

1           **Instructions For Claims Under the Family and Medical Leave Act**

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## 10.0 FMLA Introductory Instruction

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#### Model

In this case the Plaintiff \_\_\_\_\_ has made a claim under the Family and Medical Leave Act, a Federal statute that prohibits an employer from interfering with or discriminating against an employee's exercise of the right granted in the Act to a period of unpaid leave [because of a serious health condition] [where necessary to care for a family member with a serious health condition] [because of the birth of a son or daughter] [because of the placement of a son or daughter with the employee for adoption or foster care].

Specifically, [plaintiff] claims that [describe plaintiff's claim of interference, discrimination, retaliation].

[Defendant] denies [describe defenses]. Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues that you must address in this case.

#### Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq., ("FMLA") was enacted to provide leave for workers whose personal or medical circumstances require that they take time off from work in excess of what their employers are willing or able to provide. *Victorelli v. Shadyside Hosp.*, 128 F.3d 184, 186 (3d Cir. 1997) (citing 29 C.F.R. § 825.101). The Act is intended "to balance the demands of the workplace with the needs of families ... by establishing a minimum labor standard for leave" that lets employees "take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition." *Churchill v. Star Enters.*, 183 F.3d 184, 192 (3d Cir. 1999) (quoting 29 U.S.C. § 2601(b)(1), (2)).

The FMLA guarantees eligible employees 12 weeks of leave in a 1-year period following certain events: a serious medical condition; a family member's serious illness; the arrival of a new son or daughter; or certain exigencies arising out of a family member's service in the armed forces. 29 U.S.C. § 2612(a)(1). During the 12 week leave period, the employer must maintain the employee's group health coverage. § 2614(c)(1). Leave must be granted, when "medically necessary," on an intermittent or part-time basis. § 2612(b)(1). Upon the employee's timely return,

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34 the employer must reinstate the employee to his or her former position or an equivalent, §  
35 2614(a)(1), so long as the employee is able to perform the essential functions of that position.<sup>1</sup>  
36 The Act makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of"  
37 these rights, § 2615(a)(1); to "discharge or in any other manner discriminate against any individual  
38 for opposing any practice made unlawful by [the FMLA]," § 2615(a)(2); and to retaliate against  
39 those who file charges, give information, or testify in any inquiry related to an assertion of rights  
40 under the Act, § 2615(b).<sup>2</sup> Violators are subject to payment of certain monetary damages and  
41 appropriate equitable relief, § 2617(a)(1). The Act provides for liquidated (double) damages where  
42 wages or benefits have been denied in violation of the Act, unless the defendant proves to the court  
43 that the violation was in good faith.

### 44 *Special Provisions Concerning Servicemembers*

45 The 2008 amendments to the FMLA added provisions concerning leave relating to service  
46 in the armed forces. See Pub. L. No. 110-181, Div. A, Title V, § 585, Jan. 28, 2008, 122 Stat. 129.  
47 As further amended in 2009,<sup>3</sup> Section 2612(a)'s list of leave entitlements includes leave "[b]ecause  
48 of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact  
49 that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has  
50 been notified of an impending call or order to covered active duty) in the Armed Forces." 29 U.S.C.  
51 § 2612(a)(1)(E). The 2008 amendments also created an entitlement to servicemember family leave:  
52 "Subject to section 2613 of this title, an eligible employee who is the spouse, son, daughter, parent,

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<sup>1</sup> "The FMLA does not require 'an employer to provide a reasonable accommodation to an employee to facilitate his return to the same or equivalent position at the conclusion of his medical leave.'" *Macfarlan v. Ivy Hill SNF, LLC*, 675 F.3d 266, 271 (3d Cir. 2012) (quoting *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 384 (3d Cir. 2002)). Thus, a plaintiff asserting a violation of Section 2614(a)(1) must "establish not only that he was not returned to an equivalent position but also that he was able to perform the essential functions of that position." *Rinehimer*, 292 F.3d at 384. See also *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 249, 254 (3d Cir. 2014) (holding that a reasonable jury could find that the plaintiff was able to perform the essential function of typing despite using only seven digits, where plaintiff's doctor placed no restrictions on her (other than use of a splint), where plaintiff had previously completed her work in a fraction of the required time, and where her co-worker used the "hunt and peck" method for typing); 29 C.F.R. § 825.216(c) ("If the employee is unable to perform an essential function of the position because of a physical or mental condition ... the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. See § 825.702 ....").

<sup>2</sup> As of spring 2016, 29 C.F.R. § 825.220(c) states: "The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights."

<sup>3</sup> See the National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, October 28, 2009, 123 Stat 2190.

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53 or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave  
54 during a 12-month period to care for the servicemember. The leave described in this paragraph  
55 shall only be available during a single 12-month period.” *Id.* § 2612(a)(3). And the amendments  
56 added a combined leave total where leave is taken under both subsection (a)(1) and subsection  
57 (a)(3): “During the single 12-month period described in paragraph (3), an eligible employee shall  
58 be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3). Nothing in  
59 this paragraph shall be construed to limit the availability of leave under paragraph (1) during any  
60 other 12-month period.” *Id.* § 2612(a)(4).

61 These Instructions and Comments were drafted prior to the adoption of the 2008  
62 amendments. The Committee has attempted to indicate places where the amendments provide a  
63 different framework for service-related leaves. When litigating cases involving service-related  
64 leaves practitioners should review with care the FMLA’s provisions so as to note the special  
65 FMLA provisions relating to such leaves.

### 66 *Employers Covered by the FMLA*<sup>4</sup>

67 A covered employer under the Act is one engaged in commerce or in an industry affecting  
68 commerce who employs 50 or more employees for each working day during each of 20 or more  
69 calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A)(i); 29  
70 C.F.R. § 825.104(a).

71 29 U.S.C. § 2611(4)(A)(iii) provides that the term “employer” “includes any ‘public  
72 agency’, as defined in section 203(x) of this title.” 29 U.S.C. § 203(x) defines “public agency” to  
73 include, inter alia, state and local governments. *Nevada Department of Human Resources v.*  
74 *Hibbs*, 538 U.S. 721 (2003), upheld Congress’s power (under Section 5 of the Fourteenth  
75 Amendment) to abrogate state immunity from suit for claims arising from the FMLA provision  
76 entitling covered employees to take unpaid leave “[i]n order to care for the spouse, or a son,  
77 daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health  
78 condition,” 29 U.S.C. § 2612(a)(1)(C). But in *Coleman v. Court of Appeals of Maryland*, 132 S.  
79 Ct. 1327 (2012), five Justices voted to strike down Congress’s attempt to abrogate state immunity  
80 from suit for claims arising from Section 2612(a)(1)(D), which provides for unpaid leave when  
81 the employee himself or herself has “a serious health condition.” *See id.* at 1338 (plurality  
82 opinion); *id.* at 1338-39 (Scalia, J., concurring in the judgment).

83 29 U.S.C. § 2611(4)(A)(ii)(I) provides that the term “employer” encompasses “any person  
84 who acts, directly or indirectly, in the interest of an employer to any of the employees of such  
85 employer.” The Court of Appeals has held that this provision grounds individual liability for  
86 supervisors acting on behalf of covered employers: “[A]n individual is subject to FMLA liability  
87 when he or she exercises ‘supervisory authority over the complaining employee and was

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4 Much of the following analysis of the FMLA is adapted from the Comment to the Eighth Circuit Jury Instructions on FMLA claims, Instruction 5.80.

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88 responsible in whole or part for the alleged violation’ while acting in the employer's interest.”  
89 *Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 667 F.3d 408, 417 (3d Cir. 2012) (quoting  
90 *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987)). The *Haybarger* court held that this  
91 liability extends to supervisors in public agencies. *See id.* at 410, 415.

### 92 *Employees Eligible for Leave*

93 Not all employees are entitled to leave under the FMLA. Before an employee can take  
94 leave under the Act, the following eligibility requirements must be met: he or she must have been  
95 employed by the employer for at least 12 months and must have worked at least 1,250 hours during  
96 the previous 12-month period. 29 U.S.C. § 2611(2)(A). *See Erdman v. Nationwide Ins. Co.*, 582  
97 F.3d 500, 504-06 (3d Cir. 2009) (discussing how to calculate the number of hours worked during  
98 the relevant period). Spouses who are both eligible for FMLA leave and are employed by the same  
99 covered employer may be limited by the employer to a combined total of 12 weeks of leave during  
100 any 12-month period if the leave is taken 1) for the birth of the employee’s son or daughter or to  
101 care for that newborn; 2) for placement of a son or daughter for adoption or foster care, or to care  
102 for the child after placement; or 3) to care for the employee’s parent. 29 C.F.R. § 825.120(a)(3).  
103 29 U.S.C. § 2612(f)(2) sets special provisions concerning servicemember family leaves taken by  
104 spouses employed by the same employer.

### 105 *Family Members Contemplated by the FMLA*

106 Employees are also eligible for leave when certain family members – his or her spouse,  
107 son, daughter, or parent – have serious health conditions. The FMLA defines “spouse” as “a  
108 husband or wife, as the case may be.” 29 U.S.C. § 2611(13). As of spring 2016, the relevant DOL  
109 regulation provides:

110 For purposes of this definition, husband or wife refers to the other person with  
111 whom an individual entered into marriage as defined or recognized under state law  
112 for purposes of marriage in the State in which the marriage was entered into or, in  
113 the case of a marriage entered into outside of any State, if the marriage is valid in  
114 the place where entered into and could have been entered into in at least one State.  
115 This definition includes an individual in a same-sex or common law marriage that  
116 either:

117 (1) Was entered into in a State that recognizes such marriages; or

118 (2) If entered into outside of any State, is valid in the place where entered  
119 into and could have been entered into in at least one State.

120 29 C.F.R. § 825.122(b).

121 Under the FMLA, a son or daughter means a biological, adopted or foster child, a stepchild,  
122 a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or who is

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123 age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C.  
124 § 2611(12); 29 C.F.R. § 825.122(d). Persons with “in loco parentis” status under the FMLA  
125 include those who had day-to-day responsibility to care for and financially support the employee  
126 when the employee was a child. 29 C.F.R. § 825.122(d)(3). “Incapable of self-care” means that  
127 the individual requires active assistance or supervision to provide daily self-care in three or more  
128 of the activities of daily living or instrumental activities of daily living. 29 C.F.R. § 825.122(d)(1).  
129 “Activities of daily living” include adaptive activities such as caring appropriately for one’s  
130 grooming and hygiene, bathing, dressing and eating. *Id.* “Instrumental activities of daily living”  
131 include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a  
132 residence, using telephones and directories, using a post office, etc. *Id.* “Physical or mental  
133 disability” means a physical or mental impairment that substantially limits one or more of the  
134 major life activities of an individual. 29 C.F.R. § 825.122(d)(2). These terms are defined in the  
135 same manner as they are under the Americans with Disabilities Act. *Id.*

136 “Parent” means “the biological parent of an employee or an individual who stood in loco  
137 parentis to an employee when the employee was a son or daughter.” 29 U.S.C. § 2611(7). As the  
138 regulations further explain, “[p]arent means a biological, adoptive, step or foster father or mother,  
139 or any other individual who stood in loco parentis to the employee when the employee was a son  
140 or daughter as defined in paragraph (d) of this section. This term does not include parents ‘in law.’  
141 ” 29 C.F.R. § 825.122(c).

### 142 *Leave for Birth, Adoption or Foster Care*

143 The FMLA permits an employee to take leave because of the birth of the employee’s son  
144 or daughter and to care for the child, and/or because of the placement of a son or daughter with the  
145 employee for adoption or foster care. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100(a). The right to  
146 take leave under the FMLA applies equally to male and female employees. A father as well as a  
147 mother can take family leave for the birth, placement for adoption, or foster care of a child. 29  
148 C.F.R. § 825.112(b). Circumstances may require that the FMLA leave begin before the actual date  
149 of the birth of a child or the actual placement for adoption of a child. For example, an expectant  
150 mother may need to be absent from work for prenatal care, or her condition may make her unable  
151 to work. 29 C.F.R. § 825.120(a).

152 For methods of determining the amount of leave, see 29 C.F.R. § 825.200.

### 153 *What Constitutes a “Serious Health Condition?”*

154 The term “serious health condition” was meant to be construed broadly, so that the FMLA’s  
155 provisions are interpreted to effect the Act’s remedial purpose. *Stekloff v. St. John’s Mercy Health*  
156 *Systems*, 218 F.3d 858, 862 (8th Cir. 2000). For discussion of this term, see Instruction and  
157 Comment 10.2.1.

158

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### *Certification of Medical Leave*

159  
160 The FMLA does not require an employee, in the first instance, to provide a medical  
161 certification justifying a leave for a serious health condition. But it does allow the employer to  
162 demand such a certification. The basic framework for such certifications is set by statute. *See* 29  
163 U.S.C. § 2613(a) (authorizing employer to require that employee provide certification in support  
164 of leave request); *id.* § 2613(b) (describing contents that render a certification sufficient); *id.*  
165 § 2613(c) (authorizing employer to require a second opinion under certain circumstances); *id.*  
166 § 2613(d) (providing for “[r]esolution of conflicting opinions”); *id.* § 2613(e) (authorizing  
167 employer to “require ... subsequent recertifications on a reasonable basis”); *id.* § 2613(f)  
168 (addressing certifications relating to service in the Armed Forces). As of spring 2016, the  
169 regulations fleshing out the certification mechanism can be found at 29 C.F.R. §§ 825.305 –  
170 825.313. “If the employer determines that a certification is either incomplete or insufficient, it may  
171 deny the requested leave on the basis of an inadequate certification. But it may only do so if it has  
172 ‘provide[d] the employee with seven calendar days (unless not practicable under the particular  
173 circumstances despite the employee's diligent good faith efforts) to cure any such deficiency.’ ”  
174 *Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149, 153 (3d Cir. 2015) (quoting 29 C.F.R.  
175 § 825.305(c)). For a discussion of the employer’s right to request a medical certification that an  
176 employee can return from leave to work without medical restrictions, see *Budhun v. Reading Hosp.*  
177 *& Med. Ctr.*, 765 F.3d 245, 252-55 & n.4 (3d Cir. 2014) (discussing medical certification); *see*  
178 *also* Comment 10.1.1 (discussing *Budhun*).

### *Certification related to active duty or call to active duty*

179  
180 29 U.S.C. § 2613(f) provides: “An employer may require that a request for leave under  
181 section 2612(a)(1)(E) of this title be supported by a certification issued at such time and in such  
182 manner as the Secretary may by regulation prescribe. If the Secretary issues a regulation requiring  
183 such certification, the employee shall provide, in a timely manner, a copy of such certification to  
184 the employer.”

### *Ministerial exception*

185  
186 With respect to claims for wrongful termination, the First Amendment’s religion clauses  
187 give rise to an affirmative defense that “bar[s] the government from interfering with the decision  
188 of a religious group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church &*  
189 *Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012). Though *Hosanna-Tabor* involved a retaliation  
190 claim under the Americans with Disabilities Act, the Court’s broad description of the issue  
191 suggests that its recognition of a “ministerial exception” may apply equally to wrongful-  
192 termination claims brought under other federal anti-discrimination statutes. *See id.* at 710 (“The  
193 case before us is an employment discrimination suit brought on behalf of a minister, challenging  
194 her church's decision to fire her.... [T]he ministerial exception bars such a suit.”). For further  
195 discussion of the ministerial exception, see Comment 5.0.

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196 *Potential overlap between ADA reasonable-accommodation claims and FMLA claims*

197 Regulations and caselaw recognize the possibility that the same facts might (in certain  
198 circumstances) ground both a reasonable-accommodation claim under the Americans With  
199 Disabilities Act and a claim under Family and Medical Leave Act. “If an employee is a qualified  
200 individual with a disability within the meaning of the ADA, the employer must make reasonable  
201 accommodations, etc., barring undue hardship, in accordance with the ADA. At the same time, the  
202 employer must afford an employee his or her FMLA rights. ADA’s ‘disability’ and FMLA’s  
203 ‘serious health condition’ are different concepts, and must be analyzed separately.” 29 C.F.R. §  
204 825.702(b). “[A] request for FMLA leave may qualify, under certain circumstances, as a request  
205 for a reasonable accommodation under the ADA.” *Capps v. Mondelez Glob., LLC*, 847 F.3d 144,  
206 156-57 (3d Cir. 2017) (upholding grant of summary judgment to defendant because, “even  
207 assuming, *arguendo*, that Capps’ requests for intermittent FMLA leave constituted requests for a  
208 reasonable accommodation under the ADA as well, Mondelez continued to approve Capps’  
209 requested leave, and indeed, Capps took the requested leave,” with the result that “Capps received  
210 the accommodation he asked for”).

