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Laraclay Parker
University of Kentucky

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4% Absent = 100% Disaster: Why the Math Doesn’t Add Up on Fixed Attendance Leave Policies Under the FMLA

Laraclay Parker

You know, I think we need a paradigm shift . . . . I think for too long we have thought about these kinds of work–family policies as luxury benefits. They are not. [The FMLA] make[s] the difference between economic survival and economic disaster for families in this country . . . .

Ann’s employer, a large manufacturing firm, had been more than understanding when she was diagnosed with breast cancer. Her supervisor gave her information on the Family and Medical Leave Act (FMLA or “the Act”) and told her she was entitled to intermittent or continuous leave totaling twelve weeks of work time. Thankful for the support, Ann took six weeks of intermittent leave in order to undergo surgery and chemotherapy treatments. Shortly after ending her FMLA leave, Ann’s son caught a minor cold at daycare. Because she was her son’s exclusive caretaker, Ann had to stay home with him for two days while he was sick. To her shock, Ann was terminated upon her return to work for violating her employer’s 96% attendance rate policy. Since she was terminated for absenteeism, Ann was not eligible for employee benefits; she could no longer afford her apartment and became homeless. Leslie, Ann’s coworker, took off the same two days to care for her own sick child but was not terminated. The only difference between these two workers’ conditions of employment is that Ann took FMLA leave.

The scenario above illustrates the difficult legal—and deeply personal—problems that occur when employers apply fixed attendance rate policies (“the policy”) to employees who have taken leave under the FMLA. Like most federal employment statutes, the FMLA prohibits an employer from

1 University of Kentucky College of Law, J.D. expected May 2014. I would like to thank Dale Golden for his guidance and support in developing this research topic.


3 The Family and Medical Leave Act requires employers to give twelve weeks of leave, which may be unpaid, to employees with serious health conditions or who are providing care to a family member with a serious health condition. 29 U.S.C. § 2612(a)(1), (c) (2012).

4 This scenario is a hypothetical situation designed to illustrate the problems with fixed rate attendance policies under the Family and Medical Leave Act.

denying an employee benefits to which she is entitled under the statute. The Act ensures this prohibition by creating a private cause of action that allows the employee to bring suit in federal court if the employee’s employer “interferes” with her FMLA leave. Courts have previously found that failing to prorate performance goals and assessing absence points against an employee’s leave time interfered with the exercise of the employee’s FMLA rights. Under such an interpretation of “interference,” it would seem that Ann’s employer’s conduct would also be illegal. Surprisingly, the few courts that have examined this issue have differed on whether or not fixed attendance rate policies constitute FMLA interference when applied to employees on FMLA leave.

This Note argues that interference under the FMLA includes conduct that does not directly deny an employee any allotted leave but simply treats FMLA employees differently from non–FMLA employees, and, therefore, fixed attendance rate policies interfere with the exercise of an employee’s FMLA rights by either denying the employee’s right to reinstatement or denying the employee her full entitlement of leave time. This Note will show that under all three major branches of statutory interpretation the term “interference” encompasses employer conduct that discriminates against FMLA employees and non–FMLA employees in some term of their employment other than their leave entitlement. Part I begins with an overview of the substantive rights guaranteed under the FMLA, an examination of fixed rate attendance policies that show that such policies treat FMLA and non–FMLA employees differently, and a review of current conflicting case law on the fixed rate attendance policy issue. Part II will apply the three main methods of statutory construction—the plain meaning method, the legislative intent method, and the common law method—to the interference language in the FMLA. All three methods demonstrate that an interference cause of action encompasses fixed rate policies because interference with an employee’s rights can occur through the application of a non–FMLA policy that treats FMLA employees differently.

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6 29 U.S.C. § 2615(a)(1) (2012); see 29 C.F.R. § 825.214 (2013) (“On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.”).


10 See Sandra F. Sperino, Flying without a Statutory Basis: Why McDonnell Douglas Is Not
I. Substantive Rights Under the FMLA, Fixed Rate Attendance Policies, and Relevant Case Law

A. The FMLA Provides Employees with Substantive Rights and Causes of Action to Vindicate Those Rights.

Congress enacted the FMLA in 1993 to close an important gap in workplace legislation; the Act's aim was "to balance the demands of the workplace with the needs of families" and "to entitle employees to take reasonable leave for medical reasons." Before the Act, workers who needed to take substantial time off to undergo chemotherapy, care for a dying parent, or have surgery were left to the whim of employers that might terminate them because of these medically necessary and temporary absences.

FMLA rights are triggered when a qualified employee or a member of an employee’s family has a "serious health condition" necessitating "continuing treatment by a health care provider." Generally, the FMLA entitles employees to take twelve weeks off from work because of a variety of health issues. An employee may either take this leave in one block of time or, if the employer...
and employee agree, intermittently over the course of a year. If her condition persists after one year, the employee must recertify her FMLA leave in order to be eligible for more leave. An employer must allow a qualified employee with a covered health issue to take her leave after she has given proper notice of leave, and that employee must make a reasonable effort to not unduly disrupt the operations of the employer. The FMLA requires that an employee be reinstated to her position or an equivalent position after her leave. The terms of her reinstatement must include all benefits accrued prior to her leave and any benefits she would have been entitled to if FMLA leave had not been taken.

The FMLA created two different causes of action, "retaliation" and "interference," under which employees may vindicate their rights. FMLA retaliation resembles traditional Title VII retaliation claims; in order to prevail on a retaliation claim, an employee must show she suffered an adverse employment action because she took FMLA leave. In contrast, the interference cause of action requires a plaintiff to prove that her employer "interfered with, restrained, or denied" the FMLA rights to which she was entitled. In order to prevail under this theory, the employee must show that she has actually been damaged by her employer's actions.

