

Essay

Standard Confusion: The Case for Adopting Motivating Factor Causation for FMLA Retaliation Claims

*Alyssa Shaw**

Statutory anti-retaliation protections are often the only enforcement mechanism placed in federal minimum labor standard statutes, and the Family Medical Leave Act (FMLA) is no exception. An integral part of proving retaliation claims is showing there was a causal connection between the adverse action and the use of protected leave. Unfortunately for plaintiffs, the federal circuit courts apply different causation burdens to these claims. Some adopt motivating factor causation and others adopt but-for causation.

This Essay examines this circuit split and argues for the adoption of motivating factor causation for FMLA retaliation claims stemming from the use of protected leave. Drawing on statutory interpretation, legislative history, and comparative analysis with analogous employment discrimination regimes, this Essay contends that a motivating factor standard better aligns with the FMLA's statutory text, remedial purpose, and protective design. This is true even in the absence of deference to Department of Labor (DOL) regulation on the subject. Further, requiring but-for causation imposes an unduly high burden on employees, undermining enforcement and enabling subtle forms of employer retaliation to evade liability. By contrast, a motivating-factor approach preserves employer defenses while

* J.D. Candidate, 2026, University of Minnesota Law School; Lead Managing Editor, *Minnesota Law Review*, Volume 110. Thank you to my parents, Tom and Shellie, for instilling the values of hard work and discipline in me from a young age. Without your sacrifices and support I wouldn't stand where I do today. I would also like to thank my colleagues and friends from the Indiana State Personnel Department who fostered my passion for employment law and believed in my potential from day one. Copyright © 2026 by Alyssa Shaw.

ensuring meaningful protection for employees who invoke their statutory rights.

INTRODUCTION

A large majority of employees in today's workforce have a second full-time job—providing care for their immediate family members.¹ The stress of these obligations can lead some workers to voluntarily leave their positions, and many others worry that asking for time off will negatively impact their career progression.² The impacts of caregiving responsibilities are typically associated with women in the workforce, but familial caregiving responsibilities and the resulting likelihood of discriminatory bias are experienced across all genders.³ In addition to providing care to their family members, a significant portion of the workforce also manage their own serious health conditions.⁴ Navigating one's own serious health condition places a significant time and stress burden on employees, which may necessitate taking time off, pursuing accommodations, or changing career fields.⁵ The Family Medical Leave Act (FMLA) was designed to

1. Denise Brodey, *73% of Employees Have a Secret Second Job—It's Caregiving*, FORBES (Apr. 25, 2024), <https://www.forbes.com/sites/denise-brodey/2024/04/25/73-of-employees-have-a-secret-second-job-its-caregiving> [<https://perma.cc/Z99E-HATK>].

2. *Id.* (describing how employees don't trust their employers to keep their discussions confidential or worry requesting time off will limit their chances for promotion).

3. Amy Henderson & Sarah Johal, *Supporting Employee Caregivers Starts with Better Data*, HARV. BUS. REV. (Apr. 15, 2022), <https://hbr.org/2022/04/supporting-employee-caregivers-starts-with-better-data> [<https://perma.cc/VH89-2BZK>] (describing how employees of all genders who have caregiving responsibilities are likely to face bias, which includes the one third of men who change jobs when they become caregivers).

4. Peter Boersma et al., *Prevalence of Multiple Chronic Conditions Among US Adults, 2018*, PREVENTING CHRONIC DISEASE, Sept. 2020, at 1, 2 (“In 2018, 51.8% (129 million) of civilian, noninstitutionalized adults had been diagnosed with at least 1 of 10 [surveyed] chronic conditions.”); Tainya C. Clarke et al., *Working with Cancer: Health and Disability Disparities Among Employed Cancer Survivors in the U.S.*, 53 PREVENTATIVE MED. 331, 331 (2011) (“Of the more than one million Americans newly diagnosed with cancer each year, about 40% are working-age adults. . . . [U]p to 85% of persons diagnosed continue working during treatment or return to work shortly after treatment.” (citation omitted)).

5. See A. R. Bosma et al., *Supporting Employees with Chronic Conditions to Stay at Work: Perspectives of Occupational Health Professionals and Organizational Representatives*, BMC PUB. HEALTH, Dec. 2021, at 1, 1 (2021) (describing how chronic conditions significantly impact one's working life and may result in productivity loss, use of sick leave, or job loss); *What It's Like Living and Working with a Chronic Illness*, MICH. ST. UNIV.: CAREER SERVS. NETWORK (Jan. 31, 2019), <https://careernetwork.msu.edu/blog/2019/01/31/what-its-like-living-and-working-with-a-chronic-illness> [<https://perma.cc/T8ET-Y9KK>] (discussing a personal battle with chronic illness and having to leave a job in retail

allow those needing leave to fully address their own serious health condition or that of a family member to do so without fear of losing their employment.⁶

The FMLA provides eligible employees with up to twelve weeks of protected unpaid leave each year to fulfill their caregiving duties and manage their own serious health conditions.⁷ The statute additionally prevents employers from interfering with an employee's use of protected leave and prohibits employers from discriminating against those who oppose any act made unlawful under the FMLA.⁸ Protections for opposition are found in multiple minimum labor standards statutes, and they protect employees who communicate opposition to actions they perceive as violating a minimum labor standard.⁹ This includes protections for complaining about alleged discrimination against oneself or others, providing information in an internal investigation, and refusing to obey orders reasonably believed to violate a minimum labor standard.¹⁰

The FMLA has proven to be an imperfect solution to the needs of the American workforce.¹¹ Even with explicit protection against interference and discrimination for opposition, some employees who exercise their rights under the Act suffer adverse employment action in response and must litigate to enforce their rights.¹² A key aspect of this litigation surrounds the causation standard imposed on plaintiffs by the FMLA. Specifically, whether plaintiffs must show that their use of leave was *the sole*

because the industry was leaving the author depleted and unable to function due to fibromyalgia symptoms).

6. See 29 U.S.C. § 2601(b) (describing the purpose of the FMLA).

7. *Id.* § 2612(a)(1).

8. See *id.* § 2615(a).

9. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2016-5, QUESTIONS AND ANSWERS: ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (2016) (listing examples of protected opposition under various equal employment opportunity statutes).

10. *Id.*

11. See Pamela Joshi et al., *Inequitable Access to FMLA Continues*, DIVERSITY DATA KIDS (Mar. 1, 2023), <https://www.diversitydatakids.org/research-library/data-visualization/inequitable-access-fmla-continues> [<https://perma.cc/9HYB-UCEV>] (providing statistics showing only around fifty percent of working adults are FMLA eligible, and those that are eligible face significant affordability barriers).

