the notice requirement in a way that requires employees to disclose requests for leave which would, in turn, expose them to retaliation for which they have no remedy.” *Id.*

131. *Pereda*, 666 F.3d at 1275.

precedent where it was concluded that a loophole would be created if an employer could use other provisions of the statute against the employee,<sup>132</sup> the Eleventh Circuit determined that if the employer prevailed, it would “frustrate the purpose of the FMLA by permitting employers to eliminate staff that the employer perceives will need FMLA.”<sup>133</sup> Therefore, it is unquestionable, based upon the language and purpose of the FMLA, that Congress intended maternity leave as a “protected activity” under the FMLA. If women seeking maternity leave under the FMLA are not protected, the purpose of the FMLA would forever be lost and all of the progress made by Congress to advance family stability would start back at where we were before the FMLA was ever enacted.

#### VIII. PATERNITY LEAVE: ITS EFFECT ON MATERNITY LEAVE

It is no surprise that women seek FMLA leave when having children; however, what about the men that opt to stay home with their newborns instead? How does paternity leave affect maternity leave? The FMLA may be perceived as a statute particularly pertaining to women, but, as previously stated, Congress enacted the FMLA as a gender-neutral policy.<sup>134</sup> Nevertheless, paternity leave is quite uncommon. In 2000, only 13.5% of male employees took FMLA leave, as opposed to 19.8% of female employees who did so.<sup>135</sup> Chuck Halverson argues that men do not take FMLA paternity leave as often as most would anticipate because of social stigma founded on gender stereotypes, the man’s role as the financial supporter of the family, and employer’s unwillingness to comply with the FMLA.<sup>136</sup>

Halverson further suggests that the FMLA is not gender-neutral because, not only do the stereotypes against men exist, but the FMLA also is inherently discriminatory against women.<sup>137</sup> Arguably, Congress intended the FMLA to only apply to women.<sup>138</sup> This is because “a double standard remains in place. . . . Women, on the one hand, are perceived to be bad mothers if they are successful at the office, whereas men are perceived to be successful on the home front if they are successful at work and thus provide for their

132. See *Smith*, 273 F.3d at 1313.

133. *Pereda*, 666 F.3d at 1275.

134. See 29 U.S.C. § 2601(a)-(b) (2006).

135. Chuck Halverson, *From Here to Paternity: Why Men are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN’S L.J. 257, 259 (2003).

136. *Id.* at 261-70. Halverson also suggests that rewriting the FMLA’s purpose provision would clarify the importance of men also being able to take time with their newborn children. *Id.* at 276. Changing the language, he argues, would “shift the theories upon which lawsuits are brought, giving more ammunition to men who have trouble getting paternity leave through the FMLA.” *Id.* Similarly to the argument proposed by Halverson, Nina Golden has also suggested that if Congress did change the language of the FMLA, the policy would perform as it was initially intended. See Golden, *supra* note 6, at 14. Golden recognizes that although the FMLA applies to men and women, men have not taken advantage of the FMLA as much as expected. *Id.* at 12.

137. See Halverson, *supra* note 135, at 258.

138. *Id.*

families.”<sup>139</sup> Because it is rare that men take paternity leave, the burden is further left on the woman to raise her child in our stereotypical society. Thus, if paternity leave continues to be a rarity, the FMLA must be read expansively to protect the woman’s ability to take maternity leave to care for her child should she so choose. If employers continue to deny women FMLA maternity leave, the legislative intent driving the FMLA would essentially be dead.

If men seldom use their right to paternity leave, not only will the relationship between father and child be hindered,<sup>140</sup> but also career driven women, pre-eligible for the FMLA, will continue to request FMLA maternity leave months before their due date at higher rates than ever before. The stigma against paternity leave “encourages workplace discrimination against women of childbearing age,” and thus, even though the FMLA does apply to women and men equally, the FMLA as a “[g]ender-neutral parental leave polic[y] will not prevent such discrimination as long as women dominate the use of family leave.”<sup>141</sup> Unless the underlying negative stigma attached to paternity leave changes, women will continue to take FMLA maternity leave at higher rates than ever before, and more cases, such as Pereda’s, will come before the court system.

#### IX. CONCLUSION

FMLA enthusiasts must continue to promote its foundational rationales as Congress initially proposed. Courts will continually fail to understand not only the importance of the FMLA, but also its significance to the changing social and economic world. Though Congress enacted the FMLA as a gender-neutral policy, in practice the FMLA has not decreased discrimination against women as anticipated. As women participate in the workforce at a higher percentage than ever before, mothers are torn between family life and a stable career. Especially during a rocky economy, many mothers have no choice but to go back to work to support their families, regardless whether or not they are the primary breadwinners. If courts narrowly interpret the FMLA and continue to prevent pre-eligible employees from seeking FMLA maternity leave, the FMLA would arguably disrupt family life, which is contrary to the policy’s intended goal of maintaining the stability of the family unit.

Courts interpret policies similar to the FMLA broadly, as demonstrated by Title VII, the FLSA, the ADEA, and the NLRA to name just a few. The broad application of these policies promotes the protection of employees, just as the broad application of the FMLA should protect expecting mothers who are complying with the FMLA’s notice provision. It is contrary to the statutory language and legislative intent to not consider a pre-eligible employee seeking maternity leave as protected under the FMLA. Thus, courts must continue to hold that women in Pereda’s position have standing to raise claims

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139. Halverson, *supra* note 135, at 263.

140. Malin, *supra* note 14, at 1057.

141. *Id.* at 1095.

against employers who interfere and retaliate against those wishing to take FMLA leave. A broad interpretation of “eligible employee” allows women, like Pereda, to have standing to fight for, and receive, the benefits Congress intended to offer.

Should such FMLA disputes continue to be argued through the channels of the judicial system, it is quite possible that the Supreme Court will again hear a similar FMLA case. If so, the Supreme Court has the chance to reconfirm Congress’s intent to protect the rights and needs of pre-eligible women seeking maternity leave under the FMLA and forever end the circuit split once and for all.