B. Fixed Attendance Rate Policies Mathematically Discriminate Against Employees on FMLA Leave.

Most employers choose to promulgate policies addressing employee absences. Because employee absences are also covered by a federal scheme, employers may often find themselves restricted by federal law when drafting policies. As with any complex federal law, employers may be in violation of some obscure administrative regulation by mistake. Such is the case with percentage–based attendance policies under the FMLA. While appearing

15 Id. § 2612(b)(1).
17 Id. § 2612(e)(1)–(2).
19 Id. § 2614(a)(2)–(3).
21 E.g., Stallings, 447 F.3d at 1051; see 29 U.S.C. § 2615(a)(1)–(2).
24 This Note assumes that employers who use fixed attendance rate policies do not promulgate the policies specifically to deny FMLA employees the rights of which they are entitled under the Act. If an employer did maintain the policy for that reason, then an employee could bring an action for retaliation under the FMLA, which would require the employee to prove her employer's intent to treat her unfavorably for taking FMLA leave. See, e.g., Johnson v. Dollar Gen., Inc., 880 F. Supp. 2d 967, 990 (N.D. Iowa 2012) (stating that "a retaliation claim ... requires proof of an impermissible
neutral, these policies can actually interfere with an employee’s unimpeded exercise of her FMLA rights.  

Under a fixed attendance rate policy, an employer picks an arbitrary percentage of scheduled days over a period of time during which an employee must attend work. The employer then calculates the percentage of days an employee works within the policy’s applicable time period and compares each employee’s percentage of worked days to the percentage of days excused by the policy. If the employee’s percentage of attendance is less than the arbitrary percentage in the policy, then the employee may incur some form of discipline.  

Fixed attendance rate policies become problematic for employees who take FMLA leave intermittently. Employers usually have a policy that states that FMLA days will not be counted as absence for the calculation of an employee’s percentage of days worked. However, fixed attendance rate policies allow an employer to deduct the number of FMLA days taken from the number of total days worked in calculating the percentage of overall days worked.  

It is helpful to return to Ann’s story to see how removing FMLA days from days worked mathematically impacts the intermittent leave employee. Assume that Ann’s employer used a policy that demands 96% attendance over a three–month period along with a provision that failure to comply will result in termination. Ann’s coworker, Leslie, who was similarly situated to Ann in every discriminatory animus”.


26 E.g., Dickinson, 2008 WL 4659562, at *1 (stating that under the St. Cloud Hospital policy at issue, absenteeism rates exceeding 4% would be referred for supervisor review); EMPS RESEARCH COUNSEL, ERC ABSENCE MANAGEMENT PRACTICES SURVEY 68 (2012) [hereinafter ERC SURVEY], available at http://www.youerc.com/_CE/pagecontent/Documents/survey/research-studies/2012-Absence-Management-Survey-Report.pdf (a private human resources research firm reporting that one respondent’s policy required “97% attendance” not counting vacation, personal day[s], or FMLA [leave]).

27 See, e.g., ERC Survey, supra note 26, at 59–69 (reporting a sampling of respondents’ policies and calculation methods).

28 See, e.g., id. at 68 (reporting that one respondent’s excessive absence policy reflected a progressive discipline procedure resulting in termination after three warnings).

29 Courts generally agree that counting FMLA days as absences and administering disciplinary action for them is a clear-cut case of interference and, perhaps, retaliation under the Act. See Bachelder v. Am. W. Airlines, Inc., 239 F.3d 1112, 1132 (9th Cir. 2001).

30 See, e.g., Dickinson, 2008 WL 4659562, at *1; ERC Survey, supra note 26, at 68.
respect, was scheduled to work 480 hours over the three-month period. Leslie missed two days of scheduled work during that time period. Her percentage of days worked would be calculated as follows:

\[
\frac{\text{Hours Worked}}{\text{Hours Scheduled}} = \frac{464}{480} = 96.6\%^{32}
\]

Ann’s attendance for three months, in which she took six weeks (thirty days, or 240 hours) of FMLA leave and missed two days for a non-FMLA reason—such as caring for a child with a minor illness—will be calculated as follows:

\[
\frac{\text{Hours Worked}}{\text{Hours Scheduled} - \text{FMLA Days}} = \frac{224}{240} = 93.3\%
\]

Despite the fact that Ann and Leslie missed the same amount of scheduled work, Leslie would not be subject to discipline under the employer’s absence policy, but Ann would be terminated because she took FMLA days. Ann’s number of total hours worked would be so heavily discounted because of her FMLA leave that any non-FMLA absences would greatly affect her overall attendance record, dropping her below the 96% threshold. This policy effectively treats those employees on FMLA leave differently than those not on FMLA leave.

C. Case Law on Fixed Attendance Rate Policies Is in Conflict About Whether or Not the Policy Constitutes Interference.

Several district courts have reviewed fixed attendance rate policies and have split on the question of whether an employer’s withholding of FMLA days as “days worked” is interference with an employee’s rights under the FMLA. The Western District of Michigan first confronted the policy in Keasey v. Federal Express Corp. In Keasey, the court granted summary judgment for the defendant on the plaintiff’s interference claim, stating that counting the employee’s FMLA days as days worked would operate as a “windfall” by essentially recording “a perfect attendance record during [the employee’s] FMLA leave period.”