12. Carol L. Risk & Richard A. Bales, *Family Medical Leave Act Standards of Proof and the Impact of Desert Palace on Retaliation Claims*, 28 N.C. CENT. L.J. 68, 68–69 (2005).

reason for the termination (but-for),¹³ or whether they must simply show that their use of leave contributed to the employer's adverse action (motivating factor).¹⁴ As the law stands today, a plaintiff's causation burden fluctuates based on the circuit in which they bring their claim.¹⁵ Differing causation analysis for FMLA and other minimum labor standards cases creates confusion for litigants and courts, and the textually unjustified imposition of heightened causation standards results in many plaintiffs' cases being prematurely decided in the pleadings stage.¹⁶

I. HISTORY OF THE FMLA AND LABOR CAUSATION STANDARDS

The FMLA was enacted in 1993 and serves as the only federal legislation providing protected medical leave to employees across the country.¹⁷ The FMLA was a highly debated bill as legislators worked to balance the interests of employees and employers.¹⁸ Over the span of eight years and two presidential

13. *See, e.g.*, *Lapham v. Walgreen Co.*, 88 F.4th 879, 883 (11th Cir. 2023) (applying but-for causation); *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 245–46 (4th Cir. 2020) (same).

14. *See e.g.*, *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 166 (2d Cir. 2017) (applying motivating factor causation); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 273–74 (3d Cir. 2017) (same).

15. *Contrast Lapham*, 88 F.4th at 883 (applying a but-for causation standard to FMLA retaliation claims), *and Fry*, 964 F.3d at 245–46 (holding that but-for causation must be established because the plaintiff relied on indirect evidence in bringing her FMLA claim), *with Woods*, 864 F.3d at 166 (applying motivating factor causation to the plaintiff's FMLA retaliation claim), *and Egan*, 851 F.3d at 273–74 (concluding that motivating factor causation is a permissible construction of the FMLA). Not only is this disparity inequitable for plaintiffs, it also increases the administrative burden on multi-state employers who must adjust their business practices to comply with differing standards. *Cf. The Burden of Today's Employment Law*, PRECISION GLOB. LTD, <https://pgcgroup.com/blog/the-burden-of-todays-employment-law> [https://perma.cc/T6TK-F9PU] (describing the difficulty employers face in ensuring compliance with complex and varying employment laws across states).

16. D'Andra Millsap Shu, *The Coming Causation Revolution in Employment Discrimination Litigation*, 43 CARDOZO L. REV. 1807, 1807 (2022) (“[E]mployment discrimination causation law has been a confusing, often overly restrictive quagmire that has contributed substantially to the paltry success rate of plaintiffs in employment discrimination cases. Most of these cases are dismissed pretrial, all too often based on a failure of causation.”).

17. *See* Daiquiri J. Steele, *Protecting Protected Activity*, 95 WASH. L. REV. 1891, 1909 (2020) (“Despite the FMLA’s weaknesses compared to leave entitlements in other countries, it still remains the only federal legislation of its kind in the United States.”).

18. *See id.* at 1906 (discussing how the business community, which comprises the employers, strongly opposed the passage of the FMLA).

vetoed, the Act dwindled from an eighteen week to a twelve week leave entitlement.¹⁹ Each iteration included more exemptions for small businesses and increased eligibility requirements to qualify for leave.²⁰ The Act's controversial nature and resulting compromises provide an informative backdrop for courts to consider when interpreting its provisions.

This Part will discuss the circumstances surrounding Congress's decision to pass the Act, the protections provided by the Act, how the Act compares to other minimum labor standards statutes, and the pitfalls of the Act. Section A will discuss Congress's motivations for passing the FMLA, the lengthy compromise that made the FMLA possible, and the basic structure of the Act. Section B compares the statutory language of the FMLA's retaliation provisions to that of other minimum labor standards and discusses how the differences in language should impact a court's causation analysis. Section C then highlights how racial and economic disparities in accessing FMLA protected leave make it even more critical that courts correctly apply the statutory language to claims in which employees are attempting to assert their rights.

A. THE FMLA'S PASSAGE AND BASIC STRUCTURE

When Congress passed the FMLA, it aimed to ease the stresses of employees and allow them to balance their family and work responsibilities without fear of job loss.²¹ Congress found that the lack of employment policies to accommodate working parents could force them to choose between their jobs and parenting their children.²² They were also concerned that there was inadequate job security for employees with serious health conditions.²³ These findings were supported by subcommittee hearings where employees testified about being forced to resign from their positions to care for terminally ill parents and children.²⁴

19. *Id.* at 1905–06.

20. *Id.*

21. *See* 29 U.S.C. § 2601(b) (listing the purposes of the act to include balancing the demands of the workplace with the needs of families, entitling employees to take reasonable leave for medical reasons, birth or adoption of a child, and for the care of a family member, and to promote national interests in preserving family integrity).

22. *Id.* § 2601(a)(3).

23. *Id.* § 2601(a)(4).

24. Lisa B. Feinstein, Note, *The Forgotten Public Policies Behind the Family and Medical Leave Act: Burden of Proof Structures Placing Unnecessary Burdens on Employees' Statutory Entitlement*, 73 *FORDHAM L. REV.* 2561, 2561

Congress sought to address these issues by providing federally protected medical leave benefits, reinstatement guarantees, and protections from interference and discrimination. Under the FMLA, eligible employees are entitled to up to twelve weeks per year of unpaid leave to care for a newborn or child newly placed for adoption or foster care; a child, spouse, or parent with a serious health condition; or their own serious health condition.²⁵ The twelve weeks can be used continuously or intermittently to fit the needs of the employee.²⁶ For those who take FMLA leave, the Act does not provide any sort of paid leave, but instead guarantees reinstatement to the employee's former, or equivalent, position upon their return from unpaid leave.²⁷

Additionally, Congress protected employees who exercise their rights under the Act. Specifically, the Act prohibits employers from interfering with an employee's FMLA rights.²⁸ The Act also makes it unlawful for employers to discriminate against employees for opposing acts made unlawful under the FMLA or participating in official proceedings or inquiries under the Act.²⁹ The inclusion of interference and retaliation prohibitions creates the primary mechanism for employees and agencies to enforce

(2005) (describing testimony from two individuals who had to choose between their jobs and caring for their immediate family members).

25. See 29 U.S.C. § 2612(a)(1)(A)–(D).

26. *Need Time?: The Employee's Guide to the Family and Medical Leave Act*, U.S. DEP'T OF LAB. 6 (2015), <https://www.dol.gov/sites/dolgov/files/WHDLegacy/files/employeeguide.pdf> [<https://perma.cc/68YD-RRQZ>] (explaining that FMLA leave can be used as a single block of time, smaller blocks of time, or on a part-time basis).

27. See 29 U.S.C. § 2614(a) (entitling employees, upon return from leave, to their former or an equivalent position); Steele, *supra* note 17, at 1905 (explaining that the FMLA provides unpaid leave). Notably, there has been a recent rise in states enacting paid family medical leave programs, which helps to ease the financial burden of taking medical leave. See *State Paid Family Leave Laws Across the U.S.*, BIPARTISAN POLY CTR. (Jan. 26, 2024), <https://bipartisanpolicy.org/explainer/state-paid-family-leave-laws-across-the-u-s> [<https://perma.cc/5TH3-R82F>] (discussing these programs); see also Alyssa Shaw, *Change the System, Not the Woman: Addressing Workplace Inequities Stemming from the American Economy*, MINN. L. REV. DE NOVO BLOG (Dec. 20, 2024), <https://minnesotalawreview.org/2024/12/20/change-the-system-not-the-woman-addressing-workplace-inequities-stemming-from-the-american-economy> [<https://perma.cc/W2DV-4JCQ>] (discussing how paid family leave laws have increased labor participation for mothers, but do not fully address the trade-offs of taking leave).