## 10.1.1 Interference With Right to Take Leave

### 10.1.1 Elements of an FMLA Claim— Interference With Right to Take Leave

#### Model

[Plaintiff] claims that [defendant] interfered with [his/her] right to take unpaid leave from work under the Family and Medical Leave Act.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].<sup>5</sup>

Second: This condition was a “serious health condition,” defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.<sup>6</sup>

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. “Appropriate notice” was given where,

[if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]<sup>7</sup>

[if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and

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<sup>5</sup> The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member’s service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction’s discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

<sup>6</sup> If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

<sup>7</sup> This language may require tailoring, because the statute specifies somewhat different treatment of the notice of foreseeable leave depending on the type of reason for the leave. *See* 29 U.S.C. § 2612(e)(1) (notice where need “is foreseeable based on an expected birth or placement”); *id.* § 2612(e)(2) (notice where need “is foreseeable based on planned medical treatment”); *id.* § 2612(e)(3) (notice where need arises from exigency caused by specified person’s military service).

### 10.1.1 Interference With Right to Take Leave

19 Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was  
20 [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover,  
21 [plaintiff] was not required to give [defendant] a formal written request for anticipated  
22 leave. Simple verbal notice is sufficient.] The critical question for determining “appropriate  
23 notice” is whether the information given to [defendant] was sufficient to reasonably apprise  
24 it of [plaintiff’s] request to take time off for a serious health condition.

25 Fourth: [Defendant] interfered with the exercise of [plaintiff’s] right to unpaid leave. Under  
26 the statute, “interference” can be found in a number of ways, including:

27 *[Include any of the following factors raised by the evidence]*

28 1) terminating employment;<sup>8</sup>

29 2) refusing to allow an employee to return to his or her job, or to an equivalent  
30 position, upon return from leave;<sup>9</sup>

31 3) ordering an employee not to take leave or discouraging an employee from taking  
32 leave;<sup>10</sup> and

33 4) failing to provide an employee who gives notice of the need for a leave a written  
34 notice detailing the specific expectations and obligations of the employee and  
35 explaining any consequences of a failure to meet these obligations.

36 [However, interference cannot be found simply because [defendant] imposes reporting  
37 obligations for employees who are on leave. For example, an employer does not interfere with an  
38 employee’s right to take leave by establishing a policy requiring all employees to call in to report  
39 their whereabouts while on leave. The Family and Medical Leave Act does not prevent employers  
40 from ensuring that employees who are on leave do not abuse their leave.]

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<sup>8</sup> Whether termination constitutes interference under the FMLA depends on the circumstances. In *Ross v. Gilhuly*, 755 F.3d 185 (3d Cir. 2014), the Court of Appeals held that termination *after the end of FMLA leave and the employee’s return to work* did not count as interference. See *Ross*, 755 F.3d at 192 (“Because Ross received all of the benefits to which he was entitled by taking leave and then being reinstated to the same position from which he left ... he fails to make a prima facie showing of interference ....”).

<sup>9</sup> If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

<sup>10</sup> Where an employee complains solely of an employer’s *unsuccessful* attempt to discourage the taking of FMLA leave, it appears that no FMLA interference claim arises. See the Comment for a discussion of *Fraternal Order of Police v. City of Camden*, 842 F.3d 231, 245-46 (3d Cir. 2016).

## 10.1.1 Interference With Right to Take Leave

41 I instruct you that you do not need to find that [defendant] intentionally interfered with  
42 [plaintiff's] right to unpaid leave. The question is not whether [defendant] acted with bad intent,  
43 but rather whether [plaintiff] was entitled to a leave and [defendant] interfered with the exercise  
44 of that leave.

### 45 **[Affirmative Defense:**

46 However, your verdict must be for [defendant] if [defendant] proves, by a preponderance  
47 of the evidence, that [plaintiff] would have lost [his/her] job even if [he/she] had not taken leave.  
48 For example, if [defendant] proves that [plaintiff]'s position was going to be eliminated even if  
49 [she/he] would not have been on leave, then you must find for [defendant]].

### 51 **Comment**

52 29 U.S.C. § 2615(a)(1) provides that “[i]t shall be unlawful for any employer to interfere  
53 with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the  
54 FMLA].” Claims brought under § 2615(a)(1) are denominated “interference” claims. A plaintiff  
55 asserting an FMLA claim must prove that “(1) he or she was an eligible employee under the  
56 FMLA; (2) the defendant was an employer subject to the FMLA’s requirements; (3) the plaintiff  
57 was entitled to FMLA leave; (4) the plaintiff gave notice to the defendant of his or her intention to  
58 take FMLA leave; and (5) the plaintiff was denied benefits to which he or she was entitled under  
59 the FMLA.” *Ross v. Gilhuly*, 755 F.3d 185, 191-92 (3d Cir. 2014) (quoting *Johnson v. Cmty. Coll.  
60 of Allegheny Cnty.*, 566 F. Supp. 2d 405, 446 (W.D. Pa. 2008)).<sup>11</sup> The first two of the elements  
61 listed in *Ross* (eligible employee, and covered employer) are discussed in Comment 10.0.

62 The court in *Parker v. Hahnemann University Hospital*, 234 F. Supp. 2d 478, 483 (D.N.J.  
63 2002), provides helpful background on the gravamen of a claim brought under § 2615(a)(1):

64 The first theory of recovery under the FMLA is the entitlement, or interference,  
65 theory. It is based on the prescriptive sections of the FMLA which create substantive rights  
66 for eligible employees. Eligible employees are entitled to up to twelve weeks of unpaid  
67 leave per year because of a serious health condition, a need to care for a close family

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<sup>11</sup> The Court of Appeals has also stated a two-element test for an interference claim: “an employee ‘only needs to show that [1] he was entitled to benefits under the FMLA and [2] that he was denied them.’” *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 252 (3d Cir. 2014) (alterations in original) (quoting *Callison v. City of Phila.*, 430 F.3d 117, 119 (3d Cir. 2005)). “[T]he first four elements of [Ross’s] longer test largely collapse into the first element of the *Callison* formulation because in order to be entitled to benefits, an employee must be eligible for FMLA protections and leave, work for a covered employer, and provide sufficient notice.” *Budhun*, 765 F.3d at 252 n.2.

### 10.1.1 Interference With Right to Take Leave

68 member with a serious health condition, or a birth, adoption, or placement in foster care of  
69 a child. An employee is also entitled to intermittent leave when medically necessary, 29  
70 U.S.C. § 2612(b), and to return after a qualified absence to the same position or to an  
71 equivalent position, 29 U.S.C. § 2614(a)(1). . . .

72 An employee can allege that an employer has violated the FMLA because she was  
73 denied the entitlements due her under the Act. 29 U.S.C. § 2615(a)(1). In such a case, the  
74 employee only needs to show she was entitled to benefits under the FMLA and that she  
75 was denied them. She does not need to show that the employer treated other employees  
76 more or less favorably and the employer cannot justify its action by showing that it did not  
77 intend it or it had a legitimate business reason for it. The action is not about discrimination;  
78 it is about whether the employer provided its employees the entitlements guaranteed by the  
79 FMLA.

80 *See also Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (no showing of  
81 discrimination is required for an interference, as that claim is made if the employee shows “that he  
82 was entitled to benefits under the FMLA and that he was denied them.”); *Ross*, 755 F.3d at 192  
83 (noting that the plaintiff need not show disparate treatment; that the defendant does not avoid  
84 liability by showing a legitimate business purpose; and that the *McDonnell Douglas* burden-  
85 shifting scheme is not necessary because FMLA interference claims concern interference rather  
86 than discrimination).

87 Because the issue in interference claims is not discrimination but interference with an  
88 entitlement, courts have found that the plaintiff is not required to prove intentional misconduct.  
89 *See, e.g., Williams v. Shenango, Inc.*, 986 F. Supp. 309, 317 (W.D. Pa. 1997) (finding that “a claim  
90 under § 2615(a)(1) is governed by a strict liability standard”); *Moorer v. Baptist Memorial Health*  
91 *Care*, 398 F.3d 469, 487 (6th Cir. 2005) (“Because the issue [in an interference claim] is the right  
92 to an entitlement, the employee is due the benefit if the statutory requirements are satisfied,  
93 regardless of the intent of the employer.”); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712  
94 (7th Cir. 1997) (noting that an employee alleging interference with an FMLA entitlement is not  
95 alleging discrimination and therefore no intent to discriminate need be found).

96 *Affirmative Defense Where Employee Would Have Lost the Job Even if Leave Had Not Been Taken*

97 After taking a qualified leave, the employee is generally entitled to reinstatement in the  
98 same or a substantially equivalent job. However, this is not the case if the employee would have  
99 lost her job even if she had not taken leave. As the court put it in *Parker*, supra, “the FMLA does  
100 not give the employee on protected leave a bumping right over employees not on leave.”

101 The *Parker* court considered which party had the burden of proof on whether the employee  
102 would have lost her job even if she had not taken leave. The court noted that Department of Labor  
103 regulations interpreting the FMLA place the burden of proof on the employer. 29 C.F.R. §  
104 825.216(a)(1). The court continued its analysis as follows:

### 10.1.1 Interference With Right to Take Leave

105 The Third Circuit has not considered whether this regulation places the burden on the  
106 employer. The Tenth Circuit has held that it does and functions like an affirmative defense.  
107 *Smith v. Diffe Ford-Lincoln-Mercury*, 298 F.3d 955, 963 (10th Cir. 2002). Under their  
108 approach, the plaintiff presents her FMLA case by showing, as explained above, that she  
109 was entitled to benefits and denied them. *Id.* Then, the burden is on the employer to mitigate  
110 its liability by proving that she would have lost her job whether or not she took leave. *Id.*  
111 The Seventh Circuit instead found that the regulation leaves the burden on the plaintiff to  
112 prove that she was entitled to benefits and denied them even though the defendant  
113 presented some evidence indicating that her job would have been terminated if she had not  
114 taken leave. *Rice v. Sunrise Express*, 209 F.3d 1008, 1018 (7th Cir.2000). . . It interprets  
115 the regulation as only requiring the defendant to come forward with some evidence that the  
116 termination would have occurred without the leave.

117 This Court finds that the better approach is the one followed by the Tenth Circuit  
118 which places the burden on the employer. An issue about the burden of proof is a "question  
119 of policy and fairness based on experience in the different situations," *Keyes v. Sch. Dist.*  
120 *No. 1*, 413 U.S. 189, 209 (1973), and policy, fairness, and experience support the Tenth  
121 Circuit's approach. As for policy, the approach upholds the validity and the plain language  
122 of the regulation that was promulgated in accordance with standard administrative  
123 procedure. As for fairness, the approach places the burden on the party who holds the  
124 evidence that is essential to the inquiry, evidence about future plans for a position,  
125 discussions at management meetings, and events at the workplace during the employee's  
126 FMLA leave. *See Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 359 n. 45 (1977)  
127 (stating that burdens of proof should "conform with a party's superior access to the proof").  
128 As for experience, other labor statutes also place the burden on the employer to mitigate  
129 its liability to pay an employment benefit in certain situations. As a result, this Court will  
130 require plaintiff to bear the burden of proving that she was entitled to reinstatement and  
131 was denied it, and will require defendants to mitigate their liability by bearing the burden  
132 of proving plaintiff's position would have been eliminated even if she had not taken FMLA  
133 leave.

134 234 F. Supp. 2d at 487 (footnotes and some citations omitted). More recently, the Court of Appeals  
135 appears to have adopted the approach that places the burden on the defendant. *See Lichtenstein v.*  
136 *University of Pittsburgh Medical Center*, 691 F.3d 294, 312 (3d Cir. 2012) ("UPMC ... can defeat  
137 Lichtenstein's claim if it can demonstrate that Lichtenstein was terminated for reasons 'unrelated  
138 to' her exercise of rights."). Accordingly, the instruction places the burden of proof on the  
139 defendant to show that the plaintiff would have lost her job even if she had not taken leave. *See*  
140 *also Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972 (8th Cir. 2005) (employer has  
141 the burden of showing that employee would have been discharged even if she had not taken FMLA  
142 leave).

143 *The Meaning of "Interference"*

### 10.1.1 Interference With Right to Take Leave

144 “[F]iring an employee for [making] a valid request for FMLA leave may constitute  
145 interference with the employee's FMLA rights as well as retaliation against the employee.”  
146 *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009); *see also Budhun v. Reading*  
147 *Hosp. & Med. Ctr.*, 765 F.3d 245, 256 (3d Cir. 2014) (“[A]n employee’s leave need not have been  
148 approved by his or her employer in order for an employee to invoke rights under the act because  
149 an employee can state an interference claim even if his or her leave is *never* approved.” (citing 29  
150 C.F.R. § 825.220(b))). *Compare Lichtenstein v. University of Pittsburgh Medical Center*, 691  
151 F.3d 294, 312 n.25 (3d Cir. 2012) (stating that “[i]t is not clear ... that *Erdman* necessarily  
152 guarantees that plaintiffs have an automatic right to claim interference where, as here, the claim is  
153 so clearly redundant to the retaliation claim,” but not deciding that question); *Ross v. Gilhuly*, 755  
154 F.3d 185, 192 (3d Cir. 2014) (holding that termination *after the end of FMLA leave and the*  
155 *employee’s return to work* did not count as interference); *Capps v. Mondelez Glob., LLC*, 847 F.3d  
156 144, 156 (3d Cir. 2017) (citing *Ross* and holding that “[u]nder the specific circumstances in this  
157 case” termination after employee’s return from FMLA leave did not give rise to an FMLA  
158 interference claim).

159 29 C.F.R. § 825.220(b) defines “interference” as including “not only refusing to authorize  
160 FMLA leave, but discouraging an employee from using such leave.” Some lower-court caselaw  
161 could be read to suggest that even *unsuccessful* attempts to discourage the exercise of FMLA rights  
162 may constitute interference. *See, e.g., Shtab v. The Greate Bay Hotel and Casino*, 173 F. Supp.  
163 2d 255, 267-68 (D.N.J. 2001); *Williams v. Shenango, Inc.*, 986 F. Supp. 309, 321 (W.D. Pa. 1997).  
164 But the Court of Appeals has adopted the opposite view. In *Fraternal Order of Police v. City of*  
165 *Camden*, 842 F.3d 231, 245 (3d Cir. 2016), the plaintiff based his FMLA-interference claim on  
166 the fact that, though he was approved for (and took) FMLA leave to care for his mother, he was  
167 “warned that he was using too much leave”; “placed in the ‘Chronic Sick Category’ ” and warned  
168 of eventual future discipline; and “visited ... at home while he was on leave.” *Fraternal Order of*  
169 *Police*, 842 F.3d at 245. The Court of Appeals, noting that the plaintiff relied both on 29 C.F.R.  
170 § 825.220(b) and on *Shtab*, rejected the plaintiff’s arguments on two grounds. First, it held that  
171 the level of discouragement was insufficient to constitute interference. *See Fraternal Order of*  
172 *Police*, 842 F.3d at 246 (“Camden officials only visited Officer Holland once while he was on  
173 leave, and we agree that this was minimally intrusive.... Camden’s actions ... were not beyond  
174 the limitations the FMLA places on employers attempting to manage their workplaces....”).  
175 Second, the Court of Appeals stressed that the FMLA authorizes no remedy unless the plaintiff  
176 has been harmed by the defendant’s conduct. *See id.* (“Officer Holland does not allege he was  
177 actually denied FMLA leave. In fact, he concedes that he was able to take time off to care for his  
178 mother.”).

179 As the preceding discussion suggests, the FMLA does not prohibit reasonable attempts by  
180 the employer to protect against abuses in taking leave. Thus, in *Callison v. City of Philadelphia*,  
181 430 F.3d 117, 121 (3d Cir. 2005), the employer imposed a requirement on all employees taking  
182 sick leave that they “notify the appropriate authority or designee when leaving home and upon  
183 return” during working hours. The plaintiff argued that the call-in requirement constituted  
184 interference with his FMLA leave, which he interpreted as a right to be “left alone.” But the court

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185 disagreed, stating that the FMLA does not prevent employers “from ensuring that employees who  
186 are on leave from work do not abuse their leave.” Bracketed material in the instruction is consistent  
187 with the *Callison* decision.

188 The Court of Appeals addressed interference with the employee’s right to return to work  
189 in *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245 (3d Cir. 2014). Viewing the facts in the  
190 light most favorable to Budhun, the Court of Appeals held that Budhun invoked her right to return  
191 by stating in an August 12 email that she would return on August 16 and by attaching a doctor’s  
192 note stating that she had no restrictions. *See id.* at 249, 252. The fact that the doctor’s note spoke  
193 only in general terms (and did not address Budhun’s ability to perform specific tasks) did not make  
194 the certification inadequate, because Budhun’s employer had not included (in its individualized  
195 FMLA notice to Budhun) “a list of essential functions” for Budhun’s job. *Id.* at 253. Moreover,  
196 a subsequent equivocation by the doctor (stating that Budhun should instead be off work until  
197 September 8) did not alter the analysis because that statement post-dated the employer’s directive  
198 to Budhun “that she could not return to work until she had full use of all ten fingers.” *Id.* (The  
199 *Budhun* court was applying 29 C.F.R. § 825.312 as it stood in 2010, *see Budhun*, 765 F.3d at 251  
200 n.1; the version in effect as of spring 2016 is materially similar.)