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31 While 480 hours may sound considerable, it simply reflects how many hours a full time employee will work in three months when operating on a forty-hour workweek schedule.
32 An eight-hour workday is assumed for all calculations in this Note.
35 Id. at *7.
It compared the policy to freezing an employee's probationary status while on leave, which other courts had found permissible under the Act. 36

Three years later, Payton v. Federal Express Corp. examined the same Federal Express policy at issue in Keasey to determine whether it conflicted with the FMLA. Payton discussed, but declined to follow, the Keasey court's rationale, instead finding that Federal Express's leave policy constituted interference. The Payton court reasoned that taking the plaintiff's FMLA days from the absence rate denominator was in fact counting FMLA days under a no-fault attendance policy, which is an action explicitly prohibited as interference under 29 C.F.R. § 825.220(c). 37 This regulation defines interference as any action that discriminates or retaliates against FMLA and non-FMLA employees. 38

After Keasey and Payton, the District Court of Minnesota considered the leave issue in Dickinson v. St. Cloud Hospital and discussed both courts' take on FMLA interference before siding with the Payton court. 39 The Dickinson court supported its ruling by referencing the discriminatory effect of the fixed rate attendance policy: "By virtue of the fact that [the plaintiff] elects to take FMLA leave, [the plaintiff] is allowed fewer nonFMLA [sic] absences, which results in a negative factor for purposes of an employment action." 40

Keasey, Payton, and Dickinson offer contrasting results for the same policy because the Keasey court approached the requirements for an interference cause of action differently than the Payton and Dickinson decisions. Keasey's windfall rationale grows out of the idea that an interference cause of action must be related to a denial of rights under the FMLA. Since the FMLA does not guarantee that an employee can miss work for non-FMLA reasons, taking negative action against an employee who engages in such conduct cannot be interference. 41

Payton and Dickinson advance the argument that interference with an employee's rights need not be interference with an employee's FMLA rights specifically. Instead, interference can occur when an employer's policy addressing some other facet of employment affects FMLA employees differently than non-FMLA employees. Thus, while Keasey allows employment policies with a disparate impact on FMLA employees to exist under the Act, Payton and Dickinson do not.

In order to decide which court has formulated the correct response to the policy, it will be necessary to find out whether the interference cause of

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36 Id.
38 29 C.F.R. § 825.220(c) (2013).
40 Id. at *5.
41 See, e.g., Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1261-62 (10th Cir. 1998) (holding that an employee on FMLA leave is entitled to no greater protection from a firing for a non–FMLA reason than an employee not on FMLA leave).
action supports fact patterns where the employer promulgates policies that do not address the FMLA itself, but affect FMLA employees differently than non–FMLA employees. In a case of interference, the employee's rights will actually be denied in two separate ways depending on when the policy functions against them. If the employee is terminated in the midst of her leave, then she will be denied the remainder of the leave she is entitled to as well as her reinstatement rights. If the employee is terminated after her leave ends, then she will be denied her right to reinstatement.

II. STATUTORY INTERPRETATION: THE SCOPE OF THE INTERFERENCE CAUSE OF ACTION IS BROAD ENOUGH TO ENCOMPASS POLICIES THAT HAVE THE EFFECT OF TREATING FMLA EMPLOYEES DIFFERENTLY THAN NON–FMLA EMPLOYEES.

Statutory interpretation is a broad field of legal study with many methodological theories. Rather than attempting to advance any one theory of statutory interpretation, this Part will analyze the FMLA by using the three major analytic frameworks of statutory interpretation: (1) the plain meaning method, (2) the statutory interpretation method, and (3) the common law method. In doing so, the analysis will replicate how a variety of courts might approach the issue of deciding what the Act means in the context of fixed attendance rate policies. These results, gleaned from the application of the three major methods to the Act, will then be compared to the Keasey and the Payton/Dickinson decisions to determine whether either result was correct about with regard to the scope of the Act.

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42 To see how varied this field truly is, see, for instance, John F. Manning, What Divides Textualists from Purposivists?, 106 COLUM. L. REV. 70, 78 (2006) (arguing for a textualist approach because it more accurately reflects the semantic context), and William D. Popkin, The Collaborative Model of Statutory Interpretation, 61 S. CAL. L. REV. 541, 543–544 (1988) (arguing for a collaborative approach that draws from both the reader's subjective interpretations and constructive textual meaning).

43 Sperino, supra note 10, at 762 (identifying these categories of statutory interpretation and advocating for several caveats in understanding the depth and utility of her categories).

First, this Article is not attempting to make any descriptive, evaluative, or normative claim about any particular statutory construction methodology over another. The solution offered to correct the existing problem is consistent with all of the discussed methodologies, thus requiring no choice between them. Second, the Article is not intending to suggest that the methodologies can be neatly pressed into the general categories used in this section. Rather, the goal of this section is to describe the contours of each statutory construction method in a way that is conducive to exploring those methods in conjunction with Title VII.

Id. at 763. The same methodological caveats apply to this analysis.

44 See id. at 762.

45 See id. at 763–64. This Note also uses Sperino's method of analysis in attempting to replicate how courts may approach the interference issue as applied to fixed attendance rate policies.
A. The Plain Meaning Method: Introduction and Application

The approach advocated by the plain meaning method is apparent from its name; it asks courts to examine the words of the Act itself to deduce congressional intent. It rests on the assumption that "only the language actually adopted by the legislature is law," and thus requires courts to look no further in interpreting the statute than to what successfully passed both congressional bodies. In approaching the statute's language, the method first determines whether the statute sufficiently defines the word at issue, either through a traditional definitions section or through association with other words. If not, then the method explores contemporary dictionaries and other writings to determine how certain words would have been understood by the legislators at the time of the statute's enactment. The FMLA's language never directly addresses fixed attendance rate policies. Because of this hole, the plain meaning analysis of whether interference encompasses these policies, then, will focus on finding whether the statute ever mentions what types of employer actions are necessary to sustain an interference cause of action, either through a definitions section or in relation to other terms in the statute. The statute's text begins with a definitions section, but it fails to provide a definition for what type of employer conduct constitutes interference. In fact, the term "interference" is only mentioned twice in the statute: once to create the cause of action and once to ban interference with proceedings under the Act.

49 Id. See also Chickasaw Nation v. United States, 208 F.3d 871, 876 (10th Cir. 2000).
53 The provision of the Act entitled “Interference with Proceedings or Inquiries” appears at 29 U.S.C. § 2615(b) and states, “It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual . . . has filed any charge . . . .” Usually, one could examine this language for clues about what “interference” in section (a) means because both sections use the word “interference.” See Comm’r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 159 (1993) (citations omitted) (applying the following statutory construction rule to income
The section of the Act that creates the interference cause of action states:

“It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.”