28. 29 U.S.C. § 2615(a)–(b).

29. *Id.*

statutory protections.³⁰ Without these provisions, employers would be free to treat those who exercise their rights under the FMLA differently without administrative or legal consequence.

B. THE FMLA IN COMPARISON TO OTHER MINIMUM LABOR STANDARDS STATUTES

The FMLA and other federal minimum labor standard statutes are crucial to the well-being of employees, and broad retaliation provisions are necessary for effective enforcement. Workers often carry the burden of reporting violations if they want their employer to be held accountable, and without retaliation protections, workers are less likely to report violations.³¹ Federal minimum labor standards provide the floor that employers must meet.³² Each minimum labor standards statute was enacted to remedy defects in employment law that could not be corrected through market pressure, such as correcting labor conditions detrimental to minimum standards of living (Fair Labor Standards Act),³³ protecting from workplace hazards (Occupational Safety and Health Act),³⁴ and promoting long-term well-being through employee benefit plans and pension plans (Employee Retirement Income Security Act).³⁵

All federal minimum labor standards are strengthened by anti-retaliation provisions, but the specific prohibited acts and text of each statute varies.³⁶ Nonetheless, each provision

30. See Steele, *supra* note 17, at 1982 (“Congress adopts retaliation prohibitions as a primary mechanism for enforcing statutory protections in all employment statutes.”).

31. See *Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation*, NAT’L EMP. L. PROJECT (June 24, 2019), <https://www.nelp.org/insights-research/exposing-wage-theft-without-fear> [<https://perma.cc/6R3C-T7XL>] (explaining how retaliation provisions are necessary for any law protecting workers’ rights to be effective).

32. Feinstein, *supra* note 24, at 2568–70 (comparing the FMLA to child labor laws, minimum wage, Social Security, health and safety laws, and pensions and welfare benefit laws all of which established minimum benefits or protections for employees).

33. 29 U.S.C. § 202 (noting the policy of the FLSA is “to correct and as rapidly as practicable to eliminate” labor conditions that are detrimental to maintain the minimum standard of living).

34. *Id.* § 651(b) (“Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . .”).

35. *Id.* § 1001 (indicating that the purpose of ERISA is to ensure participants of private pension and benefit plans do not lose the benefits they are owed).

36. Steele, *supra* note 17, at 1919.

typically has one or multiple of the following: an opposition clause, a participation clause, or an interference clause.³⁷ Opposition clauses protect employees by prohibiting employers from taking adverse action against those who oppose acts made unlawful by a statute.³⁸ Participation clauses protect employees from adverse action for their participation in any proceedings regarding the exercise of rights conferred by the statute.³⁹ Interference clauses prohibit employers from interfering with the exercise of rights guaranteed by the statute.⁴⁰

Even though the general structure of anti-retaliation provisions in minimum labor standards statutes is similar, the textual differences necessitate an in-depth analysis for each provision before determining which causation standard applies.⁴¹ Causation standards are imposed by statutes and courts for the purpose of limiting defendant liability, and heightened but-for standards should only be utilized when the text of the statute dictates it.⁴² For example, the word “because” in the Fair Labor Standards Act’s participation clause suggests a but-for causation standard applies to claims made under that provision.⁴³ In contrast, the FMLA has an interference clause, opposition clause, and participation clause, and only the participation clause uses the term “because.”⁴⁴ These subtle textual differences between provisions mean that attorneys must take care to appropriately plead FMLA retaliation claims under the more forgiving interference clause. At the same time, courts must appropriately analyze which provision gives rise to each claim by applying the specific facts and actions of the case before them. Otherwise, plaintiffs face the risk of being incorrectly held to a heightened causation standard and losing the minimum protections provided to them under the statute.

37. *Id.*

38. *Id.* (defining opposition clauses).

39. *Id.* (defining participation clauses to include actions such as filing a complaint, causing a complaint to be filed, or testifying in a proceeding).

40. *Id.* at 1920 (defining interference clauses).

41. *See id.*

42. *Id.* at 1896 (“The purpose of causation requirements in cases is to limit defendant liability. Doing so in situations in which Congress is using a retaliation provision of a statute to undergird the duties and rights created in the statutes impedes the purpose of the statute.”).

43. *Id.* (“If *Gross* and *Nassar* are applied [to the FLSA participation provision], FLSA retaliation plaintiffs would be required to prove but-for causation under the FLSA.”).

44. 29 U.S.C. § 2615(b).

C. PITFALLS AND BARRIERS TO ACCESSING PROTECTED LEAVE UNDER THE FMLA

The importance of applying the correct causation standard and appropriately pleading claims becomes even more pronounced when considering the Act's numerous barriers to access. Since its passage, more than 200 million employees have benefited from the FMLA's protections, but it is not a perfect solution to the problems employees face.⁴⁵ Workers continue to face barriers to accessing protected leave, including restrictive eligibility criteria and lack of compensation during leave, making leave unaffordable, inaccessible, or impracticable for many employees.⁴⁶ Only a little over half of the working adults in the United States are eligible for protected leave due to the substantial eligibility requirements.⁴⁷ In addition to these eligibility requirements, some workers are not able to exercise the rights they are entitled to because they simply cannot afford to go without an income for an extended period of time.⁴⁸ This is especially difficult for low-income workers, which leads to significant racial disparities in those who benefit from the FMLA and those who do not.⁴⁹ These pitfalls of the FMLA make it even more important to ensure those who *do* exercise their rights are protected from retaliation to the extent Congress intended. This requires courts to interpret the language of the statute as written and federal circuit courts have not consistently done so.

Reinstatement to one's job after taking protected leave is the main benefit provided by the FMLA, and the primary mechanism used to enforce this right when employers violate the statute is through retaliation and interference claims. While this is

45. See *History of the FMLA*, NAT'L P'SHIP FOR WOMEN & FAM., <https://nationalpartnership.org/economic-justice/family-medical-leave-act/history-of-the-fmla> [<https://perma.cc/TBV2-DZE2>] (“[T]he FMLA has been used more than 200 million times . . .”); Joshi et al., *supra* note 11 (providing statistics showing only around fifty percent of employees are FMLA eligible, and those that are eligible face significant affordability barriers).

46. Joshi et al., *supra* note 11.

47. *Id.* (“To be eligible for FMLA, employees must work for an employer for at least one year and at least 1,250 hours in the year preceding leave. They must also work for an FMLA-covered employer, which includes all public sector agencies, public and private elementary and secondary school and private employers with at least 50 employees within 75 miles.”).

48. *Id.* (“[N]ot all workers and families have the financial resources to go without a paycheck for several weeks.”).

49. *Id.* (providing a graph showing only 19% of Hispanic immigrants and 34% of Black workers are both eligible for, and can afford to take, FMLA leave, as compared to 43% of White workers).

a similar enforcement mechanism to other minimum labor standards, the differences in the FMLA's statutory language are important to consider when interpreting the statute. The FMLA's precise statutory language is discussed further in the next Part, which includes an examination of the statute's interference and opposition clauses.