201 Employers are permitted to consider an employee’s FMLA absence when allocating  
202 performance bonuses. Thus, in *Sommer v. Vanguard Group*, 461 F.3d 397, 401 (3d Cir. 2006),  
203 the court held that the employer was not liable for interference under the FMLA when it refused  
204 to award the plaintiff a full annual bonus payment under its Partnership Plan, but instead awarded  
205 him a payment prorated on the basis of the time he was absent on FMLA leave. Parsing the FMLA  
206 regulations, the Court differentiated between a bonus program based upon “production,” and a  
207 bonus plan dependent upon the absence of an occurrence—such as a bonus for no absences or no  
208 injuries. The FMLA permits employers to consider an FMLA absence in assessing productivity; it  
209 does not, however, allow an employer to deny benefits that are based on an absence of an  
210 occurrence. The *Sommer* Court found that the employer’s partnership plan was a performance  
211 plan, because awards were contingent on performance of a certain number of hours per year.

#### 212 *Notice Requirements*

213 Both the employee and the employer have notice obligations under the FMLA. The Court  
214 of Appeals has described the employer’s notice obligations thus:

215 The FMLA requires employers to provide employees with both general and  
216 individual notice about the FMLA. To meet the general notice requirements, an employer  
217 must post a notice of FMLA rights on its premises. *See* § 2619(a). Because employers have  
218 some discretion in the way FMLA policies are implemented, employers must also include  
219 information regarding the employer’s FMLA policies in a handbook or similar publication.  
220 *See* 29 CFR § 825.300.

### 10.1.1 Interference With Right to Take Leave

221 In addition, regulations issued by the Department of Labor require that an employer  
222 give employees individual written notice that an absence falls under the FMLA, and is  
223 therefore governed by it. 29 CFR § 825.208; *Conoshenti v. Public Serv. Elec. & Gas Co.*,  
224 364 F.3d 135, 142 (3d Cir. 2004) (“the regulations require employers to provide employees  
225 with individualized notice of their FMLA rights and obligations.”). Thus, once an employer  
226 is on notice that an employee is taking FMLA-qualifying leave, the employer must: (1)  
227 within five business days notify the employee of his or her eligibility to take FMLA leave,  
228 29 C.F.R. § 825.300(b)(1); (2) notify the employee in writing whether the leave will be  
229 designated as FMLA leave, 29 C.F.R. § 825.300(d)(1); (3) provide written notice detailing  
230 the employee’s obligations under the FMLA and explaining any consequences for failing  
231 to meet those obligations, § 825.300(c)(1); and (4) notify the employee of the specific  
232 amount of leave that will be counted against the employee’s FMLA leave entitlement, §  
233 825.300(d)(6).

234 *Lupyan v. Corinthian Colls. Inc.*, 761 F.3d 314, 318 (3d Cir. 2014).

235 The statute sets out the employee’s notice obligations in cases where the need for leave is  
236 foreseeable. *See* 29 U.S.C. § 2612(e).<sup>12</sup> As of spring 2016, regulations setting out the employee’s  
237 notice obligations in cases where the need is unforeseeable are codified at 29 C.F.R. § 825.303.  
238 “How the employee’s notice is reasonably interpreted is generally a question of fact, not law.”  
239 *Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 303 (3d Cir. 2012). The  
240 Court of Appeals emphasized in *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d  
241 Cir. 2007), that the employee notice requirement is to be flexibly applied. The court observed that  
242 the notice need not be in writing, and that “employees may provide FMLA qualifying notice before  
243 knowing the exact dates or duration of the leave they will take.” The *Sarnowski* court concluded  
244 that the critical question for the employee’s attempt to notify is “whether the information imparted  
245 to the employer is sufficient to reasonably apprise it of the employee’s request to take time off for  
246 a serious health condition.” *See also Lichtenstein*, 691 F.3d at 305 (“The regulations state that if  
247 an employee's initial notice reasonably apprises the employer that FMLA may apply, it is the  
248 employer's burden to request additional information if necessary.”). The Instruction contains  
249 language that is consistent with this liberal interpretation of the FMLA notice requirement.

#### 250 *Consequences of Employer’s Failure to Comply With the Notice Requirement*

251 In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002), the Court invalidated  
252 a regulation promulgated by the Department of Labor which had provided that if the employer  
253 does not give proper notice, the employee’s leave could not be counted against the 12-week FMLA  
254 period. In that case, the employee took a 30 week leave, and the employer had not given proper  
255 notice that the leave would count against her FMLA entitlement. Under the terms of the regulation,  
256 this meant that the employee would be entitled to 12 more weeks of leave after the 30 already

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<sup>12</sup> The 2008 amendments added a special provision concerning notice for leave due to active duty of a family member. *See* 29 U.S.C. § 2612(e)(3).

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257 taken. The Court held that the regulation was beyond the Secretary of Labor’s authority, because  
258 it was not sufficiently tied to the interests protected by the FMLA:

259 The challenged regulation is invalid because it alters the FMLA's cause of action in a  
260 fundamental way: It relieves employees of the burden of proving any real impairment of  
261 their rights and resulting prejudice. ... [The regulation] transformed the company's failure  
262 to give notice -- along with its refusal to grant her more than 30 weeks of leave -- into an  
263 actionable violation of § 2615. This regulatory sleight of hand also entitled Ragsdale to  
264 reinstatement and backpay, even though reinstatement could not be said to be "appropriate"  
265 in these circumstances and Ragsdale lost no compensation "by reason of" Wolverine's  
266 failure to designate her absence as FMLA leave. By mandating these results absent a  
267 showing of consequential harm, the regulation worked an end run around important  
268 limitations of the statute's remedial scheme.

269 The Third Circuit has emphasized that the Supreme Court, while invalidating the regulation  
270 at issue in *Ragsdale*, did not question the validity of the regulations setting out the FMLA notice  
271 requirements. *Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 143 (3d Cir. 2004).  
272 The *Conoshenti* court noted that the regulations require “employers to provide employees with  
273 individualized notice of their FMLA rights and obligations” by designating leave as FMLA-  
274 qualifying, and giving notice of the designation to the employee. Moreover, each time the  
275 employee requests leave, the employer must, within a reasonable time "provide the employee with  
276 written notice detailing the specific expectations and obligations of the employee and explaining  
277 any consequences of a failure to meet these obligations." (Quoting 29 C.F.R. § 825.301(b)(1),  
278 (c)). The plaintiff in *Conoshenti* alleged that the employer’s failure to give proper notice under the  
279 regulations interfered with his ability to exercise his right to an FMLA leave. Specifically, had he  
280 received the proper notice, he would have been able to make an informed decision about  
281 structuring his leave and would have structured it, and his plan of recovery, in such a way as to  
282 preserve the job protection afforded by the FMLA. The Third Circuit concluded that “this is a  
283 viable theory of recovery,” and in doing so addressed the defendant’s argument that any reliance  
284 on the notice provisions in the regulations was prohibited by *Ragsdale*. The court stated that the  
285 *Ragsdale* Court “expressly noted that the validity of notice requirements of the regulations  
286 themselves was not before it. Accordingly, *Ragsdale* is not dispositive of anything before us.” *See*  
287 *also Lupyán*, 691 F.3d at 321 (holding that employer could not rely on “mailbox rule” to obtain  
288 summary judgment based on its assertion that it mailed individual FMLA notice to plaintiff,  
289 because “evidence sufficient to nullify the presumption of receipt under the mailbox rule may  
290 consist solely of the addressee’s positive denial of receipt, creating an issue of fact for the jury”);  
291 *id.* at 323 (holding that plaintiff established material question of fact on her interference claim by  
292 asserting “that, had she known her leave fell under the FMLA, she would have expedited her return  
293 and rejoined CCI before she exhausted her twelve weeks of leave and was effectively terminated”).

294 However, *Ragsdale* did support the court of appeals’ more recent conclusion that a prior  
295 version of 29 C.F.R. § 825.110(d) – which provided, at the relevant time, that “[i]f the employer  
296 fails to advise the employee whether the employee is eligible prior to the date the requested leave

### 10.1.1 Interference With Right to Take Leave

297 is to commence, the employee will be deemed eligible” – was invalid. *See Erdman v. Nationwide*  
298 *Ins. Co.*, 582 F.3d 500, 507 (3d Cir. 2009) (explaining that this holding was “consistent with the  
299 recent amendment to § 825.110, which removed the remedial eligibility provision in light of  
300 [*Ragsdale’s*] pronouncement that a remedial eligibility provision in 29 C.F.R. § 825.700 was  
301 invalid for similar reasons”).

#### 302 *Consequences of Employer’s Failure to Permit Cure of Certification*

303 A plaintiff can state an interference claim under Section 2615(a)(1) based on the  
304 employer’s failure to comply with regulations permitting the employee to cure an incomplete or  
305 insufficient medical certification:

306

307 Just like employers must advise their employees of their rights under the Act, 29  
308 C.F.R. § 825.300, they also must advise their employees of deficiencies in their  
309 medical certifications and provide them with an opportunity to cure, *id.* §  
310 825.305(c). These modest burdens imposed on employers help ensure that  
311 employees are equipped with at least basic information about the Act’s  
312 requirements and have an opportunity to exercise their rights in a meaningful way.  
313 And to encourage employer compliance, the regulations provide injured employees  
314 with a cause of action for interference. *See* 29 C.F.R. § 825.220(b) (“Any violations  
315 of the Act or of these regulations constitute interfering with, restraining, or denying  
316 the exercise of rights provided by the Act.”).

317 *Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149, 157 (3d Cir. 2015); *id.* at 156 (“Assuming  
318 that she can prove she was denied benefits to which she was otherwise entitled, Hansler may  
319 premise her interference claim on these alleged regulatory violations.”).

1 **10.1.2 Elements of an FMLA Claim — Discrimination — Mixed-Motive**

2 **Model**

3 [Plaintiff] claims that [he/she] was discriminated against for exercising the right to unpaid  
4 leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on this  
5 discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally  
6 discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] taking leave  
7 was a motivating factor<sup>13</sup> in [defendant’s] decision to [describe action] [plaintiff].

8 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of  
9 the evidence:

10 First: Plaintiff [or a family member as defined by the Act] had a [specify condition].<sup>14</sup>

11 Second: This condition was a “serious health condition,” defined in the statute as an illness,  
12 injury, impairment or physical or mental condition that involves either 1) inpatient care in  
13 a hospital or other care facility, or 2) continuing treatment by a health care provider.<sup>15</sup>

14 Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work.  
15 “Appropriate notice” was given where,

16 [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least  
17 30 days before the leave was to begin]

18 [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant  
19 as soon as practicable after [he/she] learned of the need for leave].

20 [Plaintiff] was required to timely notify [defendant] of the need for leave, but  
21 [plaintiff] was not required to specify that the leave was sought under the Family and  
22 Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was

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<sup>13</sup> See the Comment for discussion of the choice between the phrases “motivating factor” and “negative factor.”

<sup>14</sup> The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member’s service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction’s discussion of notice would require alteration. See 29 U.S.C. § 2612(e)(3).

<sup>15</sup> If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

## 10.1.2 Discrimination – Mixed-Motive

23 [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover,  
24 [plaintiff] was not required to give [defendant] a formal written request for anticipated  
25 leave. Simple verbal notice is sufficient.] The critical question for determining “appropriate  
26 notice” is whether the information given to [defendant] was sufficient to reasonably apprise  
27 it of [plaintiff’s] request to take time off for a serious health condition.

28 Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not  
29 placed in a substantially equivalent position upon [his/her] return from leave]<sup>16</sup> [was  
30 terminated after returning from leave] [was demoted after returning from leave].<sup>17</sup>

31 Fifth: [Plaintiff’s] taking leave was a motivating factor in [defendant’s] decision [not to  
32 reinstate, to terminate, etc.] [plaintiff].

33 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,  
34 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate  
35 [plaintiff’s] federal rights.

36 In showing that [plaintiff’s] taking leave was a motivating factor for [defendant’s] action,  
37 [plaintiff] is not required to prove that the leave was the sole motivation or even the primary  
38 motivation for [defendant’s] decision. [Plaintiff] need only prove that [his/her] taking leave played  
39 a motivating part in [defendant’s] decision even though other factors may also have motivated  
40 [defendant].

41 **[For use where defendant sets forth a “same decision” affirmative defense:<sup>18</sup>**

42 If you find in [plaintiff’s] favor with respect to each of the facts that [plaintiff] must prove,  
43 you must then decide whether [defendant] has shown that [defendant] would have made the same  
44 decision with respect to [plaintiff’s] employment even if there had been no motive to discriminate  
45 on the basis of [plaintiff’s] having taken leave. Your verdict must be for [defendant] if [defendant]  
46 proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same  
47 even if [plaintiff’s] leave had played no role in the employment decision.]

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<sup>16</sup> If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

<sup>17</sup> See Comment for a discussion of adverse employment actions under the FMLA.

<sup>18</sup> The Committee uses the term “affirmative defense” to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense. See the Comment for discussion of the applicability of the same-decision defense to FMLA retaliation-for-exercise claims.

## 10.1.2 Discrimination – Mixed-Motive

### 49 **Comment**

#### 50 *The nature of claims concerning retaliation for exercise of FMLA rights*

51 The claims treated in Instructions 10.1.2 and 10.1.3 allege “retaliation” for the exercise of  
52 the right to take unpaid leave under the FMLA. “The [FMLA’s] prohibition against interference  
53 prohibits an employer from discriminating or retaliating against an employee or prospective  
54 employee for having exercised or attempted to exercise FMLA rights.” 29 C.F.R. § 825.220(c).<sup>19</sup>  
55 Although dictum in *Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005), cited 29  
56 U.S.C. §§ 2615(a)(1) and 2615(a)(2) and 29 C.F.R. § 825.220(c) as providing authority for  
57 retaliation-for-exercise claims, and the Court of Appeals has cited Section 2615(a)(2) as the basis  
58 for such claims, *see Lupyán v. Corinthian Colleges Inc.*, 761 F.3d 314, 318 (3d Cir. 2014)  
59 (employees “can ... sue under 29 U.S.C. § 2615(a)(2), if an employer retaliates against an  
60 employee for exercising her FMLA rights”), in five other cases the Court of Appeals has explained  
61 that it views such claims as arising under the regulation:

62 [R]etaliation for taking an FMLA leave does not come within the literal scope of  
63 the sections of the FMLA directed to retaliation: § 2615(a)(2), making it unlawful  
64 to retaliate “against any individual for opposing any practice made unlawful by the  
65 [FMLA],” and § 2615(b), making it unlawful to retaliate against any individual for  
66 participating in any inquiry or proceeding related to the FMLA....

67 The Ninth Circuit, we believe appropriately, has predicated liability in such  
68 situations on [29 C.F.R.] § 825.220(c) ..., which is found in a section implementing  
69 § 2615(a) of the statute [which] makes it unlawful to interfere with, restrain or deny  
70 any FMLA right.... [T]here is no challenge here to the validity of § 825.220(c).

71 Even though 29 C.F.R. § 825.220(c) appears to be an implementation of the  
72 “interference” provisions of the FMLA, its text unambiguously speaks in terms of  
73 “discrimination” and “retaliation,” and we shall, of course, apply it in a manner  
74 consistent with that text.

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<sup>19</sup> The distinction between interference claims and retaliation-for-exercise claims may sometimes blur. *See Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 509 (3d Cir. 2009) (noting that “it is not clear whether firing an employee for requesting FMLA leave should be classified as interference with the employee's FMLA rights, retaliation against the employee for exercising those rights, or both,” and concluding that “firing an employee for [making] a valid request for FMLA leave may constitute interference with the employee's FMLA rights as well as retaliation against the employee”); *Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d 149, 158-59 (3d Cir. 2015) (reversing dismissal of complaint and reasoning that plaintiff had stated both an interference claim and a retaliation-for-exercise claim concerning the same events).