From the statutory language, it is clear that employer conduct must inhibit the rights guaranteed by the FMLA in any of the three ways described. Such an interpretation is consistent with the Supreme Court's pronouncement in *Ragsdale v. Wolverine World Wide* that no interference cause of action will lie where the plaintiff has not been actually harmed by the defendant's conduct. While the statute does address what result the conduct must have, it unfortunately fails to state what kind of employer conduct is required to support a claim of interference.

In creating the cause of action, the FMLA's text states that employer interference must interfere with “the exercise, or the attempt to exercise,” FMLA rights. One could interpret such language to mean that an employer’s interference must be an action that directly curtails the exercise of FMLA rights—such as denying an employee an FMLA day or refusing to certify her FMLA time. But this interpretation does not give effect to the plain meaning of the statute and instead inserts a requirement for a type of employer conduct when there is none. The Act itself never mentions how an employer might interfere with, restrain, or deny an employee's FMLA rights. Therefore, the most natural reading of the statute is that it prohibits any conduct by employers that affects the enjoyment of FMLA rights, whether that conduct is directed specifically at FMLA rights or has incidental effects on FMLA rights.

The text of the statute is clear by its silence on the matter of what employer conduct constitutes interference: any employer conduct that denies or inhibits FMLA rights falls under this cause of action. Because fixed attendance rate policies have the effect of denying employees FMLA rights, employers may be held liable for applying them to FMLA employees without counting FMLA days as days worked in making the rate calculation.

This conclusion should end a court’s inquiry under the plain meaning method. Since the statute’s meaning is clear, a court need not explore contemporary

tax cases: “It is a ‘normal rule of statutory construction,’ that ‘identical words used in different parts of the same act are intended to have the same meaning.’”). However, the language used in the “Interference with Proceedings or Inquiries” section is identical to the language used to create the retaliation cause of action under the FMLA. 29 U.S.C. § 2615(a)(2). It would therefore be improper to graft the retaliation language into the interference cause of action through this canon of statutory construction.

56 This is a common canon of statutory construction. *See*, e.g., *State v. LeClair*, 287 P.3d 875, 875–876 (Kan. 2012) (holding that a "address of residence" required under sex offender statutes could not include defendant’s one night stay on a park bench); *State v. Trujillo*, 160 P.3d 577, 582 (N.M. Ct. App. 2007) (declining to read an age threshold onto the state’s definition of "mental retardation"); *Trigg v. Sanders*, 515 N.E.2d 1367, 1374–75 (Ill. App. Ct. 1987) (declining to read into a statute a prohibition on modifying teachers’ suspensions during a statutory 60–day appeal period).
dictionaries and other writings to determine the meaning of the statute.\textsuperscript{57} Furthermore, if a court attempted to do so, it would run across an unsolvable practical problem; since there is no word in the statute that addresses what kind of employer conduct is necessary to precipitate a violation, there would be no words for the court to define in dictionary terms or through other writings. The court would therefore be forced to accept either that the statute is clear, or to abandon the plain meaning inquiry and proceed to an analysis of the statute under the legislative intent approach, delineated in Part II.B, below.

\textbf{B. The Legislative Intent Approach: Introduction and Application}

The body of thought comprising the legislative intent approach is fraught with differing methods and attempts at unifying the theory.\textsuperscript{58} But, at its most basic, the legislative intent method requires courts to first examine the plain meaning of the statute through the procedure outlined in the above section.\textsuperscript{59}

The legislative intent approach first requires the court to undertake a plain meaning analysis, demonstrated in Part II.A.\textsuperscript{60} If the statute remains ambiguous\textsuperscript{61} despite the plain meaning inquiry, then courts will examine the legislative history of the statute in order to find the legislative intent behind the ambiguous terms.\textsuperscript{62} Courts will look at several fonts of legislative history to make their intent determinations including permutations of the bill.

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\textsuperscript{57} See State v. Daniel, 103 S.W.3d 822, 826 (Mo. Ct. App. 2003) (noting that when the meaning of a statute is unambiguous, courts do not have to resort to other methods of statutory construction, including dictionaries).

\textsuperscript{58} Compare Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 VA. L. REV. 1295, 1335–1336 (1990) (critiquing the strict textualist approach and arguing for a method that approaches statutory interpretation like a “question of fact”), with Victoria F. Nourse, A Decision Theory of Statutory Interpretation: Legislative History by the Rules, 122 Yale L.J. 70, 109–113 (2012) (arguing for rules of legislative procedure that would inform, and make more predictable, statutory interpretation). Use of the approach in and of itself is also controversial for several judges, most notably Justice Scalia, who criticizes the use of the approach for its illegitimacy and indeterminacy, noting, “If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history. And the present case nicely proves that point.” Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., dissenting).


\textsuperscript{60} See e.g., Landis v. Physicians Ins. Co. of Wisconsin, Inc., 628 N.W.2d 893, 898 (Wis. 2001).

\textsuperscript{61} Determining ambiguity is beyond the scope of this Note. For information about the complexity of the doctrine and the difficulty courts have in applying it, see Ward Farnsworth et al., Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation, 2 J. Legal Analysis 257 (2010). However, the fact that the ambiguity analysis is outside of this Note's scope does not affect its critical analysis. In order to address the meaning of interference under each statutory interpretation method, this Note simply assumes that some judges would find the statute ambiguous.