II. THE STATUTORY STRUCTURE AND INTERPRETATION OF SECTION 2615(A)

Establishing a *prima facie* case is an integral part of any successful FMLA retaliation case. To make their *prima facie* claim, a plaintiff must establish four elements: (1) the plaintiff engaged in protected activity, (2) the employer was aware of this activity, (3) the plaintiff suffered a materially adverse employment action, and, most relevant to this Essay, (4) there was a causal connection between the protected activity and the adverse action.⁵⁰ In the current employment litigation climate, causation plays a significant role in determining a plaintiff's success, regardless of which minimum labor standard statute is at play.⁵¹ Which causation standard applies to a particular employment statute is a long-debated issue and it is unclear if, or when, litigants will gain clarity from the Supreme Court.⁵² Currently, the circuits are split on which causation standard to apply to FMLA retaliation claims.⁵³ This lack of clarity means courts have discretion in choosing a causation standard, and discretion often brings inconsistency.

When determining which causation standard applies to FMLA retaliation claims, it is important to consider all of the relevant statutory text, legislative history, interpretative precedent, regulations, and policy because they serve as evidence of

50. Daiquiri J. Steele, *Integrating Interference Theory*, 104 B.U. L. REV. 185, 195 (2024).

51. Shu, *supra* note 16, at 1809 (explaining that causation is often one of the reasons why employment discrimination cases are unsuccessful under Title VII).

52. *See id.* ("Which standard should apply in any particular case has been a recurring issue since Congress first passed protections against employment discrimination back in 1964."); *see also* cases cited *supra* note 15. The Supreme Court had an opportunity to resolve the circuit split in FMLA retaliation causation in 2024 and did not take up the case. *See Lapham v. Walgreen Co.*, 145 S. Ct. 162 (2024) (mem.) (denying writ of certiorari to the Eleventh Circuit).

53. *See Steele, supra* note 17, at 1924–26 (examining the discrepancies in causation across minimum labor standards and the lack of authoritative Supreme Court decisions to resolve any splits in circuit decisions).

what Congress intended when enacting the FMLA. This Part examines the statutory language of the FMLA’s “Prohibited Acts” provision, section 2615(a), and identifies key terms impacting which retaliation claims are found under the interference clause and which are found under the opposition clause. Section A first outlines the specific language included in section 2615(a) and identifies the gaps in its provisions that leave some employees without express anti-retaliation protection. Section B then discusses how each provision could be interpreted to prohibit certain retaliation actions that are otherwise not expressly prohibited, such as firing an employee after they have taken their protected leave.

A. THE FMLA’S INTERFERENCE AND OPPOSITION CLAUSES
SERVE AS ANTI-RETALIATION PROTECTIONS, BUT SOME
CLAIMS ARE NOT EXPRESSLY COVERED

While the statutory language utilized for anti-retaliation provisions differs between employment statutes, each statute contains either an express or implied anti-retaliation provision.⁵⁴ The anti-retaliation language of the FMLA can be found in the “Prohibited Acts” provision of section 2615.⁵⁵ The term “retaliation” broadly covers any adverse action taken by an employer against any employee for engaging in protected activity.⁵⁶ The only express anti-retaliation provision in the FMLA prohibits retaliation against employees who file a charge with the Department of Labor (DOL) or otherwise participate in a DOL investigation or proceeding.⁵⁷ The focus of this Essay is on retaliation against employees for engaging in a separate and distinct protected activity—using the FMLA protected leave to which they are entitled.⁵⁸ As such, this Essay focuses on the

54. *See, e.g.*, 29 U.S.C. § 215 (prohibiting the discharge or discrimination of employees for filing complaints under the Fair Labor Standards Act); 42 U.S.C. § 2000e-3(a) (prohibiting the discrimination of employees or applicants because they opposed an act made unlawful under Title VII or for filing complaints against their employers); *see also* Steele, *supra* note 50, at 188 (“Each workplace statute comes with a built-in enforcement tool—an anti-retaliation provision.”).

55. *See* 29 U.S.C. § 2615.

56. *See Retaliation*, U.S. DEP’T OF LAB.: WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/retaliation> [<https://perma.cc/ME8Z-JLES>] (defining retaliation).

57. *See* 29 U.S.C. § 2615(b).

58. *See id.* § 2612 (describing the FMLA leave protections and qualification requirements). Unless the text of this Essay indicates otherwise, general references to “FMLA retaliation” through this Essay should be construed to

language of the “interference with rights” provision, section 2615(a), and the protections it provides to employees who experience adverse employment action after exercising their rights under the Act.⁵⁹ The full text of section 2615(a) provides:

(a) INTERFERENCE WITH RIGHTS

(1) EXERCISE OF RIGHTS

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.

(2) DISCRIMINATION

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.⁶⁰

Anti-retaliation provisions like section 2615(a) have long been recognized as an integral component to effective enforcement of minimum labor standards.⁶¹ Unfortunately for most plaintiffs who may have actionable FMLA retaliation claims, neither provision of section 2615(a) expressly covers their claims.⁶² This does not mean plaintiffs are unable to bring retaliation claims, but it introduces some uncertainty regarding a plaintiff’s ability to survive summary judgment.⁶³ The lack of an express anti-retaliation provision leaves courts to determine: (1) which provision each retaliation claim falls under and (2) which causation standard applies under that provision. As discussed below, the circuit split that exists today results in two outcomes for FMLA retaliation claims. The first result is that a court decides to analyze the claim under section 2615(a)(1) and applies motivating factor causation, and the second is that a court decides to analyze the claim under section 2615(a)(2) and applies

mean retaliation against employees for using their FMLA protected leave. The author acknowledges there are several other types of retaliation under the FMLA and does not advance any arguments relating to the causation standard that attaches to them.

59. *See id.* § 2615(a).

60. *Id.*

61. Steele, *supra* note 50, at 188 (“For over fifty years, the Supreme Court’s retaliation jurisprudence reflected the value placed on strong retaliation protections to undergird workplace statutes.”).

62. *See* Steele, *supra* note 17, at 1922–23 (explaining that only one provision of the FMLA covers a specific type of retaliation—participation—and that retaliation claims stemming from use of FMLA protected leave is not expressly covered).

63. Shu, *supra* note 16, at 1811 (discussing how the heightened but-for standard has directly caused many dismissals in the context of employment discrimination lawsuits).

but-for causation to the claim.⁶⁴ Understanding the language used in each provision sheds light on how courts can arrive at these distinct conclusions when faced with the same type of claims.

B. INTERPRETING THE INTERFERENCE AND OPPOSITION
CLAUSES TO COVER RETALIATION FOR USING PROTECTED
LEAVE

Section 2615(a)(1) is an interference clause, and unlike an express anti-retaliation clause, it does not require that plaintiffs engage in protected activity.⁶⁵ Section 2615(a)(1) covers three types of employer attempts to avoid their responsibilities under the FMLA: interfering with, restraining, and denying an employee's rights.⁶⁶ To better understand the scope of the interference provision, this Section utilizes the dictionary definitions of the terms to assist in differentiating which employer actions constitute "interfering with" versus "restraining" versus "denying" an employee's rights. An employer "interferes with" FMLA rights by making it more difficult for an employee to take leave.⁶⁷ An example of employer interference with FMLA rights is discouraging FMLA use.⁶⁸ These actions tend to make it more difficult for employees to exercise their rights because they feel pressured not to take the leave they are entitled to. An employer "restrains" an employee from exercising FMLA rights when it limits or controls an employee's use of FMLA leave.⁶⁹ An example of restraining FMLA rights is when an employer manipulates an employee's work hours to require them to make up for an FMLA covered absence.⁷⁰ This manipulation tactic results in

64. *See infra* Part III.