## 10.1.2 Discrimination – Mixed-Motive

75 *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 146 n.9 (3d Cir. 2004) (applying a prior  
76 version of the regulation). *See also Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294,  
77 301 (3d Cir. 2012) (“Although neither [Section 2615(a)(1) nor Section 2615(a)(2)] expressly  
78 forbids employers from terminating employees ‘for having exercised or attempted to exercise  
79 FMLA rights,’ a Department of Labor regulation has interpreted the sum of the two provisions as  
80 mandating this result. *See* 29 C.F.R. § 825.220(c).”); *Erdman v. Nationwide Ins. Co.*, 582 F.3d  
81 500, 508 (3d Cir. 2009) (noting and following *Conoshenti*’s reliance on the regulation); *Budhun v.*  
82 *Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 256 (3d Cir. 2014) (“FMLA retaliation claims are  
83 rooted in the FMLA regulations. *Erdman*, 582 F.3d at 508. They prohibit an employer from  
84 ‘discriminating or retaliating against an employee or prospective employee for having exercised  
85 or attempted to exercise FMLA rights.’ 29 C.F.R. § 825.220(c).”). *Compare Hansler v. Lehigh*  
86 *Valley Hosp. Network*, 798 F.3d 149, 158 (3d Cir. 2015) (citing both Section 2615(a)(2) and 29  
87 C.F.R. § 825.220(c) as authority for a retaliation-for-exercise claim). Most recently, the Court of  
88 Appeals has upheld Section 825.220(c)’s creation of the retaliation-for-exercise claim as “a  
89 reasonable interpretation of § 2615(a)(1).” *Egan v. Delaware River Port Authority*, 851 F.3d 263,  
90 271 (3d Cir. 2017).

91 The claims treated in Instructions 10.1.2 and 10.1.3 are distinct from claims of retaliation  
92 for actions such as complaining about discrimination, testifying in discrimination proceedings, and  
93 the like, which are comparable to the retaliation claims brought under other statutes, such as Title  
94 VII. A separate instruction for these forms of retaliation, analogous to retaliation claims brought  
95 under other employment discrimination statutes, is found at 10.1.4.

### 96 *Availability of a mixed-motive framework for FMLA claims*

97 Prior to the Supreme Court’s decisions in *University of Texas Southwestern Medical Center*  
98 *v. Nassar*, 133 S. Ct. 2517, 2533 (2013), and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167  
99 (2009), courts had stated that FMLA discrimination/retaliation claims were subject to the basic  
100 mixed-motive/pretext delineation applied to employment discrimination claims brought under  
101 Title VII. *See generally Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 147 (3d  
102 Cir. 2004) (applying the *Price Waterhouse* framework in an FMLA discrimination case).

103 The court in *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA  
104 case, distinguished “mixed motive” instructions from “pretext” case instructions as follows:

105 Only in a “mixed motives” . . . case is the plaintiff entitled to an instruction that he or she  
106 need only show that the forbidden motive played a role, i.e., was a “motivating factor.”  
107 Even then, the instruction must be followed by an explanation that the defendant may  
108 escape liability by showing that the challenged action would have been taken in the absence  
109 of the forbidden motive. . . . In all other . . . disparate treatment cases, the jury should be  
110 instructed that the plaintiff may meet his or her burden only by showing that age played a  
111 role in the employer’s decisionmaking process and that it had a determinative effect on the  
112 outcome of that process.

## 10.1.2 Discrimination – Mixed-Motive

113 To the extent that *Miller* held that a mixed-motive framework is available in ADEA cases,  
114 it was overruled by *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009). In *Gross*, the  
115 Supreme Court rejected the use of a mixed-motive framework for claims under the Age  
116 Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that  
117 the *Price Waterhouse* mixed-motive framework applied to ADEA claims; that the ADEA’s  
118 reference to discrimination “because of” age indicated that but-for causation is the appropriate test;  
119 and that this interpretation was bolstered by the fact that when Congress in 1991 provided the  
120 statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was  
121 not drafted so as to cover ADEA claims.

122 In 2013, the Supreme Court applied similar reasoning in holding that the mixed-motive  
123 proof framework is unavailable for Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v.*  
124 *Nassar*, 133 S. Ct. 2517, 2533 (2013) (“Title VII retaliation claims must be proved according to  
125 traditional principles of but-for causation, not the lessened causation test stated in [42 U.S.C.] §  
126 2000e-2(m). This requires proof that the unlawful retaliation would not have occurred in the  
127 absence of the alleged wrongful action or actions of the employer.”). The *Nassar* Court reasoned  
128 that Congress legislated against a background tort principle of “but for” causation, *see Nassar*, 133  
129 S. Ct. at 2523; that Title VII’s retaliation provision uses the word “because,” which is incompatible  
130 with a mixed-motive test, *see id.* at 2528; that Congress would have structured the statutory  
131 framework differently had it wished to encompass Title VII retaliation claims among those eligible  
132 for the statutory mixed-motive test set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B),  
133 *see id.* at 2529; that policy considerations support a restrictive approach to the standards of proof  
134 for retaliation claims, *see id.* at 2531-32; and that the “careful balance” that Congress set in the  
135 Civil Rights Act of 1991 forecloses the use of the *Price Waterhouse* mixed-motive test for Title  
136 VII retaliation claims, *id.* at 2534.

137 It was initially unclear what effect, if any, *Gross* and *Nassar* would have on existing  
138 precedents recognizing a mixed-motive FMLA theory. *See Lichtenstein v. University of*  
139 *Pittsburgh Medical Center*, 691 F.3d 294, 302 (3d Cir. 2012) (noting but not deciding this  
140 question); *Capps v. Mondelez Glob., LLC*, 847 F.3d 144, 151 n.5 (3d Cir. 2017) (noting the  
141 question, citing *Lichtenstein*, and holding that the plaintiff had failed to adduce evidence sufficient  
142 to trigger a mixed-motive analysis (if such an analysis remained available)). In *Egan v. Delaware*  
143 *River Port Authority*, 851 F.3d 263 (3d Cir. 2017), the Court of Appeals held that FMLA  
144 retaliation-for-exercise claims are grounded in 29 C.F.R. § 825.220(c); that the regulation  
145 authorizes mixed-motive claims; and that because “§ 825.220(c) is entitled to controlling deference  
146 under *Chevron*, ... a mixed-motive jury instruction is available for FMLA retaliation[-for-  
147 exercise] claims.” *Egan*, 851 F.3d at 274.

148 Under *Egan*, a litigant need not adduce direct evidence of discrimination in order to obtain  
149 a mixed-motive instruction in an FMLA retaliation-for-exercise case. Rather, if a litigant requests  
150 a mixed-motive instruction, the court should “determine[] whether there [is] evidence from which  
151 a reasonable jury could conclude that the [defendant] had legitimate and illegitimate reasons for

## 10.1.2 Discrimination – Mixed-Motive

152 its employment decision and that [the plaintiff’s] use of FMLA leave was a negative factor in the  
153 employment decision.” *Egan*, 851 F.3d at 275.

154 “*Negative factor*” versus “*motivating factor*”

155 The regulation on which FMLA retaliation-for-exercise claims are founded uses the term  
156 “negative factor,” in contrast to the Instruction’s use of the term “motivating factor.” The  
157 regulation states that “employers cannot use the taking of FMLA leave as a negative factor in  
158 employment actions, such as hiring, promotions or disciplinary actions....” 29 C.F.R.  
159 § 825.220(c). Relying on this provision, the *Egan* court also referred repeatedly to the mixed-  
160 motive theory as involving the question of whether the exercise of FMLA rights was a “negative  
161 factor.” Users may wish to consider whether to revise the Instruction to use the term “negative  
162 factor” in order to track these authorities closely. But there are at least two counter-arguments.

163 First, the regulation and the Instruction are structured differently. The regulation focuses  
164 generically on “employment actions,” whereas Instruction 10.1.2 refers specifically to the *adverse*  
165 action taken by a particular defendant. In the context of the Instruction, saying that the exercise of  
166 FMLA rights was a *negative* factor could be confusing. Jurors might well interpret “negative”  
167 correctly – to mean, a factor that operated adversely to the plaintiff’s interests – but they might  
168 instead misinterpret “negative” to mean a factor that weighed *against* the defendant’s adverse  
169 employment decision. Assuming that “negative factor” (as the regulation employs that term)  
170 means “a factor weighing in favor of an adverse employment decision,” the term “motivating  
171 factor” would seem to be a useful translation for purposes of the Instruction, and “negative factor”  
172 might actually cause juror confusion.

173 Second, there is a potential cost to using terminology that is unique to FMLA claims. The  
174 term “motivating factor” appears in the model instructions for mixed-motive claims under other  
175 other statutory schemes. *See* Instruction 5.1.1 (employing the term “motivating factor” for mixed-  
176 motive Title VII claims); Instruction 6.1.1 (same, for mixed-motive Section 1981 claims);  
177 Instruction 7.1 (same, for mixed-motive Section 1983 equal-protection claims); Instruction 9.1.1  
178 (same, for mixed-motive ADA claims); *see also* Instruction 7.4 (using the term “motivating factor”  
179 in instruction for Section 1983 First-Amendment-retaliation claims). It is possible that some cases  
180 will involve both mixed-motive FMLA retaliation-for-exercise claims and mixed-motive claims  
181 under another statutory scheme (such as the ADA); in such a case, using “negative factor” for one  
182 type of claim and “motivating factor” for the other type could be confusing.

183 *Adverse Employment Action*

184 Instruction 10.1.2’s list of adverse employment actions is not exhaustive. “An ‘adverse  
185 employment action’ is an action that ‘alters the employee’s compensation, terms, conditions, or  
186 privileges of employment, deprives him or her of employment opportunities, or adversely affects  
187 his or her status as an employee.’ ” *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 257 (3d  
188 Cir. 2014) (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)). In *Budhun*

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189 – an FMLA case under 29 C.F.R. § 825.220(c) – the Court of Appeals noted but did not decide the  
190 question whether “the less restrictive standard for ‘adverse employment action’ promulgated in  
191 the Title VII context by *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 ...  
192 (2006)” can apply in such FMLA cases. *Budhun*, 765 F.3d at 257.

193 “*Same Decision*” *Affirmative Defense*

194 Mixed-motive discrimination claims are typically subject to a “same-decision defense” –  
195 *i.e.*, that the defendant would have made the same decision even absent the discriminatory motive.  
196 For Title VII mixed-motive discrimination claims, the same-decision defense limits remedies  
197 rather than providing a defense to liability. *See* Comment 5.1.1; *see also* 42 U.S.C. § 2000e-2(m)  
198 (providing that “an unlawful employment practice is established when the complaining party  
199 demonstrates that race, color, religion, sex, or national origin was a motivating factor for any  
200 employment practice, even though other factors also motivated the practice”); *id.* § 2000e-  
201 5(g)(2)(B) (limiting remedies under Section 2000e-2(m), in a case where the defendant  
202 “demonstrates that [it] would have taken the same action in the absence of the impermissible  
203 motivating factor,” to declaratory relief, certain injunctive relief, and certain attorney’s fees and  
204 costs). Noting that the Americans with Disabilities Act borrows enforcement and remedial  
205 provisions from Title VII, Comment 9.1.1 takes the view that the same-decision defense similarly  
206 limits remedies for mixed-motive claims under the ADA.<sup>20</sup> By contrast, the model instructions set  
207 out the same-decision defense as a defense to liability for mixed-motive claims under Section 1981  
208 and Section 1983. *See* Instruction 6.1.1 (mixed-motive Section 1981 claims); Instruction 7.1  
209 (mixed-motive Section 1983 equal-protection claims); *see also* Instruction 7.4 (setting out same-  
210 decision defense as defense to liability for Section 1983 First-Amendment-retaliation claims). The  
211 difference arises because pre-1991 caselaw recognized the same-decision defense as a defense to  
212 liability for mixed-motive claims, *see, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 258  
213 (1989) (plurality opinion), but Congress altered that landscape in 1991 with respect to Title VII  
214 claims. For Title VII claims, the Civil Rights Act of 1991 modified the *Price Waterhouse*  
215 framework so that the same-decision defense limits remedies rather than foreclosing liability. The  
216 model instructions reflect the view that the framework set by the 1991 amendments governs Title  
217 VII and ADA claims, but not Section 1983 equal-protection or Section 1981 claims.

218 The Court of Appeals has not discussed the application of the same-decision defense to  
219 mixed-motive FMLA retaliation-for-exercise claims, and the regulation that is regarded as creating  
220 those claims (29 C.F.R. § 825.220(c)) makes no mention of the defense either. Instruction 10.1.2

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<sup>20</sup> Comment 9.1.1 explains: “The ADA explicitly relies on the enforcement tools and remedies described in 42 U.S.C. § 2000e-(5). *See* 42 U.S.C. § 12117(a). Therefore, a plaintiff in a ‘mixed-motives’ case under the ADA is not entitled to damages if the defendant proves that the adverse employment action would have been made even if disability had not been a motivating factor.”

## 10.1.2 Discrimination – Mixed-Motive

221 reflects an assumption that the *Price Waterhouse* approach applies, so that the same-decision  
222 defense, if established, forecloses liability.

### 223 *Notice Requirements*

224 For a discussion of notice requirements pertinent to FMLA claims, see the commentary to  
225 Instruction 10.1.1.

### 226 *Serious Health Condition*

227 For a discussion of the term “serious health condition” see Instruction and Comment  
228 10.2.1.

### 229 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

230 For a discussion of the Court’s treatment in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011),  
231 of the animus of an employee who was not the ultimate decisionmaker, see Comment 5.1.7. *Staub*  
232 concerned a statute that used the term “motivating factor,” and it is unclear whether the ruling in  
233 *Staub* would extend to mixed-motive claims under statutes (such as the FMLA) that do not contain  
234 the same explicit statutory reference to discrimination as a “motivating factor.”

1 **10.1.3 Elements of an FMLA Claim— Discrimination —Pretext**

2 **Model**

3 In this case [plaintiff] is alleging that [he/she] was discriminated against for exercising the  
4 right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to recover  
5 on this discrimination claim against [defendant], [plaintiff] must prove that [defendant]  
6 intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her]  
7 exercise of the right to take leave was a determinative factor in [defendant’s] decision to [describe  
8 action] [plaintiff].

9 To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of  
10 the evidence:

11 First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].<sup>21</sup>

12 Second: This condition was a “serious health condition”, defined in the statute as an illness,  
13 injury, impairment or physical or mental condition that involves either 1) inpatient care in  
14 a hospital or other care facility, or 2) continuing treatment by a health care provider.<sup>22</sup>

15 Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work.  
16 “Appropriate notice” was given where,

17 [if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least  
18 30 days before the leave was to begin]

19 [if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant  
20 as soon as practicable after [he/she] learned of the need for leave].

21 [Plaintiff] was required to timely notify [defendant] of the need for leave, but  
22 [plaintiff] was not required to specify that the leave was sought under the Family and  
23 Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice. Nor was  
24 [plaintiff] required to provide the exact dates or duration of the leave requested. [Moreover,

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21 The Act also covers leave due to the birth of a son or daughter, the placement of a son or daughter with the employee for adoption or foster care, or certain exigencies arising out of a family member’s service in the armed forces. If such a ground raises disputed questions of fact for the jury to decide, the instruction can be altered accordingly. For example, with respect to leave due to active duty of a family member the instruction’s discussion of notice would require alteration. *See* 29 U.S.C. § 2612(e)(3).

22 If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

### 10.1.3 Discrimination –Pretext

25 [plaintiff] was not required to give [defendant] a formal written request for anticipated  
26 leave. Simple verbal notice is sufficient.] The critical question for determining “appropriate  
27 notice” is whether the information given to [defendant] was sufficient to reasonably apprise  
28 it of [plaintiff’s] request to take time off for a serious health condition.

29 Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not  
30 placed in a substantially equivalent position upon [his/her] return from leave]<sup>23</sup> [was  
31 terminated after returning from leave] [was demoted after returning from leave].<sup>24</sup>

32 Fifth: [Plaintiff’s] taking leave was a determinative factor in [defendant’s] decision to  
33 [describe adverse employment action].

34 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,  
35 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate  
36 [plaintiff’s] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of  
37 intent, such as statements admitting discrimination. Intentional discrimination may be inferred  
38 from the existence of other facts.

39 You should weigh all the evidence received in the case in deciding whether [defendant]  
40 intentionally discriminated against [plaintiff]. [For example, you have been shown statistics in this  
41 case. Statistics are one form of evidence that you may consider when deciding whether a defendant  
42 intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with  
43 all the other evidence.]

44 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s action]. If  
45 you believe [defendant’s] stated reason and if you find that the [adverse employment action] would  
46 have occurred because of defendant’s stated reason regardless of [plaintiff’s] taking leave, then  
47 you must find for [defendant]. If you disbelieve [defendant’s] stated reason for its conduct, then  
48 you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining  
49 whether [defendant’s] stated reason for its actions was a pretext, or excuse, for discrimination, you  
50 may not question [defendant’s] business judgment. You cannot find intentional discrimination  
51 simply because you disagree with the business judgment of [defendant] or believe it is harsh or  
52 unreasonable. You are not to consider [defendant’s] wisdom. However, you may consider whether  
53 [plaintiff] has proven that [defendant’s] reason is merely a cover-up for discrimination.

54 Ultimately, you must decide whether [plaintiff] has proven that [his/her] taking leave under  
55 the Family Medical Leave Act was a determinative factor in [defendant’s employment decision.]