\textsuperscript{62} See Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004) (explaining that if the statutory text is nonsurplusage (i.e., it refers to an ambiguous component of the statute) the plain meaning method will not suffice).
committee reports, floor debates, and any ex post facto regulations addressing the ambiguous terms.\textsuperscript{63}

Not surprisingly, the legislative history of the Family Medical Leave Act never directly addresses fixed attendance rate policies and whether or not they might constitute interference under the Act. It might be argued that such a gap in the legislative history means that the Act does not reach the policy, and therefore the policy cannot be interference. An examination of the legislative history reveals that legislators never discussed the specific content of any employer policy and yet some employer policies have been found to conflict with an employer’s duties under the Act.\textsuperscript{64} It is a more accurate interpretation of the legislative history to say that Congress legislated to prohibit broad categories of conduct under which discrete actions could fall. Just because Congress did not mention each discrete action does not mean it is allowed by the Act. The goal of this legislative intent inquiry, then, should be to establish the outer parameters of the interference cause of action to see if interference is expansive enough to cover the policy at issue.

Unfortunately, legislators did not devote much of their time to discussing the meaning of the term “interference.” In fact, the main thrust of the FMLA debate was one of tension between the interests of small businesses and working women.\textsuperscript{65} The debate centered on whether government should be regulating employers \textit{at all}, not on whether these specific regulations were sound.\textsuperscript{66} Floor speeches and committee reports addressed the interference cause of action perfunctorily.\textsuperscript{67} But there were several occasions when legislators mentioned the cause of action by name. This legislative history analysis therefore begins by examining those times when members of Congress overtly discussed interference to see if those passages shed any light on how far the interference cause of action should stretch.

While interference may not have been a primary concern, many legislators considered the litigation effects that the FMLA might have on small businesses. Discussions about the cost of litigation to small businesses found in the legislative

\begin{itemize}
\item \textsuperscript{64} \textit{E.g.}, 29 C.F.R. § 825.220(c) (2013) (prohibiting employers from enacting policies that treat FMLA and non–FMLA employees differently for benefits purposes).
\item \textsuperscript{65} See generally \textit{136 CONG. REc. Sr2,j6i} (Aug. 3, 1990) (statement of Sen. Dodd) (referring to the FMLA as "pro–family legislation").
\item \textsuperscript{66} \textit{See generally} \textit{136 CONG. REc. Hio44} (Mar. 22, 1990) (statement of Rep. Ballenger) (opposing the bill and pointing out that "[t]he issue is not whether the leave is a good policy to pursue, the issue remains the appropriate role for Government").
\item \textsuperscript{67} \textit{139 CONG. REc. S650} (1993) (statement of Sen. Dodd) (illustrating that even when introducing the bill in its final round of debates, Senator Dodd never mentioned the interference cause of action).
\end{itemize}
history of the FMLA correlates to the scope of the interference provision. Thus, the legislative history analysis will conclude with an examination of the debate on the litigation costs of the FMLA to determine how the debate affects the understanding of what "interference" means.

1. Congress's Overt Discussions of Interference Show that FMLA Interference Can Occur Within a Policy that Does Not Specifically Deny FMLA Rights.— The language that now comprises the interference portion of the FMLA was introduced in 1986, in the first draft of the Act, which was entitled "The Parental and Medical Leave Act." The provision survived intact over the course of seven years and two presidential vetoes. But even in the earliest stages of the bill's development, interested parties worried about the scope of the FMLA's private causes of action. Only a month after its introduction, during the Joint Hearing before the House Education and Labor Committee, the U.S. Chamber of Commerce's Council of Small Businesses expressed concern that the interference cause of action was too "loosely worded." Speaking for the organization, Susan Hager gave an example of how the loose wording of the statute might affect employers: "[W]hat would keep an employee from accusing that employer of 'interference' with the employee's right to take the leave?" The committee report expressed anxiety about employment litigation exploding because of the FMLA.

After these initial worries and a failed attempt to pass the Parental and Medical Leave Act in 1989, different congressional committees endeavored to explain why the interference cause of action was not overbroad. In 1989, the House report that would have accompanied the Act, designated HR 770, noted that interference should not apply to an employer's attempt to make sure leave benefits are exercised properly. Furthermore, in 1989, both the House and Senate sought to more concretely define the interference cause of action in committee reports. The Senate Committee on Labor and Human Resources stated that the FMLA's causes of action addressed "[the situation where] an employer, in certain circumstances, may seek to induce an employee not to take the entitled leave," and the causes of action under the FMLA were directed at employer action.

During floor debates, legislators indicated what the FMLA causes of action should provide protection by describing conduct prohibited by the statute.

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71 Id.
72 See id.
In his 1990 statement on the introduction of the FMLA to the Senate, Senator Packwood painted a picture of the conduct that the FMLA was meant to stop: "What we are saying with this bill is simple justice: A single mother shouldn't be forced to lose her job to take care of a dangerously ill child. A father should be able to count on returning to work after taking care of his family's emergency at home." 75

From the beginning, members of Congress and the public expressed concern about how far interference reached into the private sector. Based upon early statements made by the U.S. Chamber of Commerce's Council on Small Businesses, it is clear that employers opposed the interference provision applying to situations in which employers tried to make sure that leave was being exercised appropriately. One could argue that this debate about how employers could ensure leave benefits were exercised properly had the effect of defining interference to only include employer conduct directed specifically at leave benefits. But this conclusion takes citations from the House report and the Chamber of Commerce's report out of context. The snippets contained in both of those reports addressed a very specific problem: how should the interference cause of action intersect with employers' attempts to verify leave? 76 Neither the House report nor the Chamber of Commerce report addressed situations like the policy in question, in which an employer engages in conduct that is not designed to make sure the employee is exercising benefits properly, but could still affect the employee's FMLA leave. These parts of the legislative history should not be interpreted as complete statements on all employer conduct constituting interference, but rather as statements in response to some concerns voiced by a few affected parties.