65. *See Steele, supra* note 50, at 191 ("The most crucial difference between retaliation claims and interference claims is that retaliation claims require that the plaintiff engaged in a protected activity, while interference claims do not.").

66. *See* 29 U.S.C. § 2615(a)(1).

67. *Interfere with*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/interferes%20with> [<https://perma.cc/KJ8G-MQJE>] (defining "interfere with" to mean "to make (something) slower or more difficult.>").

68. *Fact Sheet #77B: Protection for Individuals Under the FMLA*, U.S. DEPT. OF LAB. WAGE & HOUR DIV. (Dec. 2011), <https://www.dol.gov/agencies/whd/fact-sheets/77b-fmla-protections> [<https://perma.cc/P2CC-GK47>].

69. *Restrain*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/restrain> [<https://perma.cc/TU23-L8GU>] (defining "restrain" to mean "limit, restrict, or keep under control").

70. *Cf. Fact Sheet #77B: Protection for Individuals Under the FMLA, supra* note 68 ("Examples of prohibited conduct include . . . [m]anipulating an employee's work hours to avoid responsibilities under the FMLA . . .").

employees not actually benefitting from FMLA leave and instead serves as a type of flexible schedule where they must make up the hours they missed at another time. Lastly, an employer denies an eligible employee their FMLA rights when they refuse to grant requests for qualifying leave.⁷¹ These denials manifest as refusing leave despite an employee's eligibility, or denying specific, covered absences after an employee's application is approved.⁷²

Some courts conclude that FMLA retaliation claims can be brought under the interference clause because taking adverse action against an employee after they use their protected leave can be considered interfering with, restraining, or denying their rights.⁷³ When the FMLA was enacted, the established understanding of "interference" and "restraint" included employer actions that deter employees' participation in protected activity.⁷⁴ If an employee can expect to be fired or otherwise disciplined when they exercise their FMLA rights, they are less likely to exercise those rights because they must decide between caring for themselves (or a qualified family member) or maintaining their employment.⁷⁵ Because the term "interfere" is sufficiently broad to encompass the range of activities related to exercising FMLA rights, the placement of FMLA retaliation claims under this

71. *Deny*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/deny> [<https://perma.cc/PAP3-EP53>] (defining "deny" to mean "to refuse to grant").

72. *Cf. Fact Sheet #77B: Protection for Individuals Under the FMLA*, *supra* note 68 ("Examples of prohibited conduct include . . . [r]efusing to authorize FMLA leave for an eligible employee . . .").

73. *See Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 167 (2d Cir. 2017) ("Firing an employee for having exercised her rights under the FMLA is certainly 'interfer[ence]' with or 'restrain[t]' of those rights . . . terminating an employee who has taken leave is itself an outright denial of FMLA rights."); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 160 n.4 (1st Cir. 1998) (determining that retaliation for exercising rights under the FMLA can be read into § 2615(a)(1)); *see also* Megan VanGilder, *In Search of a Standard: Unraveling the Emerging Circuit Split over the Proper Causation Standard for Retaliation Claims Under the FMLA*, U. CIN. L. REV. BLOG (Aug. 7, 2024), <https://uclawreview.org/2024/08/07/in-search-of-a-standard-unraveling-the-emerging-circuit-split-over-the-proper-causation-standard-for-retaliation-claims-under-the-fmla> [<https://perma.cc/5RMB-EFHZ>] ("Section 2615(a)(1) appears to have stronger support as the proper statutory basis for retaliation claims.")

74. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001).

75. *Id.* ("[A]ttaching negative consequences to the exercise of protected rights surely 'tends to chill' an employee's willingness to exercise those rights . . .").

provision is the better reading of the statute. Under this view, asserting FMLA rights through application for leave or use of protected leave is distinct from opposing an unlawful practice under section 2615(a)(2).⁷⁶

In contrast, section 2615(a)(2) is an opposition clause, which prohibits employers from taking adverse employment action against an employee because they opposed a practice made unlawful by the statute.⁷⁷ In general, opposing a practice means filing lawsuits, complaining to administrative agencies, or in some cases, reporting violations internally.⁷⁸ These actions usually involve affirmatively reporting violations of statutory rights in good faith.⁷⁹ However, the plain meaning of “oppose” only requires that an employee act “against” the unlawful practice.⁸⁰ Employees who exercise their rights under the FMLA are inherently “against” being denied those rights, at least as far as it applies to their own exercise of those rights.⁸¹ Put differently, someone who attempts to assert a right would logically oppose being denied that right. This reading of the statute is quite attenuated and conflicts with the historical understanding of what it means to oppose an act made unlawful.

The language provided in section 2615(a) expressly protects certain types of actions, but when plaintiffs allege their employers took adverse action against them for exercising their rights, the application of the statute becomes more ambiguous. As a result, courts are left to decide which section allows plaintiffs to bring these retaliation claims. The next Part discusses how courts have approached this issue. Section A explicitly discusses the interpretative methodology of courts that place claims under section 2615(a)(1) and briefly examines how the overturning of the *Chevron* doctrine does not necessarily invalidate these courts’ interpretation of the statute. Section B then goes on to

76. *Woods*, 864 F.3d at 167 (“Being fired for *taking* FMLA leave cannot easily be described as ‘opposing any practice made unlawful’ by the FMLA.”).

77. *Steele*, *supra* note 17, at 1919.

78. *Steele*, *supra* note 50, at 193 (explaining the types of actions that opposition clauses protect).

79. *Id.*

80. *Oppose*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/oppose> [<https://perma.cc/L4GZ-4HKY>] (defining “oppose” to mean “to place opposite or against something”).

81. *Cf. Yashenko v. Harrah’s NC Casino Co., LLC*, 446 F.3d 541, 546 (4th Cir. 2006) (describing section 2615(a)(2) as the *only* proscriptive provision protecting employees from discrimination or retaliation for exercising their substantive rights under the FMLA).

discuss the other side of the circuit split in which courts root these retaliation claims in section 2615(a)(2) and rely on precedent from other minimum labor standards statutes to interpret the FMLA.

III. COURT AND AGENCY INTERPRETATIONS OF CAUSATION FOR FMLA RETALIATION CLAIMS

Since the passage of the FMLA in 1993, there has been ample opportunity for federal courts and agencies to weigh in on the issue of causation in FMLA retaliation cases. Federal circuit court interpretations of causation are inconsistent, and two contradicting understandings of causation have created a circuit split. On one side are courts that place FMLA retaliation claims under section 2615(a)(1) and apply motivating factor causation.⁸² Conversely, other circuits place FMLA retaliation claims under section 2615(a)(2) and consequently apply but-for causation.⁸³ This separation in the circuits results from the courts employing varying levels of statutory analysis, deference, and integration of Title VII precedent. Section A examines the interpretative methodology of the circuits that adopt motivating factor causation and discusses how a DOL regulation (the Regulation) has historically impacted courts' analysis. Circuits that exclusively apply motivating factor causation often cite deference to the Regulation as central to reaching their conclusion.⁸⁴ But, this Essay argues the plain text of the statute supports the use of motivating factor causation, regardless of deference principles. Section B examines the interpretative methodology of the circuits that adopt but-for causation and discusses how these courts have applied precedent from other minimum labor standards statutes to their analytical framework. These circuits

82. See *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 166 (2d Cir. 2017) (“We hold that FMLA retaliation claims of the sort [the plaintiff] brings in this case are grounded in 29 U.S.C. § 2615(a)(1) and a ‘motivating factor’ causation standard applies to those claims.”); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 271–72 (3d Cir. 2017) (deferring to Department of Labor regulations that locate the FMLA’s anti-retaliation provision in section 2615(a)(1) and impose a mixed-motive, rather than but-for, causation standard).