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23 If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

24 See Comment for a discussion of adverse employment actions under the FMLA.

### 10.1.3 Discrimination –Pretext

56 “Determinative factor” means that if not for [plaintiff’s] taking leave, the [adverse employment  
57 action] would not have occurred.

58

#### 59 **Comment**

60 In *Egan v. Delaware River Port Authority*, 851 F.3d 263 (3d Cir. 2017), the Court of  
61 Appeals held that FMLA retaliation-for-exercise claims are grounded in 29 C.F.R. § 825.220(c)  
62 and that such claims encompass both pretext and mixed-motive theories. See *Egan*, 851 F.3d at  
63 274. If a litigant requests a mixed-motive instruction, the court should “determine[] whether there  
64 [is] evidence from which a reasonable jury could conclude that the [defendant] had legitimate and  
65 illegitimate reasons for its employment decision and that [the plaintiff’s] use of FMLA leave was  
66 a negative factor in the employment decision”; if so, a mixed-motive instruction is available. *Egan*,  
67 851 F.3d at 275. See Instruction and Comment 10.1.2 for the mixed-motive instruction. Instruction  
68 10.1.3 provides a pretext instruction.

69 In *Miller v. Cigna Corp.*, 47 F.3d 586 (3d Cir. 1995) (en banc), an ADEA case, the court  
70 discussed the proper instruction to be given in a pretext case:

71 A plaintiff . . . who does not qualify for a burden shifting instruction under *Price*  
72 *Waterhouse* has the burden of persuading the trier of fact by a preponderance of the  
73 evidence that there is a "but-for" causal connection between the plaintiff's age and the  
74 employer's adverse action -- i.e., that age "actually played a role in [the employer's  
75 decisionmaking] process and had a determinative influence on the outcome" of that  
76 process.

77 *Miller*, 47 F.3d at 595-96 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). (To  
78 the extent that *Miller* contemplated the use of the *Price Waterhouse* framework for ADEA claims,  
79 it has been overruled by *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).)

80 The Court in *Miller* reversed a verdict for the defendant because the trial judge instructed  
81 the jury that age must be the “sole cause” of the employer’s decision. That standard was too  
82 stringent; instead, in a pretext case, “plaintiff must prove by a preponderance of the evidence that  
83 age played a role in the employer's decisionmaking process and that it had a determinative effect  
84 on the outcome of that process.” *Miller*, 47 F.3d at 598. See *Alifano v. Merck & Co., Inc.*, 175 F.  
85 Supp. 2d 792, 794 (E.D. Pa. 2001) (applying the *McDonnell-Douglas* analysis to an FMLA claim).

### 10.1.3 Discrimination –Pretext

86 If the plaintiff establishes a prima facie case of discrimination,<sup>25</sup> the burden shifts to the  
87 defendant to produce evidence of a legitimate nondiscriminatory reason for the challenged  
88 employment action. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993). If the  
89 defendant meets its burden of producing evidence of a nondiscriminatory reason for its action, the  
90 plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for  
91 discrimination, or in some other way prove it more likely than not that discrimination motivated  
92 the employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).<sup>26</sup> The

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<sup>25</sup> *See generally Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 302 (3d Cir. 2012) (applying the *McDonnell Douglas* burden-shifting framework to an FMLA claim and explaining that to make out a prima facie case, the plaintiff must adduce evidence “sufficient to create a genuine factual dispute about each of the three elements of her retaliation claim: (a) invocation of an FMLA right, (b) termination, and (c) causation”); *id.* at 307-09 (applying the causation prong of this test); *Budhun*, 765 F.3d at 257 (holding that a reasonable jury could find an adverse employment action when the employer gave the plaintiff’s position to another employee and “told [the plaintiff] to turn in her badge and keys,” even though the employer did not formally terminate her at that point); *id.* at 258 (holding that “unusually suggestive timing” could support a finding of causation where the employer “decided to replace [the plaintiff] before her FMLA leave ended” and notified the plaintiff – less than a week after her FMLA leave ended – that she had been replaced).

<sup>26</sup> In *Ross v. Gilhuly*, 755 F.3d 185 (3d Cir. 2014), the Court of Appeals upheld summary judgment for the defendant because the plaintiff had failed to establish pretext. Plaintiff Ross’s employer had adopted a “Performance Improvement Plan” (PIP) for Ross before learning that he had cancer. *Id.* at 188-89. After learning of the cancer, the employer extended the timeline for the PIP. *See id.* at 189. Ross took FMLA leave and had surgery. *See id.* After his return, the employer extended the PIP again. *See id.* at 190. Ross then sued, asserting FMLA interference and retaliation claims. *See id.* A little more than two months later, the employer fired Ross, citing insufficient improvement and lack of “fit” for the job. *Id.* Reasoning that “customer feedback, particularly from an important customer who accounts for millions of dollars of revenue, is an obviously valid factor in evaluating performance,” the Court of Appeals rejected Ross’s argument that such a customer’s concerns were an insufficient basis for adopting the PIP. *Id.* at 194. The Court of Appeals also rejected Ross’s attempt to argue that the sequence of events showed pretext. *See id.* (“[T]he timing of the alleged retaliatory action must be unusually suggestive of retaliatory motive before a causal link will be inferred.” (quoting *Williams v. Philadelphia Hous. Auth. Police Dep’t*, 380 F.3d 751, 760 (3d Cir. 2004))). Here, “it was perfectly sensible for Continental to delay the timeline of the PIP to accommodate Ross’s FMLA leave[, and t]he fact that Ross was placed on the original PIP based on documented performance problems well before his employer knew he was sick defeats any retaliatory inference based on timing.” *Id.*

### 10.1.3 Discrimination –Pretext

93 plaintiff retains the ultimate burden of proving intentional discrimination. *Chipollini v. Spencer*  
94 *Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987) (en banc) (ADEA case) (“The burden remains with  
95 the plaintiff to prove that age was a determinative factor in the defendant employer’s decision. The  
96 plaintiff need not prove that age was the employer’s sole or exclusive consideration, but must  
97 prove that age made a difference in the decision.”). The factfinder’s rejection of the employer’s  
98 proffered reason allows, but does not compel, judgment for the plaintiff. *Reeves v. Sanderson*  
99 *Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (“In appropriate circumstances, the trier of fact  
100 can reasonably infer from the falsity of the explanation that the employer is dissembling to cover  
101 up a discriminatory purpose.”). The employer’s proffered reason can be shown to be pretextual  
102 by circumstantial as well as direct evidence. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d  
103 Cir. 1987) (en banc). “To discredit the employer’s proffered reason . . . the plaintiff cannot simply  
104 show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is  
105 whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd,  
106 prudent or competent.” *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d Cir. 1997).  
107 *See generally Lichtenstein v. University of Pittsburgh Medical Center*, 691 F.3d 294, 309-12 (3d  
108 Cir. 2012) (after holding that the plaintiff had made out a prima facie case and that the defendant  
109 had offered a legitimate reason for firing the plaintiff, holding that the plaintiff had adduced  
110 evidence from which a jury could find pretext); *Hansler v. Lehigh Valley Hosp. Network*, 798 F.3d  
111 149, 159 (3d Cir. 2015) (“Hansler alleges she attempted to invoke her right to leave, she was not  
112 advised of deficiencies in her medical certification, she was not provided a cure period, and she  
113 was fired a few weeks later as a result of her leave request. Through discovery, Hansler might be  
114 able to show that Lehigh Valley had a retaliatory motive and that the stated reason for termination  
115 was pretextual.”).

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In *Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314 (3d Cir. 2014), the Court of Appeals vacated the grant of summary judgment to the defendant on the plaintiff’s FMLA retaliation claim, holding that the plaintiff had presented evidence from which a jury could find pretext, *see id.* at 325-26. The plaintiff had been told “that she was being terminated from her position at CCI due to low student enrollment, and because she had not returned to work within the twelve weeks allotted for FMLA leave.” *Id.* at 317. According to the plaintiff, “this was the first time she had any knowledge that she was on FMLA leave.” *Id.* Although the Court of Appeals noted “that Lupyan’s employment legally ended upon expiration of her FMLA leave,” it held that “Lupyan’s return outside of the twelve week window does not preclude her retaliation claim under the circumstances here.” *Id.* at 324-25 (“The FMLA’s protection against retaliation is not limited to periods in which an employee is on FMLA leave, but encompasses the employer’s conduct both during and after the . . . FMLA leave.” (quoting *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 768–69 (5th Cir. 2001))). Noting record evidence that “even if a downturn in enrollment had occurred, it was highly unusual for CCI to respond by terminating Lupyan’s position,” that the asserted hiring freeze might not actually have existed, and that any hiring freeze would not cover a current employee, the Court of Appeals found a jury question on the issue of pretext. *See id.* at 325.

### 10.1.3 Discrimination –Pretext

116 One type of legitimate nondiscriminatory reason is an employer’s honest belief that the  
117 employee is misusing FMLA leave. *See Capps v. Mondelez Glob., LLC*, 847 F.3d 144 (3d Cir.  
118 2017). In *Capps*, the employer “met its burden of demonstrating a legitimate, nondiscriminatory  
119 justification for Capps’ discharge with evidence that Capps was terminated for his misuse of  
120 FMLA leave and dishonesty surrounding the leave in violation of Mondelez’s policies.” *Id.* at  
121 152. To rebut that nondiscriminatory justification, it did not suffice for the plaintiff to show that  
122 the employer was mistaken in its belief; rebuttal would have required “evidence indicating that  
123 Mondelez did not honestly hold that belief.” *Id.* at 155. In a case featuring this type of honest-  
124 belief defense, the court should tailor the paragraph of Instruction 10.1.3 that deals with pretext –  
125 for example, by revising that paragraph as shown here:

126 [Defendant] has given a nondiscriminatory reason for its [describe defendant’s  
127 action]. Specifically, [defendant] states that it [describe defendant’s action] because it  
128 [specify defendant’s honest-belief defense – e.g., “believed that [plaintiff] was misusing  
129 her FMLA leave”]. If you find that [defendant] honestly held that belief and if you find  
130 that this belief caused the [adverse employment action], then you must find for [defendant].  
131 If you disbelieve [defendant’s] stated reason for its conduct, then you may, but need not,  
132 find that [plaintiff] has proved intentional discrimination. In assessing [defendant’s]  
133 explanations for its conduct, the key question is not whether [defendant] was correct in its  
134 belief, but rather whether [defendant] honestly held that belief. You cannot find intentional  
135 discrimination simply because you conclude that [defendant’s] belief was incorrect. You  
136 are not to consider [defendant’s] wisdom. However, you may consider whether [plaintiff]  
137 has proven that [defendant’s] reason is merely a cover-up for discrimination.

#### 138 *Adverse Employment Action*

139 Instruction 10.1.3’s list of adverse employment actions is not exhaustive. “An ‘adverse  
140 employment action’ is an action that ‘alters the employee's compensation, terms, conditions, or  
141 privileges of employment, deprives him or her of employment opportunities, or adversely affects  
142 his or her status as an employee.’ ” *Budhun v. Reading Hosp. & Med. Ctr.*, 765 F.3d 245, 257 (3d  
143 Cir. 2014) (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)). In *Budhun*  
144 – an FMLA case under 29 C.F.R. § 825.220(c) – the Court of Appeals noted but did not decide the  
145 question whether “the less restrictive standard for ‘adverse employment action’ promulgated in  
146 the Title VII context by *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 ...  
147 (2006)” can apply in such FMLA cases. *Budhun*, 765 F.3d at 257.

#### 148 *Notice Requirements*

149 For a discussion of notice requirements under the FMLA, see the commentary to  
150 Instruction 10.1.1.

#### 151 *Serious Health Condition*

### 10.1.3 Discrimination –Pretext

152                   For a discussion of the term “serious health condition” see Instruction and Comment  
153    10.2.1.

## 10.1.4 Retaliation for Opposing Actions in Violation of FMLA

### 10.1.4 Elements of an FMLA Claim — Retaliation for Opposing Actions in Violation of FMLA

#### Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because [plaintiff] opposed a practice made unlawful by the Family and Medical Leave Act.

In order to prevail on this claim, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint to her employer<sup>27</sup>] [testified/agreed to testify in a proceeding] asserting rights under the Family and Medical Leave Act.

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of any Family and Medical Leave Act claim, but only that [he/she] was acting under a reasonable,<sup>28</sup> good faith belief that [his/her] [or someone else's] rights under the Family and Medical Leave Act were violated.

Concerning the second element, the term “materially adverse” means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proved by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

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<sup>27</sup> See the Comment to this instruction for a discussion of whether informal complaints are protected activity under the Family and Medical Leave Act.

<sup>28</sup> See the Comment for a discussion of the allocation of responsibility for determining the reasonableness of the plaintiff's belief.

## 10.1.4 Retaliation for Opposing Actions in Violation of FMLA

28           Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative  
29 effect on [describe alleged retaliatory activity]. “Determinative effect” means that if not for  
30 [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

31

### 32 **Comment**

33           The FMLA establishes a cause of action for retaliation that is similar to those provided in  
34 other employment discrimination statutes. 29 U.S.C. § 2615(b) provides as follows:

35                   (b) *Interference with proceedings or inquiries.* It shall be unlawful for any person  
36 to discharge or in any other manner discriminate against any individual because such  
37 individual –

38                           (1) has filed any charge, or has instituted or caused to be instituted any  
39 proceeding, under or related to [the FMLA];

40                           (2) has given, or is about to give, any information in connection with any  
41 inquiry or proceeding relating to any right provided under [the FMLA]; or

42                           (3) has testified, or is about to testify, in any inquiry or proceeding relating  
43 to any right provided under [the FMLA].

44           Subsection (b) provides a cause of action that is separate from the type of claim treated in  
45 Instructions 10.1.2 and 10.1.3. The claims addressed in Instructions 10.1.2 and 10.1.3 are also  
46 referred to as “retaliation” claims, but those claims seek recovery for retaliation against the plaintiff  
47 for having exercised the right to unpaid leave. In contrast, the more traditional retaliation claim of  
48 subsection (b) is designed to protect those who complain about conduct that is illegal under the  
49 FMLA,<sup>29</sup> or who participate in proceedings seeking recovery for illegal activity under the Act.  
50 Potentially subsection (b) could protect a person who is not entitled to or never exercised the right  
51 to leave, but who complained about or participated in a proceeding to remedy the violation of the  
52 FMLA rights of another person.

### 53 *Protected Activity*

54           The literal terms of 29 U.S.C. § 2615(b) might appear to limit protected conduct to that  
55 involved in a formal proceeding — in contrast to the retaliation provisions of other acts (such as

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29 *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011), construed the Fair Labor Standards Act’s anti-retaliation provision and held that “the statutory term ‘filed any complaint’ includes oral as well as written complaints within its scope.” *Id.* at 4. The Court did not state whether this holding has implications for the interpretation of the phrase “filed any charge” in the FMLA’s anti-retaliation provision.

#### 10.1.4 Retaliation for Opposing Actions in Violation of FMLA

56 Title VII and the ADEA) which protect informal activity in opposition to prohibited practices  
57 under the respective statutes, including informal complaints to an employer.

58 The Third Circuit has not yet decided whether there is a cause of action for retaliation under  
59 29 U.S.C. § 2615(b) when an employee has informally opposed an employer’s action on the ground  
60 that it violates the FMLA. But case law construing similar language in the retaliation provision of  
61 the Equal Pay Act indicates that such a provision should be construed broadly so that informal  
62 complaints constitute protected activity. *See* the commentary to Instruction 11.1.2.<sup>30</sup> This  
63 instruction therefore includes informal complaints as protected activity. *See Sabbrese v. Lowe’s*  
64 *Home Centers, Inc.*, 320 F. Supp. 2d 311, 324 (W.D. Pa. 2004) (finding a valid retaliation claim  
65 when the plaintiff was discharged after informally complaining to the employer about being  
66 disciplined for taking leave).<sup>31</sup>

67 In accord with the retaliation instructions in other Chapters (*see, e.g.*, Instruction 5.1.7  
68 concerning Title VII retaliation claims), Instruction 10.1.4 requires a “reasonable, good faith  
69 belief” that an FMLA violation occurred. The statute itself does not explicitly require  
70 reasonableness and good faith. As of spring 2016, 29 C.F.R. § 825.220(e) provided that  
71 “Individuals ... are protected from retaliation for opposing (e.g., filing a complaint about) any  
72 practice which is unlawful under the Act. They are similarly protected if they oppose any practice  
73 which they reasonably believe to be a violation of the Act or regulations.” Tracking the approach  
74 taken in instructions from other circuits concerning retaliation under various employment  
75 discrimination statutes, Instruction 10.1.4 directs the jury to determine both the good faith and the  
76 reasonableness of the plaintiff’s belief that an FMLA violation occurred. *See* Fifth Circuit  
77 Committee Note to Instruction 11.6.1 (Title VII retaliation); Seventh Circuit Committee Comment  
78 to Instruction 3.02 (retaliation instruction for use in Title VII, § 1981, and ADEA cases); Eleventh  
79 Circuit Instruction 4.21 (Section 1981 retaliation); Eleventh Circuit Instruction 4.22 (retaliation  
80 claims under Title VII, ADEA, ADA, and FLSA); *see also* Eighth Circuit Instruction 10.41  
81 (retaliation claim (regarding opposition to harassment or discrimination) under Title VII and other  
82 federal discrimination laws; instruction uses phrase “reasonably believed”); *id.* Notes on Use, Note

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<sup>30</sup> Moreover, it seems possible that a claim of retaliation for informal opposition might be made under 29 U.S.C. § 2615(a)(2), which provides that “[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.”