Interpreting the legislative history to allow interference claims based on employer conduct that do not explicitly deny FMLA rights also keeps with Senator Packwood's understanding of what the interference cause of action protects. In his floor speech, Senator Packwood mentions two classes of employees that the interference cause of action protects: a mother attempting to care for a sick child and a father dealing with a family emergency. 77 Even if the policy at issue does not constitute interference, these classes of employees may still face adverse employment action if some intervening non-FMLA emergency arises while they are on FMLA leave for other matters. 78 Maintaining a cause of action that only prohibits employer conduct directed at the leave entitlement itself would not give full protection to these employees. Such an interpretation also conforms to the Senate Committee on Labor and Human Resource's stance that the interference cause of action addresses employer

78 See, e.g., supra Part I.B.
Without seeking to clearly define that conduct, the Committee's formulation only requires that the employer conduct, whatever it is, has the potential to deny FMLA rights or actually denies FMLA rights. It need not be specifically directed at the denial of rights themselves to have that effect.

Like the results found under the plain meaning method, the parts of the legislative history that explicitly mention interference show that Congress intended to protect employees against employers who would attempt to deny employee benefits through any action. Even if the employer's actions do not specifically prohibit the taking of leave, if they deny or have the possibility to deny leave, then the legislative history suggests that interference is a proper cause of action to remedy the conduct. Even though fixed attendance rate policies are not directed at the denial of FMLA benefits themselves, they can deny FMLA benefits by taking FMLA days out of the days worked column for the absence rate calculation. Because the policy has the potential to deny benefits, it is within the scope of employer conduct prohibited by the interference cause of action as imagined by legislators overtly discussing the Act.

2. Congress's Discussion of Litigation Costs Demonstrate that Neutral Policies Denying FMLA Rights Constitute Interference.—During the debates on the FMLA, members of Congress voiced generalized concerns about the litigation costs associated with the two new FMLA causes of action. But strangely, throughout the FMLA's seven-year legislative history, no member ever proposed changing the language of the interference cause of action to cover less employer conduct.

As early as 1986, the Subcommittee on Labor Management, Relation, and Labor Standards noted that the legislation might produce a large amount of litigation. Similar statements regarding potential high rates of litigation continued to circulate from 1986 to 1991, when Senator Bond negotiated an FMLA compromise bill with Senator Dodd, partially to remedy such concerns voiced by his constituents. The bill was changed in a number of ways to address the litigation flood that the FMLA was expected to produce. It made the definition of covered "employer" and "employee" more rigorous, added a highly compensated employee exemption, incorporated a remedy procedure that was identical to the one used in the Fair Labor Standards Act, added a provision allowing employers to recapture health insurance premiums if the

80 Id.
82 1986 Parental and Medical Leave Act Joint Hearing, supra note 70 (1986).
employee never returns to work, included a thirty-day notice requirement where practicable, redefined actions that constituted reinstatement, and deleted the quadruple damages provision.85

Despite the multitude of changes, some legislators were still concerned that the FMLA did not sufficiently protect employers from litigation. Senator Durenberger lobbied for stronger language on the type of emergencies that would qualify an employee for leave and guidance on how promotions and layoffs would intersect with the FMLA's new entitlements.86 He also sought to minimize litigation under the FMLA by making all FMLA claims undergo binding arbitration.87 Additionally, some senators suggested changing the remedies provisions of the bill to minimize the bill's impact on employers.88 Opposing the House Committee on Education and Labor's favorable report, several representatives expressed worry that the vagueness of the bill would lead to heightened litigation over what constituted a serious health condition.89 They also noted that the enforcement scheme through the Department of Labor was far too vague.90

Though the bill had been passed and vetoed in 1991, it was close to passing both houses again in 1992. But members of Congress still had doubts about just how much litigation would result from the FMLA.91 In 1993, the conservative wing of the legislature identified several provisions they felt made the bill too litigious. These provisions were the lack of a written notice requirement, the possibility that leave could be granted for an employee to take care of a homosexual partner or unmarried partner, the failure to adequately define "serious health condition," and the failure to adequately define "healthcare provider."92

Despite sustained concern that the Act's provision would lead to too much litigation, no member of Congress ever suggested tightening the definition of interference in the statute, or defining it in the definitions section. The interference language that became law remained unchanged from 1986 to the FMLA's adoption in 1993.93 Since Congress did not hold any prolonged

85 Id. at S14,226–32.
86 Id. at S14,166–67.
87 Id.
88 See id. at S14,170.
89 H.R. REP. No. 102–135, pt. 1, at 73 (1991) (minority view) ("[‘Serious health condition’] is defined in grossly broad, general terms which will lead to misunderstandings between employers and employees as to when leave is appropriate, to resultant litigation, and, frequently, to abuse of the rights provided by this bill.").
90 Id. at 77 ("[N]o known labor statute gives a complainant the vague right to bring a civil action after a charge has been filed on the basis that the agency has failed to meet ‘any obligation’ under the statute in a ‘timely manner.’").
debates regarding the problems that might arise under a broad definition of employer conduct that could constitute interference, it could be argued that this omission should be interpreted to limit the type of employer conduct that qualifies as interference. But this interpretation does not respect the common statutory construction canon that remedial statutes, such as the FMLA, should be construed broadly to effectuate their purposes.94

A much more likely interpretation of legislative silence is that Congress intended to make employer conduct constituting interference expansive under the Act. In testimony to the House Education and Labor Committee, architects of the bill highlighted the importance of a broad interpretation of this statute: "[W]e hope that you and the [Department of Labor] will heed our suggestions to interpret the law in the broadest possible way so that it can be administered as intended . . . ."95 This post-enactment language is a powerful incentive for interpreters to set the parameters of the FMLA as widely as possible.

Since the statute is to be interpreted broadly, and the legislative history leaves out any mention of employer conduct when addressing litigation costs, then the discussion surrounding litigation costs in the legislative history does not demonstrate any congressional intent to limit what types of employer conduct constitute interference. In this way, the litigation costs discussion reinforces the conclusions of the plain meaning method and legislators' overt references to interference in their discussions surrounding the Act. The debate on litigation costs makes clear that fixed attendance rate policies that deny FMLA days as "days worked" constitute interference protected by the Act, whether or not these policies explicitly deny benefits, because they have the effect of denying FMLA benefits to those on intermittent leave.