83. See *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 245 (4th Cir. 2020) (locating the FMLA’s anti-retaliation provision in section 2615(a)(2)); *Lapham v. Walgreen Co.*, 88 F.4th 879, 890–91 (11th Cir. 2023) (concluding section 2615(a)(2) is the source of FMLA retaliation claims and interpreting the section to require but-for causation).

84. See, e.g., *Egan*, 851 F.3d at 271–72 (applying *Chevron* deference to Department of Labor regulations and upholding a mixed-motive approach).

exclusively apply but-for causation because of the longstanding Title VII precedent dictating that the words “because of” indicate a Congressional intent to impose but-for causation.

A. INTERPRETATIVE METHODOLOGY OF CIRCUITS ADOPTING
MOTIVATING FACTOR CAUSATION

Courts that adopt the motivating factor causation standard arrive at this standard by analyzing their cases under section 2615(a)(1).⁸⁵ Under these circuits’ view, motivating factor causation is supported by the plain language of the provision and is consistent with the statutory text of section 2615(a)(2).⁸⁶ However, neither circuit court adopting this standard is persuaded by the statutory language alone in establishing its causation standard. Instead, they also rely on the Regulation, which states two important rules: (1) retaliation and discrimination constitutes interference under the Act, and (2) employers cannot use an employee’s exercise of their rights under the FMLA as a negative factor in employment decisions.⁸⁷ The first rule clarifies that the DOL believes FMLA retaliation claims fall under the protections of section 2615(a)(1).⁸⁸ The second establishes that the DOL applies motivating factor causation when examining claims.⁸⁹ The Regulation proves to be an integral component in deciding to apply motivating factor causation to FMLA retaliation claims.

Under the now-overturned *Chevron* doctrine,⁹⁰ several circuit courts deferred to the Regulations and imposed a mixed-

85. *Woods*, 864 F.3d at 166 (holding FMLA retaliation claims like the plaintiffs are grounded in section 2615(a)(1)); *Egan*, 851 F.3d at 271 (explaining that DOL regulations identify section 2615(a)(1) as the operative provision for anti-retaliation claims and deferring to the regulations).

86. *Woods*, 864 F.3d at 167 (explaining that firing an employee for having exercised their rights under the FMLA constitutes “interference” within the plain meaning of the word).

87. 29 C.F.R. 825.220(c) (2026) (“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. . . . By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions . . .”).

88. *See id.*

89. *See id.*

90. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that if a statute is silent or ambiguous, courts should defer to “permissible” agency constructions of that statute); *see also Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron* and

motive standard. For example, the Second Circuit concluded that section 2615(a)(1)'s nonuse of language historically interpreted to indicate but-for causation—such as “because,” “for,” or “by reason of”—demonstrates that the provision is silent on the issue and that deference to the Regulations was warranted.⁹¹ Similarly, the Third Circuit reasoned that section 2615(a)(1) is ambiguous on the issue of causation because “interfere with” is susceptible to multiple interpretations.⁹² Given the dispute over the proper causation standard, it is not surprising that these courts found the DOL’s regulation to be a permissible reading of the statute. In analyzing whether the regulation was reasonable, both courts discussed how motivating factor causation is consistent with the sweeping prohibitions of section 2615(a)(1), comports with the FMLA’s broad purposes, reflects the well-reasoned judgment of the DOL Secretary, and conforms with the understanding of employers at the time the FMLA was passed.⁹³

In June 2024, the Supreme Court overturned the *Chevron* doctrine to the extent it *required* judges to defer to reasonable agency interpretations of ambiguous statutes.⁹⁴ Judges are now directed to exercise their own independent judgment in determining the meaning of statutory provisions.⁹⁵ This does not foreclose the ability of judges to seek aid from the interpretations of agencies responsible for implementing the particular statute at issue, especially when those interpretations stem from the agency’s expertise.⁹⁶ The Court also conceded that there are

holding that courts cannot defer to an agency’s interpretation of the law simply because a statute is ambiguous).

91. *Woods*, 864 F.3d at 168 (reasoning that the lack of terms like “because” or “by reason of” in the text of section 2615(a) does not indicate an intent by Congress to impose but-for causation).

92. *Egan v. Del. River Port Auth.*, 851 F.3d 263, 271 (3d Cir. 2017) (“[B]ecause the term ‘interfere with’ is susceptible to multiple interpretations, and the statutory language does not directly address whether retaliation is among the actions an employer is prohibited from taking under the FMLA, Congress has not spoken on the ‘precise question’ before us.”).

93. *See Woods*, 864 F.3d at 169; *Egan*, 851 F.3d at 272–73.

94. *Loper Bright*, 144 S. Ct. at 2261 (“[B]y directing courts to ‘interpret constitutional and statutory provisions’ without differentiating between the two, Section 706 makes clear that agency interpretations of statutes . . . are *not* entitled to deference. Under the APA, it thus ‘remains the responsibility of the court to decide whether the law means what the agency says.’”).

95. *Id.* at 2273.

96. *Id.* at 2262 (“[C]ourts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations ‘constitute a body of experience and informed judgment to

situations in which the best reading of a statute is that it delegates discretionary authority to an agency.⁹⁷ It is unclear how this change in statutory interpretation principles will affect administrative law as a whole, and it is certainly unclear if it impacts the reasoning of the Second and Third Circuits. This Essay recognizes the ramifications of this decision remain unknown and instead focuses its arguments on principles separate and independent from interpretative deference to agencies.

B. INTERPRETATIVE METHODOLOGY OF CIRCUITS ADOPTING BUT-FOR CAUSATION

Courts that adopt the but-for causation standard root their statutory analysis in

section 2615(a)(2), the opposition clause. For example, in placing all FMLA retaliation claims under section 2615(a)(2), the Fourth Circuit interprets the clause broadly to not only protect employees who oppose unlawful practices, but to also protect employees from retaliation for exercising their substantive rights.⁹⁸ And, while the Eleventh Circuit has a storied history of applying sections 2615(a)(1) and 2615(a)(2) inconsistently to FMLA retaliation claims,⁹⁹ most recently, it specifically applied section 2615(a)(2).¹⁰⁰ The next step in interpreting the language of section 2615(a)(2) stems from key cases interpreting the language of the Age Discrimination in Employment Act (ADEA) and Title VII of the Civil Rights Act (Title VII).

In *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013), the Supreme Court held that Title VII retaliation claims must be established under the but-for causation standard based on the text, structure, and history of Title VII.¹⁰¹ First, the Court explained how Congress legislates with a presumption of the default but-for causation requirement unless

which courts and litigants may properly resort for guidance' consistent with the APA." (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

97. *Id.* at 2263.