<sup>31</sup> *Gillispie v. RegionalCare Hosp. Partners Inc.*, 892 F.3d 585 (3d Cir. 2018), which interpreted the whistleblower-protection provision in the Emergency Medical Treatment and Active Labor Act (“EMTALA”), might shed some indirect light on the question whether protected conduct under the FMLA’s anti-retaliation provision includes communications made only to the employer and not to an outside authority. In *Gillispie*, the court ruled that the EMTALA provision does extend to purely internal reports, both because the EMTALA provision contains no reference to “official” reports and because a contrary ruling would incentivize employers to fire employees before they had an opportunity to take their report to an outside authority. *Gillispie*, 892 F.3d at 596-97.

## 10.1.4 Retaliation for Opposing Actions in Violation of FMLA

83 5 (using phrase “reasonably and in good faith believe”); *compare* Ninth Circuit Instruction &  
84 Comment 10.3 (Title VII retaliation) (discussing reasonableness requirement in the comment but  
85 not in the model instruction). In cases where the protected nature of the plaintiff’s activity is not  
86 in dispute, this portion of the instruction can be modified and the court can simply instruct the jury  
87 that specified actions by the plaintiff constituted protected activity.

### 88 *Standard for Actionable Retaliation*

89 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 68 (2006), held that  
90 a cause of action for retaliation under Title VII lies whenever the employer responds to protected  
91 activity in such a way “that a reasonable employee would have found the challenged action  
92 materially adverse, which in this context means it well might have dissuaded a reasonable worker  
93 from making or supporting a charge of discrimination.” (citations omitted). The Court elaborated  
94 on this standard in the following passage:

95 We speak of *material* adversity because we believe it is important to separate  
96 significant from trivial harms. Title VII, we have said, does not set forth “a general civility  
97 code for the American workplace.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.  
98 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee’s decision to report  
99 discriminatory behavior cannot immunize that employee from those petty slights or minor  
100 annoyances that often take place at work and that all employees experience. See 1 B.  
101 Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting  
102 that “courts have held that personality conflicts at work that generate antipathy” and  
103 “snubbing’ by supervisors and co-workers” are not actionable under § 704(a)). The anti-  
104 retaliation provision seeks to prevent employer interference with “unfettered access” to  
105 Title VII’s remedial mechanisms. It does so by prohibiting employer actions that are likely  
106 “to deter victims of discrimination from complaining to the EEOC,” the courts, and their  
107 employers. And normally petty slights, minor annoyances, and simple lack of good  
108 manners will not create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

109 We refer to reactions of a *reasonable* employee because we believe that the  
110 provision’s standard for judging harm must be objective. An objective standard is judicially  
111 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial  
112 effort to determine a plaintiff’s unusual subjective feelings. We have emphasized the need  
113 for objective standards in other Title VII contexts, and those same concerns animate our  
114 decision here. See, e.g., [*Pennsylvania State Police v.*] *Suders*, 542 U.S., at 141, 124 S. Ct.  
115 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*,  
116 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment  
117 doctrine).

118 We phrase the standard in general terms because the significance of any given act  
119 of retaliation will often depend upon the particular circumstances. Context matters. . . . A  
120 schedule change in an employee’s work schedule may make little difference to many

#### 10.1.4 Retaliation for Opposing Actions in Violation of FMLA

workers, but may matter enormously to a young mother with school age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.

Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint. By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

548 U.S. at 68-70 (some citations omitted).

The anti-retaliation provision of Title VII, construed by the Court in *White*, is similar to the FMLA provisions on retaliation.<sup>32</sup> This instruction therefore follows the guidelines of the Supreme Court's decision in *White*.<sup>33</sup>

##### *No Requirement That Retaliation Be Job-Related To Be Actionable*

The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 548 U.S. 53, 64 (2006), held that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court rejected

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<sup>32</sup> Like 42 U.S.C. § 2000e-3(a), 29 U.S.C. §§ 2615(a)(2) and (b) use the term “discriminate against” and do not contain language limiting the sort of discrimination denoted by that term. See 42 U.S.C. § 2000e-3(a) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”); 29 U.S.C. § 2615(a)(2) (“It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.”); 29 U.S.C. § 2615(b) (“It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual” has engaged in specified protected activities).

<sup>33</sup> The Committee has not attempted to determine whether *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011) – in which the Supreme Court recognized a right of action under Title VII for certain third parties who engaged in no protected activity but were subjected to reprisals based on the protected activities of another employee – provides authority for recognition of similar third-party retaliation claims under the FMLA. For a discussion of *Thompson*, see Comment 5.1.7.

#### 10.1.4 Retaliation for Opposing Actions in Violation of FMLA

141 authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse  
142 employment action in order to recover for retaliation. The Court distinguished Title VII’s  
143 retaliation provision from its basic anti-discrimination provision, which does require an adverse  
144 employment action. The Court noted that unlike the basic anti-discrimination provision, which  
145 refers to conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any*  
146 discrimination by an employer in response to protected activity.

147 The FMLA anti-retaliation provision is very similar to the Title VII provision construed in  
148 *White*. Moreover, it not only bars “discharge” but broadly prohibits “any other ...  
149 discriminat[ion].” Accordingly, this instruction contains bracketed material to cover a plaintiff’s  
150 claim for retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit  
151 authority which required the plaintiff in a retaliation claim to prove that she suffered an adverse  
152 employment action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir. 1995) (requiring  
153 the plaintiff in a retaliation case to prove among other things that “the employer took an adverse  
154 employment action against her”).

155 It should be noted, however, that damages for emotional distress and pain and suffering are  
156 not recoverable under the FMLA. *Lloyd v. Wyoming Valley Health Care Sys.*, 994 F. Supp. 288,  
157 291 (M.D. Pa. 1998) . So, to the extent that retaliatory activity is not job-related, it is probably less  
158 likely to be compensable under the FMLA than it is under Title VII. For further discussion of  
159 *White*, see the Comment to Instruction 5.1.7.

##### 160 *Determinative Effect*

161 Instruction 10.1.4 requires the plaintiff to show that the plaintiff’s protected activity had a  
162 “determinative effect” on the allegedly retaliatory activity. Prior to 2013, a distinction between  
163 pretext and mixed-motive cases had on occasion been recognized as relevant for both Title VII  
164 retaliation claims and FMLA claims. For Title VII retaliation claims that proceeded on a “pretext”  
165 theory, the “determinative effect” standard applied. *See Woodson v. Scott Paper Co.*, 109 F.3d  
166 913, 935 (3d Cir. 1997) (holding that it was error, in a case that proceeded on a “pretext” theory,  
167 not to use the “determinative effect” language).

168 In 2013, the Supreme Court held that the mixed-motive proof framework is unavailable for  
169 Title VII retaliation claims. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533  
170 (2013) (“Title VII retaliation claims must be proved according to traditional principles of but-for  
171 causation, not the lessened causation test stated in [42 U.S.C.] § 2000e–2(m). This requires proof  
172 that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action  
173 or actions of the employer.”). The *Nassar* Court reasoned that Congress legislated against a  
174 background tort principle of “but for” causation, *see Nassar*, 133 S. Ct. at 2523; that Title VII’s  
175 retaliation provision uses the word “because,” which is incompatible with a mixed-motive test, *see*  
176 *id.* at 2528; that Congress would have structured the statutory framework differently had it wished  
177 to encompass Title VII retaliation claims among those eligible for the statutory mixed-motive test  
178 set forth in 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), *see id.* at 2529; that policy

#### 10.1.4 Retaliation for Opposing Actions in Violation of FMLA

179 considerations support a restrictive approach to the standards of proof for retaliation claims, *see*  
180 *id.* at 2531-32; and that the “careful balance” that Congress set in the Civil Rights Act of 1991  
181 forecloses the use of the *Price Waterhouse* mixed-motive test for Title VII retaliation claims, *id.*  
182 at 2534.

183 In light of *Nassar* and *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009),<sup>34</sup> it is  
184 unclear whether a mixed-motive framework can appropriately apply to FMLA retaliation claims  
185 under Section 2615(b).<sup>35</sup>

##### 186 *Timing*

187 On the relationship between timing and retaliation in FMLA cases, *see, e.g., Sabbrese v.*  
188 *Lowe’s Home Centers, Inc.*, 320 F. Supp. 2d 311, 324 (W.D. Pa. 2004) (“The court finds that  
189 plaintiff met the causal link requirement of his prima facie case by presenting evidence that: (1)  
190 he was terminated two weeks after he complained to store management; (2) defendant’s  
191 management officials gave inconsistent explanations about who authorized his firing; and (3)  
192 plaintiff was permitted to continue working after allegedly committing a violation so severe that  
193 he could have been immediately terminated.”).

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<sup>34</sup> In *Gross*, the Supreme Court rejected the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA’s reference to discrimination “because of” age indicated that but-for causation is the appropriate test; and that this interpretation was bolstered by the fact that when Congress in 1991 provided the statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not drafted so as to cover ADEA claims.

<sup>35</sup> *Cf. DiFiore v. CSL Behring, LLC*, 879 F.3d 71, 78 (3d Cir. 2018) (holding that a mixed-motive framework is unavailable for False Claims Act retaliation claims because “the language of the FCA anti-retaliation provision uses the same ‘because of’ language that compelled the Supreme Court to require ‘but-for’ causation in *Nassar* and *Gross*”).

## 10.2.1 Serious Health Condition

### 10.2.1 FMLA Definitions — Serious Health Condition

#### Model

The phrase "serious health condition," as used in these instructions, means an illness, injury, impairment, or physical or mental condition that involves:

*Set forth any of the following that are presented by the evidence:*

[Inpatient care. Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities) due to the serious health condition, treatment therefor, or recovery therefrom, or any later treatment in connection with the inpatient care. For this purpose, "overnight stay" means a stay in a hospital, hospice, or residential medical care facility for a substantial period of time from one calendar day to the next calendar day as measured by the individual's time of admission and time of discharge];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, and any later treatment or period of incapacity relating to the same condition, that also involves:

[Insert here the relevant requirement. See Comment for a discussion of the requirements for showing incapacity plus treatment.]];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic serious health condition. [See Comment for a discussion of the requirements for showing a chronic serious health condition.]];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) which is permanent or long-term due to a condition for which treatment may not be effective. [[The employee or family member] must be under the continuing supervision of a health care provider, even though [the employee or family member] may not be receiving active treatment];

## 10.2.1 Serious Health Condition

31 OR

32 [Any period of absence to receive multiple treatments (including any period of recovery  
33 from the treatments) by a health care provider, or by a provider of health care services under orders  
34 of, or on referral by, a health care provider, either for restorative surgery after an accident or other  
35 injury, or for a condition that would likely result in a period of incapacity (inability to work, attend  
36 school or perform other regular daily activities) of more than three consecutive calendar days in  
37 the absence of medical intervention or treatment.]

38

### 39 **Comment**

40 This instruction can be used if the court wishes to provide the jury with more detailed  
41 information on what constitutes a serious health condition than that set forth in Instructions 10.1.1-  
42 10.1.3. The FMLA defines “serious health condition” as “an illness, injury, impairment, or  
43 physical or mental condition that involves – (A) inpatient care in a hospital, hospice, or residential  
44 medical care facility; or (B) continuing treatment by a health care provider.” 29 U.S.C. § 2611(11).  
45 As of spring 2016, the regulations elaborating this definition are 29 C.F.R. §§ 825.113 – 825.115.  
46 Although the Committee will endeavor to update this Comment to reflect subsequent changes in  
47 the regulations, readers should keep in mind the need to check for any such changes. *See generally*  
48 *Bonkowski v. Oberg Industries, Inc.*, 787 F.3d 190, 197 (3d Cir. 2015) (discussing the “rather  
49 lengthy and complicated history” of the FMLA regulations).

50 The regulations’ definition of “serious health condition” is complicated. It should not be  
51 necessary to charge the jury on the all the intricacies of the regulation, both because counsel should  
52 be able to reach agreement concerning which details are in dispute, and because some issues are  
53 questions of law for the court.<sup>36</sup> Accordingly, some portions of Instruction 10.2.1 simply refer to  
54 the relevant portions of the regulation, which are set forth in this Comment.

#### 55 *Inpatient care*

56 29 C.F.R. § 825.114 states: “Inpatient care means an overnight stay in a hospital, hospice,  
57 or residential medical care facility, including any period of incapacity as defined in § 825.113(b),  
58 or any subsequent treatment in connection with such inpatient care.” *See Bonkowski*, 787 F.3d at  
59 206 (holding that “‘an overnight stay’ under [29 C.F.R.] § 825.114 means a stay in a hospital,  
60 hospice, or residential medical care facility for a substantial period of time from one calendar day  
61 to the next calendar day as measured by the individual’s time of admission and time of discharge”);

---

<sup>36</sup> *See Bonkowski*, 787 F.3d at 203 (holding the meaning of “overnight stay” was a question of law for the court, that it is the court’s “obligation to interpret the DOL regulation,” and that “[i]t is then the jury’s responsibility to dispose of any genuine issues of material fact on the basis of judicial instructions explaining the meaning of” the regulation).

## 10.2.1 Serious Health Condition

62 *id.* at 210 (not deciding what would count as a “substantial period” but suggesting that “a minimum  
63 of eight hours would seem to be an appropriate period of time”). 29 C.F.R. § 825.113(b) states:  
64 “The term incapacity means inability to work, attend school or perform other regular daily  
65 activities due to the serious health condition, treatment therefore, or recovery therefrom.”

### 66 *Incapacity plus treatment*

67 29 C.F.R. § 825.115 provides in part:

68 A serious health condition involving continuing treatment by a health care provider  
69 includes any one or more of the following:

70 (a) Incapacity and treatment. A period of incapacity of more than three consecutive,  
71 full calendar days, and any subsequent treatment or period of incapacity relating to the  
72 same condition, that also involves:

73 (1) Treatment two or more times, within 30 days of the first day of  
74 incapacity, unless extenuating circumstances exist, by a health care provider, by a  
75 nurse under direct supervision of a health care provider, or by a provider of health  
76 care services (e.g., physical therapist) under orders of, or on referral by, a health  
77 care provider; or

78 (2) Treatment by a health care provider on at least one occasion, which  
79 results in a regimen of continuing treatment under the supervision of the health care  
80 provider.

81 (3) The requirement in paragraphs (a)(1) and (2) of this section for treatment  
82 by a health care provider means an in-person visit to a health care provider. The  
83 first (or only) in-person treatment visit must take place within seven days of the  
84 first day of incapacity.

85 (4) Whether additional treatment visits or a regimen of continuing treatment  
86 is necessary within the 30-day period shall be determined by the health care  
87 provider.

88 (5) The term extenuating circumstances in paragraph (a)(1) of this section  
89 means circumstances beyond the employee's control that prevent the follow-up visit  
90 from occurring as planned by the health care provider. Whether a given set of  
91 circumstances are extenuating depends on the facts. For example, extenuating  
92 circumstances exist if a health care provider determines that a second in-person  
93 visit is needed within the 30-day period, but the health care provider does not have  
94 any available appointments during that time period.

95 In a case that was controlled by a prior version of the regulations, the Court of Appeals held that

## 10.2.1 Serious Health Condition

96 “an employee may satisfy her burden of proving three days of incapacitation through a  
97 combination of expert medical and lay testimony.” *Schaar v. Lehigh Valley Health Services, Inc.*,  
98 598 F.3d 156, 161 (3d Cir. 2010). The Committee has not attempted to determine whether the  
99 *Schaar* holding applies with equal force to cases controlled by the current version of the  
100 regulations.

101 *Chronic serious health condition*

102 29 C.F.R. § 825.115 provides in part:

103 A serious health condition involving continuing treatment by a health care provider  
104 includes any one or more of the following:

105 ...

106 (c) Chronic conditions. Any period of incapacity or treatment for such incapacity due to a  
107 chronic serious health condition. A chronic serious health condition is one which:

108 (1) Requires periodic visits (defined as at least twice a year) for treatment by a  
109 health care provider, or by a nurse under direct supervision of a health care  
110 provider;

111 (2) Continues over an extended period of time (including recurring episodes of a  
112 single underlying condition); and

113 (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma,  
114 diabetes, epilepsy, etc.).