3. The Code of Federal Regulations Demonstrates that a Fixed Attendance Rate Policy Is Interference When It Discriminates Against Employees on FMLA Leave. — The Code of Federal Regulations ("C.F.R." or "Code") paints a more complete picture of what interference is, in keeping with the broad definition gleaned from the statute's plain meaning and legislative history.96 In the Code, the word "interference" need not refer to an employer's action that results in a denial or restraint of an employee's FMLA rights. Instead the Code interprets the word "interference" as "discrimination" or "retaliation."97 Any employer action that

94 E.g., Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 164 (1st Cir. 1998).
97 29 C.F.R. § 825.220(c) (2013).
treats an employee on FMLA differently than employees not on FMLA is a failure to reinstate an employee to her previous position under the relevant Code sections. 98

To begin, the C.F.R. contains general guidelines for employers administering employment policies that conflict with FMLA leave. The regulations make clear that the FMLA preempts all employer action on leave management. In section 825.700, the Code establishes that the benefits mandated under the FMLA are a floor—covered employers must provide these at a minimum in their leave policies. 99 The Code also indicates that the FMLA trumps collective bargaining agreements and private employer leave policies. 100 The C.F.R. then proceeds to define interference under the FMLA. In 29 C.F.R. § 825.220, the Code 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. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. 101

Here, the C.F.R. equates interference with discrimination by defining interference as discrimination. However, the term “discrimination” under the FMLA has a different meaning than it does under Title VII. Unlike other employment statutes, where discrimination means an adverse employment action, 102 the C.F.R. indicates that discrimination simply means treating an FMLA employee differently than a non–FMLA employee. 103 It also states, by reference to employee pay, that discrimination can occur and be prohibited by the Act outside of the rights guaranteed by the FMLA. 104 Thus, discrimination under the FMLA means unequal treatment of FMLA and non–FMLA employees in all areas of employment.

Section 825.215 expands on the equal protections due to employees using FMLA time. It notes that employees returning from FMLA are entitled to unconditional pay increases that they would have received while on leave and the same employee benefits that all other employees are entitled to; an employer’s failure to grant such benefits would amount to interference with an employee’s rights. 105 There is, however, an outer limit to this type of interference under the FMLA. The regulation states the following:

[1] A bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee

98 Id. § 825.214.
99 Id. § 825.700.
100 Id.
101 Id. § 825.220(c) (emphasis added).
103 See 29 C.F.R. § 825.220(c) (2013).
104 See id. § 825.220(b) (“Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act.”).
105 Id. § 825.215(c)(1), (d).
has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.106

At first glance, this passage may appear to answer the question of fixed attendance rate policies altogether, in favor of the employer who counts FMLA days against days worked. But this passage actually lends credence to the theory that fixed attendance rate policies can be FMLA interference when administered by deducting FMLA days. This regulation speaks only to an employer's practice of giving bonuses or other pay for sales goals and attendance records. It does not cover a situation in which an employee is fired because she was unable to meet a sales goal or an attendance performance expectation due to her time on FMLA—the exact type of situation that arises under the fixed attendance rate policy scenario described in this Note. The situation in which an employee finds herself in a fixed attendance rate policy/FMLA clash is well within the outer limit of the C.F.R.'s FMLA interference protection because the Code speaks to the terms of employment and not perks of employment.

A study of the Code adds to the conclusion that interference need not be based in a denial of FMLA rights under the foregoing examinations of legislative history. The C.F.R.'s FMLA regulations stand for the principle that an employee on FMLA must be treated the same as a non–FMLA employee in all areas of employment except for bonuses. Fixed attendance rate policies mathematically treat FMLA employees differently than non–FMLA employees because they require FMLA employees to maintain a higher attendance rate percentage than their coworkers. Such blatant unequal treatment is against the letter and the spirit of the law.

In summation, the legislative history analysis demonstrates that FMLA interference occurs when an employer acts so that an employee is denied her rights under the FMLA, even if the denial is a result of a policy not directed at FMLA benefits. When used against FMLA employees, fixed attendance rate policies that take FMLA days out of the days worked rate calculation deny employees their FMLA right to take all of their leave or their right to reinstatement by requiring an FMLA employee to be at work more than a non–FMLA employee. Such an effect is clearly interference under the legislative history approach.107

106 Id. § 825.215(c)(2).
107 One other Code provision might seem a likely candidate to support a claim that absence rate policies interfere with FMLA leave. Under 29 C.F.R. § 825.220(c), employers cannot use the fact that an employee took FMLA leave as negative factor in employment decisions like hiring or discipline. This provision is applicable to interference claims. Brenneman v. MedCentral Health Sys., 366 F.3d 412, 422 (6th Cir. 2004). But employers who use fixed attendance rate policies that do not count FMLA days as “days worked” do not use FMLA days negatively; they simply do not use them at all. The effect of the policies yields negative consequences. In effect, this difference renders the code provisions, cited supra notes 96–105, a more fitting framework in which to situate fixed
C. The Common Law Approach: Introduction and Application

The common law approach to statutory construction serves as a catchall for any other concerns that might enter into the minds of the judiciary when making a statutory decision. Courts may engage in this type of inquiry when interpreting statutes without explicitly noting the framework or source of power for doing so. This approach most often examines analogous case law and public policy arguments to derive a clear idea of how a statute should be applied. Therefore, this section will discuss analogous case law where an interference claim has survived when based on the application of a neutral policy to an FMLA plaintiff. It will end with a brief discussion of public policy concerns that may influence a judge's decision to interpret interference to include fixed attendance rate policies.