98. *Fry v. Rand Constr. Corp.*, 964 F.3d 239, 245 (4th Cir. 2020).

99. *See Lapham v. Walgreen Co.*, 88 F.4th 879, 890 n.15 (11th Cir. 2023) (comparing the circuit's prior case law and noting the inconsistencies in its conclusions of which provision applies to FMLA retaliation claims).

100. *See id.*

101. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362–63 (2013) ("The text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim . . . must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.").

there is an indication to the contrary in the statute itself.¹⁰² Title VII uses the phrase “because of”—which supports a finding of but-for causation—and does not include any language to indicate a contrary intent.¹⁰³ Discussion then shifts to how the Court “must give effect to Congress’s choice,” and in this case Congress chose to insert the motivating factor language exclusively in the discrimination provisions and not the provisions that apply to both discrimination and retaliation claims.¹⁰⁴ Lastly, worries of frivolous lawsuits and proper allocation of judicial resources also motivated the Court to apply but-for causation to Title VII retaliation claims.¹⁰⁵

Similar to *Nassar*, the Supreme Court in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) held that a plaintiff bringing an ADEA disparate-treatment claim must prove that age was a but-for cause of the adverse employment action.¹⁰⁶ There, the Court focused on the text of the ADEA, specifically the portion of the statute that prohibits discrimination “because of such individual’s age.”¹⁰⁷ The Court equated “because of” to “on account of” or “by reason of.”¹⁰⁸ This means that for an employer to take an action “because of age” it must mean that age was the “reason” that the employer decided to act.¹⁰⁹ Therefore, to establish a disparate treatment claim under the ADEA, a plaintiff must prove that age had a determinative influence on the outcome and was the but-for cause of the action.¹¹⁰

Nassar and *Gross* heavily influence the courts that root all FMLA retaliation claims in section 2615(a)(2) because of that provision’s use of the phrase “for opposing any practice made unlawful.” In particular, the Eleventh Circuit held that the retaliation provisions of the FMLA and Title VII are sufficiently similar to warrant applying the interpretative logic of the ADEA and

102. *Id.* at 347.

103. *Id.* at 352.

104. *Id.* at 354.

105. *Id.* at 358–59 (discussing how raising the financial and reputational costs on “employers whose actions were not in fact the result of any discriminatory or retaliatory intent” would be contrary to the structure and operation of the statute).

106. *See* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009).

107. *Id.* at 176.

108. *Id.*

109. *Id.*

110. *Id.*

Title VII to section 2615(a)(2).¹¹¹ Thus, the Eleventh Circuit reasoned, Congress *has* spoken directly to the causation issue by utilizing “for” in the statutory language to indicate but-for causation.¹¹² Practically, this means that a plaintiff must establish that the employer would not have taken the adverse employment action if not for the plaintiff’s exercise of their FMLA rights.

Notably, the Fourth, Sixth, Seventh, and Eleventh Circuits applied a heightened causation standard where it was not appropriate based on the facts before them. Each of these Circuits analyzed claims of retaliation for exercising FMLA rights under section 2615(a)(2), which is categorically incorrect when the cases before them involved employees claiming their use of FMLA protected leave led to adverse action. Specifically, retaliation claims based on an employee’s termination or other adverse action after their use or attempted use of protected leave should not have been categorized as “opposition.”

The Eleventh Circuit’s opinion in *Lapham* is a prime example of the inadequate factual analysis of the case before them as applied to the statutory text. Specifically, it relegates its discussion of the inconsistent use of each provision for FMLA retaliation claims to a footnote as if it was not the most important preliminary decision they made in the case.¹¹³ As previously discussed, choosing which provision to analyze the claim under also determines the causation standard that applies.¹¹⁴ The Eleventh Circuit’s flippant statement that “[e]ither way, our precedent establishes that § 2615(a)(2) is relevant to FMLA claims,”—made without engaging further in how the specific claim before them fit under that provision—was detrimental to the plaintiff’s case.¹¹⁵ The absence of analysis as to whether the facts underlying the retaliation claim fell under section 2615(a)(1) or section 2615(a)(2) is present in all of the circuits adopting but-for causation. This failure prevents plaintiffs from getting a fair shot at proving their cases.

111. *Id.* at 892 (explaining both statutes use “because of” or a similar equivalent, and were enacted against the historic, default of but-for causation).

112. *Lapham v. Walgreen Co.*, 88 F.4th 879, 889–90 (11th Cir. 2023).

113. *See id.* at 890 n.15.

114. *See* cases cited *supra* notes 82–83 and accompanying text.

115. *Id.*

IV. FMLA RETALIATION CLAIMS SHOULD BE
EVALUATED UNDER SECTION 2615(A)(1) AND CARRY A
MOTIVATING FACTOR CAUSATION STANDARD

The imposition of but-for causation for all FMLA retaliation claims leads to bad outcomes for plaintiffs and is contrary to the purpose and statutory text of the FMLA. The language of section 2615(a)(1) prohibits a wide range of employer actions and is more appropriately interpreted to house FMLA retaliation claims not rooted in opposition activities. While the circuits analyzing claims under section 2615(a)(1) relied on agency deference in applying motivating factor causation, this Essay argues that the text of the statute itself supports this outcome. This Part proceeds in two sections: Section A applies principles of statutory interpretation to section 2615(a) and compares its structure to other minimum labor standards statutes to conclude FMLA retaliation claims for exercise of rights should be evaluated under the interference clause, section 2615(a)(1). Section B then argues that the interference clause sufficiently overcomes the common law presumption of but-for causation based on its plain language and the FMLA's overall statutory scheme and goals.

A. THE BROAD REACH OF INTERFERENCE CLAIMS
APPROPRIATELY INCLUDES RETALIATION CLAIMS WHEN
EMPLOYEES ARE TERMINATED AFTER EXERCISING THEIR
STATUTORY RIGHTS

Retaliation stemming from an employee's attempt to exercise their FMLA rights is not expressly prohibited, but courts have nonetheless allowed these types of claims to proceed under the provisions of section 2615.¹¹⁶ Determining which provision of section 2615 to place the retaliation claims under should be a fact-specific exercise. The type of alleged retaliation should instruct which section applies. When terminated employees seek redress in court for their previous employer's impermissible consideration of the exercise of their rights under the FMLA, courts should analyze their claims under section 2615(a)(1). As a reminder, section 2615(a)(1) provides that employers may not interfere with, restrain, or deny the exercise or attempted exercise of any right provided under the FMLA.¹¹⁷ This provision has a

116. See Steele, *supra* note 17, at 1923 (explaining how terminations for requesting or taking FMLA leave have been assessed under section 2615(a)(1) or section 2615(a)(2) even though neither expressly prohibits the conduct).