115 *Further provision applicable to pregnancy, prenatal care, and chronic serious health conditions*

116 29 C.F.R. § 825.115(f) provides: “Absences attributable to incapacity under paragraph (b)  
117 or (c) of this section qualify for FMLA leave even though the employee or the covered family  
118 member does not receive treatment from a health care provider during the absence, and even if the  
119 absence does not last more than three consecutive, full calendar days. For example, an employee  
120 with asthma may be unable to report for work due to the onset of an asthma attack or because the  
121 employee's health care provider has advised the employee to stay home when the pollen count  
122 exceeds a certain level. An employee who is pregnant may be unable to report to work because of  
123 severe morning sickness.”

124 *Other relevant provisions in 29 C.F.R. § 825.113*

125 29 C.F.R. § 825.113(c) defines “treatment.” 29 C.F.R. § 825.113(d) excludes certain  
126 conditions from the definition of “serious health condition.”

## 10.2.1 Serious Health Condition

127 *Health care provider*

128           The definitions section of the FMLA (29 U.S.C. §2611(6)) defines “health care provider”  
129 as follows:

130           6) *Health care provider*. The term "health care provider" means--

131                   (A) a doctor of medicine or osteopathy who is authorized to practice medicine or  
132 surgery (as appropriate) by the State in which the doctor practices; or

133                   (B) any other person determined by the Secretary to be capable of providing health  
134 care services.

135           The relevant regulations concerning persons determined to be capable of providing health care  
136 services can be found at 29 C.F.R. § 825.125.

137           For case law in the Third Circuit construing the statutory term “serious health condition”  
138 or related regulations, *see, e.g., Victorelli v. Shadyside Hospital*, 128 F.3d 184, 190 (3d Cir.  
139 1997)(“A factfinder may be able reasonably to find that Victorelli suffers from something more  
140 severe than a ‘minor ulcer’ and as such is entitled to FMLA protection.”); *Marrero v. Camden*  
141 *County Board of Social Services*, 164 F. Supp. 2d 455, 465 (D.N.J. 2001) (concluding that “there  
142 is nothing in the statute or regulations that prevents plaintiff’s anxiety and depression from  
143 qualifying as a serious condition under the Act. Indeed, the regulations expressly recognize the  
144 seriousness of mental illness under certain circumstances.”).

1 **10.2.2 FMLA Definitions — Equivalent Position**

2 **Model**

3 [Defendant] claims that after returning from leave, [plaintiff] was placed in a position that  
4 was equivalent to the one that [he/she] had before taking leave. [Plaintiff] claims that the new  
5 position was not equivalent to the old one. Under the Family and Medical Leave Act, the new  
6 position is equivalent to the old one if it is virtually identical in terms of pay, benefits and working  
7 conditions, including privileges, “perks” and status. It must involve the same or substantially  
8 similar duties and responsibilities, and require substantially equivalent skill, effort, responsibility,  
9 and authority. [Plaintiff] must prove by a preponderance of the evidence that the new position was  
10 not equivalent to the old one.

11

12 **Comment**

13 The court may wish to use this instruction if there is a dispute on whether the plaintiff was  
14 restored to an equivalent position. The instruction tracks the language of the FMLA regulations at  
15 29 C.F.R. § 825.215(a). *See also* 29 C.F.R. §§ 825.215(b) - (f) (providing further detail on the  
16 subject). For an application of the “equivalent position” test, *see Oby v. Baton Rouge Marriott*,  
17 329 F. Supp. 2d 772, 781 (M.D. La. 2004), where the plaintiff, who was employed as the executive  
18 in charge of housekeeping at a hotel, was offered the position of executive in charge of food and  
19 beverages upon return from FMLA leave. The court noted that courts have interpreted the  
20 “equivalent position” standard narrowly; but it concluded that these two positions were equivalent  
21 because the salary and benefits were the same, and both positions “involved supervisory duties  
22 and both had the same goal and responsibility -- customer service in and maintenance of the Baton  
23 Rouge Marriott in a managerial capacity.”

1 **10.3.1 FMLA Defense — Key Employee**

2 **Model**

3 If you find that [plaintiff] has proved by a preponderance of the evidence that [he/she] was  
4 not restored to [his/her] position [or to an equivalent position] after returning from a leave  
5 authorized by the Family and Medical Leave Act, you must then consider [defendant’s] defense.  
6 The Family and Medical Leave Act permits an employer to deny job restoration to a “key  
7 employee” when necessary to protect the employer from substantial and grievous economic injury.  
8 [Defendant] contends that it had no obligation to restore [plaintiff] to a position because [plaintiff]  
9 was a “key employee” and that [describe defendant’s action] was necessary to protect [defendant]  
10 from substantial and grievous economic injury.

11 Your verdict must be for [defendant] if [defendant] proves all of the following by a  
12 preponderance of the evidence:

13 First: That [plaintiff] was a “key employee.” [Plaintiff] was a "key employee" within the  
14 meaning of the Act if [he/she] was a salaried employee who was among the highest paid  
15 10 percent of all the employees employed by [defendant] within 75 miles of [plaintiff’s]  
16 worksite. The determination of whether [plaintiff] was among the highest paid 10 percent  
17 is to be made as of the time [plaintiff] gave notice of the need for leave.

18 Second: That failing to restore [plaintiff] to [his/her] former job [or an equivalent position]  
19 was necessary to prevent substantial and grievous economic injury to the operations of  
20 [defendant]. In determining whether or not [defendant’s] action was economically justified  
21 in this sense, you may consider factors such as whether [plaintiff] was so important to the  
22 business that [defendant] could not temporarily do without [plaintiff] and could not replace  
23 [plaintiff] on a temporary basis. You may also consider whether the cost of reinstating  
24 [plaintiff] after a leave would be substantial.

25 Third: That [defendant], when it determined that substantial and grievous injury would  
26 occur from [plaintiff’s] leave, promptly notified [plaintiff] of its intent to deny restoration  
27 of [plaintiff’s] job, specifying in the notice [defendant’s] contention that [plaintiff] was a  
28 “key employee” and restoration of [his/her] job after a leave would cause substantial and  
29 grievous economic injury to [defendant].

30 **Comment**

31 An employer may deny job restoration to a "key employee" if the denial is necessary to  
32 prevent substantial and grievous economic injury to the operations of the employer. 29 U.S.C. §  
33 2614(b) provides as follows:

34 (b) *Exemption concerning certain highly compensated employees.*

### 10.3.1 Key Employee

35 (1) *Denial of restoration.* An employer may deny restoration . . . if—

36 (A) such denial is necessary to prevent substantial and grievous economic  
37 injury to the operations of the employer;

38 (B) the employer notifies the employee of the intent of the employer to deny  
39 restoration on such basis at the time the employer determines that such  
40 injury would occur; and

41 (C) in any case in which the leave has commenced, the employee elects not  
42 to return to employment after receiving such notice.

43 (2) *Affected employees.* An eligible employee described in paragraph (1) is a  
44 salaried eligible employee who is among the highest paid 10 percent of the  
45 employees employed by the employer within 75 miles of the facility at which the  
46 employee is employed.

47 For a general discussion of “key employees,” see 29 C.F.R. § 825.217. The phrase “substantial  
48 and grievous economic injury” covers actions that threaten the economic viability of the employer  
49 or lesser injuries that cause substantial long-term economic injury. But minor inconveniences and  
50 costs that the employer would experience in the normal course of doing business do not constitute  
51 “substantial and grievous economic injury.” 29 C.F.R. § 825.218(c).

52 For a case applying the term “key employee,” see *Oby v. Baton Rouge Marriott*, 329 F.  
53 Supp. 2d 772, 783 (M.D. La. 2004), where the court granted summary judgment to the employer  
54 because the plaintiff was a key employee and the employer had followed the requirements set out  
55 in the regulations:

56 To deny restoration to a key employee, an employer must determine that restoring  
57 the employee to employment will cause substantial and grievous economic injury to the  
58 operations of the employer . . . . The regulations do not provide a precise test for the level  
59 of hardship or injury to the employer which must be sustained to constitute a substantial  
60 and grievous injury. If the reinstatement of a key employee threatens the economic viability  
61 of the firm, that would constitute substantial and grievous economic injury. A lesser injury  
62 which causes substantial, long-term economic injury would also be sufficient. Minor  
63 inconveniences and costs that the employer would experience in the normal course of doing  
64 business would certainly not constitute substantial and grievous economic injury.

65 Plaintiff has not presented any evidence to rebut . . . Columbia Sussex's evidence  
66 that it would have suffered substantial and grievous economic injury had it reinstated  
67 plaintiff to the position of Executive Housekeeper. In fact, the undisputed evidence shows  
68 that plaintiff was relied upon as the Executive Housekeeper at the Baton Rouge Marriott  
69 to keep the facilities clean and Columbia Sussex's customers happy. In consideration of  
70 this reliance, plaintiff was the third highest paid employee at the facility. When plaintiff

### 10.3.1 Key Employee

71 left, the facility was suffering, and an educated business decision was made to replace  
72 plaintiff . . . Defendant had also determined that reinstating plaintiff would cause it  
73 substantial and grievous economic injury if it had to pay two Executive Housekeepers  
74 \$41,000 each.

## 10.4.1 Back Pay – No Claim of Willful Violation

### 10.4.1 FMLA Damages — Back Pay — No Claim of Willful Violation

#### Model

If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical Leave Act, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights not been violated.

You must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date, which will be no more than two years before the date the lawsuit was filed] through the date of your verdict.

You must reduce any award of damages for lost wages and benefits by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award damages for lost wages, you are instructed to deduct from this figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of lost wages.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

**[Add the following instruction if the employer claims “after-acquired evidence” of misconduct by the plaintiff:**

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been

### 10.4.1 Back Pay – No Claim of Willful Violation

35 made previously.

36 If [defendant] proves by a preponderance of the evidence that it would have made the same  
37 decision and would have [describe employment decision] [plaintiff] because of [describe after-  
38 discovered evidence], you must limit any award of lost wages to the date [defendant] would have  
39 made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired  
40 information.]

41

#### 42 **Comment**

43 “[T]he accrual period for backpay [under the FMLA] is limited by the Act's 2-year statute  
44 of limitations (extended to three years only for willful violations), §§ 2617(c)(1) and (2).” *Nevada*  
45 *Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 740 (2003). As the *Hibbs* Court noted, the  
46 statute of limitations for recovery under the FMLA is two years, but it is extended to three years if  
47 the employer’s violation was willful. 26 U.S.C. § 2617(c)(2). The standard for “willfulness” is the  
48 same as that applied to the liquidated damages provision in the ADEA, and the statute of  
49 limitations provision in the Equal Pay Act, i.e., whether the employer “either knew or showed  
50 reckless disregard” for the employee’s statutory rights. *See Hoffman v. Professional Med Team*,  
51 394 F.3d 414, 417 (6th Cir. 2005) (“the standard for willfulness under the FMLA extended statute  
52 of limitations is whether the employer intentionally or recklessly violated the FMLA.”). This  
53 instruction is to be used when the plaintiff does not present evidence sufficient to create a jury  
54 question on whether the defendant acted willfully. See 10.4.2 for an instruction covering a willful  
55 violation of the FMLA.

56 29 U.S.C. § 2617(a)(1) provides the following damages for an employee against an  
57 employer who violates the FMLA:

58 Any employer who violates [29 U.S.C. § 2615] shall be liable to any eligible employee  
59 affected—

60 (A) for damages equal to—

61 (i) the amount of—

62 (I) any wages, salary, employment benefits, or other compensation  
63 denied or lost to such employee by reason of the violation; or

64 (II) in a case in which wages, salary, employment benefits, or other  
65 compensation have not been denied or lost to the employee, any  
66 actual monetary losses sustained by the employee as a direct result  
67 of the violation, such as the cost of providing care, up to a sum equal  
68 to 12 weeks (or 26 weeks, in a case involving leave under section

### 10.4.1 Back Pay – No Claim of Willful Violation

- 69 2612(a)(3) of this title) of wages or salary for the employee;
- 70 (ii) the interest on the amount described in clause (i) calculated at the  
71 prevailing rate; and
- 72 (iii) an additional amount as liquidated damages equal to the sum of the  
73 amount described in clause (i) and the interest described in clause (ii),  
74 except that if an employer . . . proves to the satisfaction of the court that the  
75 act or omission which violated [Section 2615] was in good faith and that  
76 the employer had reasonable grounds for believing that the act or omission  
77 was not a violation of [Section 2615], such court may, in the discretion of  
78 the court, reduce the amount of the liability to the amount and interest  
79 determined under clauses (i) and (ii), respectively[.]

80 Section 2617(a)(1)(B) authorizes the court to award “such equitable relief as may be appropriate,  
81 including employment, reinstatement, and promotion.”

82 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of back pay  
83 damages as liquidated damages, unless the defendant persuades the court that the violation was in  
84 good faith and that the employer had reasonable grounds for believing that the act or omission was  
85 not a violation of the FMLA— in which case the court has the discretion to limit the award to the  
86 amount of damages found by the jury.

#### 87 *Attorney Fees and Costs*

88 There appears to be no uniform practice regarding the use of an instruction that warns the  
89 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652  
90 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff  
91 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what  
92 you award as damages. It is my duty to decide whether to award attorney fees and costs, and if so,  
93 how much. Therefore, attorney fees and costs should play no part in your calculation of any  
94 damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected  
95 to the instruction, and, reviewing for plain error, found none: “We need not and do not decide now  
96 whether a district court commits error by informing a jury about the availability of attorney fees  
97 in an ADEA case. Assuming *arguendo* that an error occurred, such error is not plain, for two  
98 reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not*  
99 to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable that a jury tasked with  
100 computing damages might, absent information that the Court has discretion to award attorney fees  
101 at a later stage, seek to compensate a sympathetic plaintiff for the expense of litigation.” *Id.*  
102 Second, it is implausible “that the jury, in order to eliminate the chance that Collins might be  
103 awarded attorney fees, took the disproportionate step of returning a verdict against him even  
104 though it believed he was the victim of age discrimination, notwithstanding the District Court’s  
105 clear instructions to the contrary.” *Id.*; see also *id.* at 658 (distinguishing *Fisher v. City of*

#### 10.4.1 Back Pay – No Claim of Willful Violation

106 *Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir.  
107 1991)).

1 **10.4.2 FMLA Damages — Back Pay — Willful Violation**

2 **Model**

3 If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical  
4 Leave Act, then you must determine the amount of damages that [defendant's] actions have caused  
5 [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

6 You must award as actual damages an amount that reasonably compensates [plaintiff] for  
7 any lost wages and benefits, taking into consideration any increases in salary and benefits,  
8 including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights  
9 had not been violated.

10 *[Alternative One: For use in cases where the plaintiff asserts back-pay claims based on*  
11 *more than one asserted FMLA violation, and some of those violations occurred earlier than two*  
12 *years prior to the commencement of the lawsuit:]* In this case, [plaintiff] alleges that [defendant]  
13 willfully violated the Family and Medical Leave Act. If [plaintiff] proves to you by a  
14 preponderance of the evidence that [defendant's] violation of the Family and Medical Leave Act  
15 was willful, then this will have an effect on the damages that you must award. I will explain this  
16 effect in a minute, but first I will provide you more information on what it means for a violation  
17 to be “willful.”]

18 *[Alternative Two: For use in cases where all alleged FMLA violations occurred more*  
19 *than two years prior to the commencement of the suit:]* In this case, [plaintiff] alleges that  
20 [defendant] willfully violated the Family and Medical Leave Act. You may only find for [plaintiff]  
21 in this case if [plaintiff] proves to you by a preponderance of the evidence that [defendant's]  
22 violation of the Family and Medical Leave Act was willful. Let me now give you more information  
23 what it means for a violation to be “willful.”]

24 You must find [defendant's] violation of the Family and Medical Leave Act to be willful if  
25 [plaintiff] proves by a preponderance of the evidence that [defendant] knew or showed reckless  
26 disregard for whether [describe challenged action] was prohibited by the law. To establish  
27 willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant]  
28 did not know, or knew only that the law was potentially applicable, and did not act in reckless  
29 disregard for whether its conduct was prohibited by the law, then [defendant's] conduct was not  
30 willful.

31 *[For use with Alternative One:]* If you find that [defendant's] violation of the Family and  
32 Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost wages  
33 and benefits during the period starting [insert date, which will be no more than three years before  
34 the date the lawsuit was filed] through the date of your verdict. However, if you find that  
35 [defendant's] violation of the Family and Medical Leave Act was not willful, then you must award  
36 [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [insert date,

## 10.4.2 Back Pay – Willful Violation

37 which will be no more than two years before the date the lawsuit was filed] through the date of  
38 your verdict.]