1. The Case Law Approach to the Common Law Method Indicates that Fixed Attendance Rate Policies Are Interference Because They Are Factually Identical to Performance Prorate Cases.—Performance prorate cases arise when the plaintiff works in a sales job or some other job with a performance quota, takes FMLA leave, and is still held to the same performance standard despite having taken time off for a qualifying serious health condition. When analogized to fixed attendance rate policies, performance prorate cases support a finding that fixed attendance rate policies are a form of interference under the FMLA.

The most often cited example of a performance prorate case is Wojan v. Alcorn Laboratories wherein the plaintiff was a drug company representative who took FMLA time off to have a baby. Eighty percent of the defendant company’s yearly evaluative procedure was based on meeting specified sales quotas for a specific drug. In accordance with its policy, the company did not adjust the plaintiff’s sales quotas to account for her FMLA time away from work, and terminated her when she did not meet the yearly sales goal. The plaintiff brought an interference claim for her employer’s failure to adjust her performance goal, and the Eastern District of Michigan held that

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she had established a prima facie case for interference under the FMLA. The court noted that by refusing to lower its sales quotas for an employee who had been absent from work due to FMLA leave, "[the employer had] evaluated [the] Plaintiff, in part, based upon time she was absent on FMLA leave, and took employment action against her based upon that evaluation." The Seventh Circuit reached a similar result in *Pagel v. TIN, Inc.*, wherein it noted that the plaintiff's proof of unchanged sales goals despite taking FMLA leave was enough to make out a prima facie case of FMLA interference.

Just like the conclusion drawn from the Code, these cases demonstrate that interference can exist where a non-FMLA employer policy negatively affects an employee on FMLA leave, even if it appears the policy is being applied neutrally to all employees. In other words, discriminatory effects of policies are prohibited under the Act. The FMLA indicates that employers are not allowed to place more burdens on FMLA employees than non-FMLA employees and must adjust policies so that all employees are treated fairly rather than simply neutrally. Just as FMLA employees in the performance prorate cases are mathematically required to make more sales per day under an employer's neutral sales quota policy, FMLA employees are mathematically required to attend work more often than other employees under fixed attendance rate policies. Based on the common law approach, these cases serve as strong support for a finding that the FMLA's interference provision should be interpreted to apply to fixed attendance rate policies that take FMLA days out of the days worked total in the absence rate calculation.

2. Public Policy Counsels a Finding that Fixed Rate Attendance Policies Interfere with the FMLA Because the FMLA was Designed to Protect People Hurt by Such Policies.—Data collected by the Department of Labor shows that enabling employees to sue for interference after being subjected to fixed attendance rate policies would advance the purposes of the statute. In enacting the FMLA, Congress found that "the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting . . . [and that] responsibility for family caretaking often falls on women." The statute sought to remedy the difficult choice women face in their working lives when they or their children become sick but when they also need to work to survive.

If fixed attendance rate policies are not found to constitute interference, women will bear the brunt of that burden in the workforce. Persons affected by absence rate policies are those that are on intermittent FMLA leave who take off work for some other non-FMLA qualifying reason. Statistically, women

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114 Id. at *1, *4.
115 Id. at *5.
116 See Pagel v. TIN Inc., 695 F.3d 622, 630–31 (7th Cir. 2012).
118 See id. § 2601(b)(4)–(5).
“are a third more likely to take leave than men,” and women in households with children are more likely to take leave than women in households without children.\textsuperscript{119} About twenty-four percent of those who take leave do so intermittently.\textsuperscript{120} These employees will face FMLA interference if they ever need to take off for a non-FMLA qualifying reason. The most recent statistics from the U.S. Department of Labor demonstrate that women are nearly twice more likely to be absent from work when compared to men.\textsuperscript{121} Most studies agree that the higher rate of absence for women of childbearing age can be explained by the fact that women take on the lion's share of providing care for sick children, which is usually not an FMLA-qualifying event if the sickness is minor.\textsuperscript{122} These women may face termination if their employer uses a fixed rate attendance policy. Failure to consider such policies as interference undermines the purpose of the Act because the demographic that the Act explicitly attempts to protect—and the one that is most greatly affected by this oversight—is women with child-rearing responsibilities. This public policy consideration should encourage a more expansive reading of the interference provision so that it can function to protect the class of people the FMLA was designed to protect: working women.

Under the common law approach, both analogous case law and the public policy considerations behind the Act counsel interpreting the interference cause of action to include fixed attendance rate policies that take FMLA days out of the days worked category in the rate calculation. In doing so, the common law approach reinforces the conclusions reached by the plain meaning and legislative intent methods.

**Conclusion**

The plain meaning, legislative history, and common law methods of statutory analysis yield one result: not counting an employee's FMLA days as days worked under a fixed attendance rate policy interferes with an employee's exercise of her FMLA rights. Counting FMLA days as days worked is not a windfall for the employee, but is demanded by the statute. Payton and Dickinson\textsuperscript{123} achieved the correct result under the three main branches of statutory interpretation. Fixed attendance rate policies mathematically require FMLA employees to be


\textsuperscript{120} Id. at 76 exhibit 4.5.t.


\textsuperscript{123} See discussion supra Part I.C.
at work more often than non-FMLA employees. This mathematical difference denies employees FMLA rights even though these policies are not specifically designed to deny FMLA rights.

The Act prohibits employer conduct that disparately affects protected employees because its language supports an expansive reading of the term “employer conduct.”124 Its legislative history also demonstrates congressional commitment to this expansive reading,125 and FMLA case law has applied this expansive reading to analogous facts with success.126 Additionally, women with young children will carry the largest societal burden if courts systematically find that these policies do not interfere with FMLA rights—the FMLA was specifically designed to protect this class of workers.127 Therefore, in consideration of the purposes of the Act, its language, its history, and the case law that flows from it, courts should follow the Payton and Dickinson example so that an employee might be compensated for unequal treatment and, through that compensation, vindicate her rights. Employees like Ann would be well served by this broad interpretation and extended protection.

124 See supra Part II.A.
125 See supra Part II.B.
126 See supra Part II.C.
127 See supra Part II.C.