39 **[For use with Alternative Two:]** If you find that [defendant’s] violation of the Family and  
40 Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost wages  
41 and benefits during the period starting [insert date, which will be no more than three years before  
42 the date the lawsuit was filed] through the date of your verdict. However, if you find that  
43 [defendant’s] violation of the Family and Medical Leave Act was not willful, then you must find  
44 for [defendant] in this case.]

45 You must reduce any award of damages for lost wages and benefits by the amount of the  
46 expenses that [plaintiff] would have incurred in making those earnings.

47 If you award damages for lost wages, you are instructed to deduct from this figure whatever  
48 wages [plaintiff] has obtained from other employment during this period. However, please note  
49 that you should not deduct social security benefits, unemployment compensation and pension  
50 benefits from an award of lost wages.

51 [You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is  
52 [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her]  
53 damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant]  
54 persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially  
55 equivalent job opportunities that were reasonably available to [him/ her], you must reduce the  
56 award of damages by the amount of the wages that [plaintiff] reasonably would have earned if  
57 [he/she] had obtained those opportunities.]

58 [In assessing damages, you must not consider attorney fees or the costs of litigating this  
59 case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine.  
60 Therefore, attorney fees and costs should play no part in your calculation of any damages.]

61 **[Add the following instruction if the employer claims “after-acquired evidence” of  
62 misconduct by the plaintiff:**

63 [Defendant] contends that it would have made the same decision to [describe employment  
64 decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment  
65 decision. Specifically, [defendant] claims that when it became aware of the [describe the after-  
66 discovered misconduct], [defendant] would have made the decision at that point had it not been  
67 made previously.

68 If [defendant] proves by a preponderance of the evidence that it would have made the same  
69 decision and would have [describe employment decision] [plaintiff] because of [describe after-  
70 discovered evidence], you must limit any award of lost wages to the date [defendant] would have  
71 made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired  
72 information.]

## 10.4.2 Back Pay – Willful Violation

73

### 74 **Comment**

75 The Family and Medical Leave Act provides recovery for two years of lost wages and benefits if  
76 the defendant’s violation was non-willful; it extends the recovery of damages to a third year if the  
77 defendant’s violation was willful. 26 U.S.C. § 2617(c)(2). The standard for “willfulness” is the  
78 same as that applied to the liquidated damages provision in the ADEA, and the statute of  
79 limitations provision in the Equal Pay Act, i.e., whether the employer “either knew or showed  
80 reckless disregard” for the employee’s statutory rights. *See Hoffman v. Professional Med Team*,  
81 394 F.3d 414, 417 (6th Cir. 2005) (“the standard for wilfulness under the FMLA extended statute  
82 of limitations is whether the employer intentionally or recklessly violated the FMLA.”).

83 This instruction is to be used when the plaintiff presents evidence sufficient to create a  
84 jury question on whether the defendant willfully violated the FMLA. See Instruction 10.4.1 for the  
85 instruction to be used when there is insufficient evidence to create a jury question on willfulness  
86 but the plaintiff’s claims are nonetheless timely.

87 29 U.S.C. § 2617(a) provides the following damages for an employee against an employer  
88 who violates the FMLA:

89 Any employer who violates [29 U.S.C. § 2615] shall be liable to any eligible employee  
90 affected—

91 (A) for damages equal to—

92 (i) the amount of—

93 (I) any wages, salary, employment benefits, or other compensation  
94 denied or lost to such employee by reason of the violation; or

95 (II) in a case in which wages, salary, employment benefits, or other  
96 compensation have not been denied or lost to the employee, any  
97 actual monetary losses sustained by the employee as a direct result  
98 of the violation, such as the cost of providing care, up to a sum equal  
99 to 12 weeks (or 26 weeks, in a case involving leave under section  
100 2612(a)(3) of this title) of wages or salary for the employee;

101 (ii) the interest on the amount described in clause (i) calculated at the  
102 prevailing rate; and

103 (iii) an additional amount as liquidated damages equal to the sum of the  
104 amount described in clause (i) and the interest described in clause (ii),  
105 except that if an employer . . . proves to the satisfaction of the court that the

## 10.4.2 Back Pay – Willful Violation

106 act or omission which violated [Section 2615] was in good faith and that  
107 the employer had reasonable grounds for believing that the act or omission  
108 was not a violation of [Section 2615], such court may, in the discretion of  
109 the court, reduce the amount of the liability to the amount and interest  
110 determined under clauses (i) and (ii), respectively[.]

111 Section 2617(a)(1)(B) authorizes the court to award “such equitable relief as may be appropriate,  
112 including employment, reinstatement, and promotion.”

113 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of back pay  
114 damages as liquidated damages, unless the defendant persuades the court that the violation was in  
115 good faith and that the employer had reasonable grounds for believing that the act or omission was  
116 not a violation of the FMLA— in which case the court has the discretion to limit the award to the  
117 amount of damages found by the jury.

### 118 *Attorney Fees and Costs*

119 There appears to be no uniform practice regarding the use of an instruction that warns the  
120 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d  
121 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if  
122 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and  
123 above what you award as damages. It is my duty to decide whether to award attorney fees and  
124 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your  
125 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not  
126 properly objected to the instruction, and, reviewing for plain error, found none: “We need not and  
127 do not decide now whether a district court commits error by informing a jury about the availability  
128 of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not  
129 plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction directing  
130 the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable that a jury  
131 tasked with computing damages might, absent information that the Court has discretion to award  
132 attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of  
133 litigation.” *Id.* Second, it is implausible “that the jury, in order to eliminate the chance that Collins  
134 might be awarded attorney fees, took the disproportionate step of returning a verdict against him  
135 even though it believed he was the victim of age discrimination, notwithstanding the District  
136 Court's clear instructions to the contrary.” *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of*  
137 *Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir.  
138 1991)).

1 **10.4.3 FMLA Damages — Other Monetary Damages**

2 **Model**

3 The Family and Medical Leave Act provides that if an employee is unable to prove that the  
4 employer’s violation of the Act caused the employee to lose any wages, benefits or other  
5 compensation, then that employee may recover other monetary losses sustained as a direct result  
6 of the employer’s violation of the Act.

7 So in this case, if you find that [defendant] has violated [plaintiff’s] rights under the Act,  
8 and yet you also find that [plaintiff] has not proved the loss of any wages, benefits or other  
9 compensation as a result of this violation, then you must determine whether [plaintiff] has suffered  
10 any other monetary losses as a direct result of the violation. [Other monetary losses may include  
11 the cost of providing the care that gave rise to the need for a leave.] [Plaintiff] has the burden of  
12 proving these monetary losses by a preponderance of the evidence.

13 Under the law, [plaintiff’s] recovery for these other monetary damages can be no higher  
14 than the amount that [he/she] would have made in wages or salary for a [twelve-week period]<sup>37</sup>  
15 during her employment. So you must limit your award for these other monetary damages, if any,  
16 to that amount. You must also remember that if [plaintiff] has proved damages for lost wages,  
17 benefits or other compensation, then you must award those damages only and [plaintiff] may not  
18 recover any amount for any other monetary damages suffered as a result of [describe defendant’s  
19 conduct].

20 Finally, the Family and Medical Leave Act does not allow [plaintiff] to recover for any  
21 mental or emotional distress or pain and suffering that may have been caused by [defendant’s]  
22 violation of the Act. So I instruct you that you are not to award the plaintiff any damages for  
23 emotional distress or pain and suffering.

24 [In assessing damages, you must not consider attorney fees or the costs of litigating this  
25 case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine.  
26 Therefore, attorney fees and costs should play no part in your calculation of any damages.]

27  
28 **Comment**

29 The Family and Medical Leave Act provides that “in a case in which wages, salary,  
30 employment benefits, or other compensation have not been denied or lost to the employee, any  
31 actual monetary losses sustained by the employee as a direct result of the violation, such as the

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<sup>37</sup> N.B.: In cases involving servicemember family leave under 29 U.S.C. § 2612(a)(3), the relevant period is 26 weeks rather than 12 weeks.

### 10.4.3 Other Monetary Damages

32 cost of providing care, up to a sum equal to 12 weeks (or 26 weeks, in a case involving leave under  
33 section 2612(a)(3) of this title) of wages or salary for the employee [can be recovered by a  
34 plaintiff].” 29 U.S.C. § 2617(a). An award for these non-wage-related monetary losses is  
35 contingent upon the plaintiff’s *not* obtaining an award for lost wages. This instruction therefore  
36 provides that the jury is to reach the question of monetary losses other than lost wages only if it  
37 finds that the plaintiff has not proven damages for lost wages.

38 The FMLA does not provide for recovery for emotional distress or pain and suffering.  
39 *Lloyd v. Wyoming Valley Health Care Sys.*, 994 F. Supp. 288, 291 (M.D. Pa. 1998) (reasoning that  
40 “the statute itself by including ‘actual monetary compensation’ as a separate item of damage places  
41 a limited definition on ‘other compensation’ ”; concluding that “the plain meaning of the statute is  
42 that ‘other compensation’ means things which arise as a quid pro quo in the employment  
43 arrangement, and not damages such as emotional distress which are traditionally an item of  
44 compensatory damages”). See also *Coleman v. Potomac Electric Power Co.*, 281 F. Supp. 2d 250,  
45 254 (D.D.C. 2003) :

46 Recovery under FMLA is "unambiguously limited to actual monetary losses." *Walker v.*  
47 *United Parcel Service, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001). Other kinds of damages  
48 - punitive damages, nominal damages, or damages for emotional distress - are not  
49 recoverable. See *Settle v. S.W. Rodgers Co., Inc.*, 998 F. Supp. 657, 665-66 (E.D. Va. 1998)  
50 (punitive damages and damages for emotional distress); *Keene v. Rinaldi*, 127 F. Supp. 2d  
51 770, 772-73 & n.1 (M.D.N.C. 2000), *aff'd*, adopted 127 F. Supp. 2d 770 (M.D.N.C. 2000)  
52 (same).

53 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of any damages  
54 under the FMLA, as liquidated damages, unless the defendant persuades the court that the violation  
55 was in good faith and that the employer had reasonable grounds for believing that the act or  
56 omission was not a violation of the FMLA— in which case the court has the discretion to limit the  
57 award to the amount of damages found by the jury.

#### 58 *Attorney Fees and Costs*

59 There appears to be no uniform practice regarding the use of an instruction that warns the  
60 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d  
61 652 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if  
62 plaintiff wins on his claim, he may be entitled to an award of attorney fees and costs over and  
63 above what you award as damages. It is my duty to decide whether to award attorney fees and  
64 costs, and if so, how much. Therefore, attorney fees and costs should play no part in your  
65 calculation of any damages.” *Id.* at 656-57. The Court of Appeals held that the plaintiff had not  
66 properly objected to the instruction, and, reviewing for plain error, found none: “We need not and  
67 do not decide now whether a district court commits error by informing a jury about the availability  
68 of attorney fees in an ADEA case. Assuming *arguendo* that an error occurred, such error is not  
69 plain, for two reasons.” *Id.* at 657. First, “it is not ‘obvious’ or ‘plain’ that an instruction directing

### 10.4.3 Other Monetary Damages

70 the jury *not* to consider attorney fees” is irrelevant or prejudicial; “it is at least arguable that a jury  
71 tasked with computing damages might, absent information that the Court has discretion to award  
72 attorney fees at a later stage, seek to compensate a sympathetic plaintiff for the expense of  
73 litigation.” *Id.* Second, it is implausible “that the jury, in order to eliminate the chance that Collins  
74 might be awarded attorney fees, took the disproportionate step of returning a verdict against him  
75 even though it believed he was the victim of age discrimination, notwithstanding the District  
76 Court's clear instructions to the contrary.” *Id.*; *see also id.* at 658 (distinguishing *Fisher v. City of*  
77 *Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir.  
78 1991)).

1 **10.4.4. FMLA Damages — Liquidated Damages**

2

3 *No Instruction*

4

5 **Comment**

6 Punitive damages cannot be recovered under the FMLA. *Zawadowicz v. CVS Corp.*, 99 F.  
7 Supp. 2d 518, 534 (D.N.J. 2000) (noting that nothing in the FMLA damages provision, 29 U.S.C.  
8 § 2617, authorizes an award of punitive damages); *Oby v. Baton Rouge Marriott*, 329 F. Supp. 2d  
9 772, 788 (M.D. La. 2004) (same). 29 U.S.C. § 2617 provides for a mandatory award of liquidated  
10 (double) damages for any award under the FMLA. No instruction is necessary on liquidated  
11 damages, however, because there is no issue for the jury to decide concerning the availability or  
12 amount of these damages. The court simply doubles the award of damages found by the jury.

13 It should be noted that 29 U.S.C. § 2617 provides that if the defendant proves that its  
14 conduct was in good faith and that it had reasonable grounds for believing that the act or omission  
15 was not a violation of the FMLA, the “court may, in the discretion of the court, reduce the amount  
16 of the liability to” the amount of damages found by the jury. No instruction is necessary on good  
17 faith, either, because the question of good faith in this circumstance is a question for “the court.”  
18 The jury has no authority to reduce an award of liquidated damages under the FMLA. *Zawadowicz*  
19 *v. CVS Corp.*, 99 F. Supp. 2d 518, 534 (D.N.J. 2000) (noting that any question of reducing  
20 liquidated damages is for the court). *Compare* Eighth Circuit Civil Instruction 5.86 (providing an  
21 instruction on the good faith defense to liquidated damages).

1 **10.4.5 FMLA Damages — Nominal Damages**

2  
3 *No Instruction*

4  
5 **Comment**

6 Nominal damages are not available under the FMLA. The court in *Walker v. UPS*, 240  
7 F.3d 1268, 1278 (10th Cir. 2003) explained why nominal damages cannot be awarded under the  
8 FMLA, in contrast to Title VII, which authorizes an award of nominal damages:

9 Because recovery [under the FMLA] is . . . unambiguously limited to actual  
10 monetary losses, courts have consistently refused to award FMLA recovery for such other  
11 claims as consequential damages (*Nero v. Industrial Molding Corp.*, 167 F.3d 921, 930  
12 (5th Cir. 1999)) and emotional distress damages (*Lloyd v. Wyoming Valley Health Care*  
13 *Sys., Inc.*, 994 F. Supp. 288, 291-92 (M.D. Pa. 1998)). Thus *Cianci v. Pettibone Corp.*, 152  
14 F.3d 723, 728-29 (7th Cir. 1998) held that a plaintiff had no claim under the FMLA where  
15 the record showed that she suffered no diminution of income and incurred no costs as a  
16 result of an alleged FMLA violation.

17 Invoking an attempted analogy to Title VII precedents, Walker argues that nominal  
18 damages should be allowed in FMLA cases because, just as under Title VII, nominal  
19 damages would allow plaintiffs whose rights are violated but who do not suffer any  
20 compensable damages to vindicate those rights. While it is true that recent cases have  
21 rejected the "no harm, no foul" argument in the Title VII context (*see, e.g., Hashimoto v.*  
22 *Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997)), that was not always so.

23 Before the 1991 amendments to the Civil Rights Act, nominal damages (as well as  
24 damages for pain and suffering or punitive or consequential damages) were not available  
25 for Title VII violations, because the statute then provided for equitable and declaratory  
26 relief alone. Nominal damages became available only after 42 U.S.C. § 1981a ("Section  
27 1981a," which governs damages recoverable in cases brought under Title VII) was  
28 amended to allow for compensatory damages in such actions (nominal damages are  
29 generally considered to be compensatory in nature).

30 Walker's attempted argument by analogy fails because of the critical difference in  
31 statutory language between [29 U.S.C.] Section 2617(a)(1) and the amended Section  
32 1981a. In contrast to the latter, . . . Section 2617(a)(1) does not provide for compensatory  
33 damages in general, but is instead expressly limited to lost compensation and other actual  
34 monetary losses. Because nominal damages are not included in the FMLA's list of  
35 recoverable damages, nor can any of the listed damages be reasonably construed to include

#### 10.4.5 Nominal Damages

36 nominal damages, Congress must not have intended nominal damages to be recoverable  
37 under the FMLA.

38 We are obligated to honor that intent and therefore to countenance the award of  
39 only those elements of damages that Congress has deemed appropriate to redress violations  
40 of the FMLA. Because Walker has admittedly suffered no actual monetary losses as a result  
41 of UPS' asserted violation of the FMLA and has no claim for equitable relief, she has no  
42 grounds for relief under that statute.

43 *See also Lapham v. Vanguard Cellular Systems, Inc.*, 102 F. Supp. 2d 266, 269 (M.D. Pa. 2000)  
44 (while plaintiff had a cause of action for interference, she suffered no wage or other monetary loss,  
45 therefore “she cannot obtain relief under the FMLA and her claim must be dismissed.”); *Oby v.*  
46 *Baton Rouge Marriott*, 329 F. Supp. 2d 772, 788 (M.D.La. 2004) (“It is clear that nominal damages  
47 are not available under the FMLA because the statutory language of the FMLA specifically limits  
48 recovery to actual monetary losses.”).