117. 29 U.S.C. § 2615(a)(1).

wide reach and may be interpreted to cover many types of employer actions.¹¹⁸

The interference clause provides a broad range of prohibited acts and is the better provision to root claims of retaliation for exercising FMLA rights.¹¹⁹ This section encompasses any acts by the employer that make it more difficult for an employee to take leave (interfere), limit or control an employee's use of leave (restrain), or outright refuse to grant requests for leave (deny).¹²⁰ A key component of the FMLA is that it entitles employees to be reinstated into their same or similar position after the end of their leave.¹²¹ The act of reinstating the employee is the final step in granting an employee's request for FMLA leave, and by failing to do so employers effectively deny the request in whole after leave is taken.¹²²

The opposition clause, section 2615(a)(2), is not appropriately situated to house FMLA retaliation claims outside of those specifically enumerated. Section 2615(a)(2) expressly prohibits discharge or discrimination against employees who *oppose acts made unlawful by the FMLA*.¹²³ The opposition clause protects a specific employee action that is less formal than participation in a proceeding but is more active than silently disagreeing with an employer action.¹²⁴ For example, opposition in the FMLA context could include an employee's complaints to human resources when their supervisors refuse to approve an FMLA-covered absence. However, it is difficult to see how an employee who simply

118. For examples, see *supra* Part II.

119. Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 350 (2003) (describing how the FMLA interference clause appears to be modeled after the NLRA interference provision, which has long been interpreted to be broader than a prohibition on discrimination).

120. See *supra* notes 67–72.

121. 29 U.S.C. § 2614(a)(1).

122. See *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 167 (2d Cir. 2017) (“[T]erminating an employee who has taken leave is itself an outright denial of FMLA rights.”).

123. 29 U.S.C. § 2615(a)(2).

124. Craig R. Senn, *Redefining Protected “Opposition” Activity in Employment Retaliation Cases*, 37 CARDOZO L. REV. 2035, 2038–39 (“Protected activity under the opposition clause encompasses *less formal* reports or protests, such as making internal complaints about harassing workplace conduct to a supervisor or Human Resources department. In contrast, protected activity under the participation clause encompasses *more formal* reports, protests, or related conduct, such as actually filing ‘charges’ or claims with the Equal Employment Opportunity Commission.”).

exercises their FMLA rights has opposed an act made unlawful by the Act.

Retaliatory firings after exercising FMLA rights fail to meet the requirements of opposition claims. As the Supreme Court interprets the term in employment statutes, “opposition” requires both an honest, good-faith belief that unlawful conduct occurred and that the employee report such conduct.¹²⁵ When employees take FMLA leave they are not reporting any unlawful conduct that has previously occurred. Exercising their rights under the FMLA may require them to submit documents to their human resources department or notify their supervisor of their absence, but those reports and notices are not active reports of unlawful conduct. Additionally, the unlawful conduct in these cases occurs *after* the employee has exercised their right, so it does not meet the requirement that the acts occur prior to the report.

Choosing which provision to analyze FMLA retaliation claims under is only half the battle. Determining which causation standard applies under the interference clause is just as, if not more, important in determining the success of a plaintiff’s case. The following Section argues that the text of section 2615(a)(1) only requires plaintiffs to prove that their employers impermissibly considered their exercise of FMLA rights in their decision to terminate the employment relationship.

B. SECTION 2615(A)(1) REQUIRES PLAINTIFFS TO ESTABLISH MOTIVATING FACTOR CAUSATION

A preliminary comparison of the language in section 2615(a)(1) to *Gross* and *Nassar* reveals that their holdings are inapplicable to the section. In both cases, the Court found that the statutory provisions in the ADEA and Title VII, respectively, require plaintiffs to establish but-for causation.¹²⁶ The interference clause does not contain the terms “because of,” making these prior Supreme Court holdings inapplicable when

125. *Id.* at 2045–46 (discussing the elements of a claim under the opposition clauses of the Americans with Disabilities Act, Title VII, and the ADEA).

126. *See* *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (“The words ‘because of’ mean ‘by reason of: on account of.’ Thus, the ordinary meaning of the ADEA’s requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer decided to act . . . [A] plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.”); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013) (comparing the statutory language of Title VII’s anti-retaliation provision and concluding it lacks any meaningful distinction from that in the ADEA, which requires a showing of but-for causation).

interpreting the correct causation standard. The clause also lacks any meaningfully similar language like “for” that could be construed as a synonym to “because of.”¹²⁷

The Court in *Nassar* also found that Congress legislated Title VII against the background of tort law, which has a presumption that an action cannot be the cause of an event if the event would have occurred without the action in question.¹²⁸ The Court has been criticized for its comparison of Title VII claims to private tort law, and some suggest that it is wholly inappropriate to apply these default rules in the context of minimum labor standards legislation.¹²⁹ Regardless of these criticisms, the plain text of section 2615(a)(1) coupled with the policy goals of the Act overcome the presumption of but-for causation.

The use of broad language in section 2615(a)(1) reflects Congress’s intent to prohibit employers from considering the use of leave in their decisions at all, regardless of whether the outcome would be the same. Interpreting the Act as a whole requires that each provision be read in the context of the whole statute.¹³⁰ The FMLA was enacted with goals of lessening the burden of family caregiving on workers, especially female workers.¹³¹ The Act works to accomplish these goals by prohibiting behaviors that would lessen an employee’s willingness to exercise those rights.¹³²

Working with these goals and purposes to provide context to section 2615(a)(1), it is important to consider how using but-for

127. See *Lapham v. Walgreen Co.*, 88 F.4th 879, 889–90 (11th Cir. 2023) (finding the use of “for” in section 2615(a)(2) to be sufficiently similar to “because of” to warrant imposing a but-for causation standard).

128. *Nassar*, 570 U.S. at 347 (2013) (discussing the principles of tort law requiring but-for causation and how this background informs the interpretation of the default rules Congress understood to be in place when Title VII was enacted).

129. See *Steele*, *supra* note 17, at 1945 (“In interpreting public law, courts should be wary of using private law as a backdrop. . . . Courts have substantially invoked private law norms to interpret public statutes and have diluted the efficacy of the statutes as a result. If courts are going to import common law principles into statutory interpretation, they need to look for guidance in areas of the common law that similarly deal with the juncture of public law and private law, particularly given the influence of the at-will employment doctrine.” (footnotes omitted)).

130. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 1, 167 (2012).

131. See 29 U.S.C. § 2601(b)(1); *id.* § 2601(a)(5).

132. See *id.* § 2615(a)(1); Risk & Bales, *supra* note 12, at 73 (“Employer actions that deter employees from participating in protected activities constitute ‘interference’ or ‘restraint’ of the employees’ exercise of their rights.”).

causation would impede the statutory purposes. Limiting defendant liability through the use of but-for causation would defeat the Act's purpose by allowing employers to factor in the use of protected leave as long as it is paired with a permissible motive.¹³³ This outcome directly impedes the purposes of the FMLA by allowing employers to deny FMLA leave to employees as long as they do it in a post-hoc manner and find any legitimate motive to justify the action. The existence of legitimate motives should not be factored into the decision of whether the employer may be held liable and should only be used in limiting the available remedies.¹³⁴

Even after the overturning of *Chevron*, courts may be permitted to use the Regulation as an interpretative aid. There is no doubt that the question of which causation standard attaches to section 2615(a)(1) is one of law in which courts have the ultimate authority to decide. However, when deciding legal questions, *Loper Bright* allows judges to look to the interpretations of the agencies responsible for implementing statutes.¹³⁵ If a court were to consider common factors that make agency regulations persuasive, the following aspects would lean in favor of the Regulation receiving weight: consistency in interpretation,¹³⁶ contemporaneous adoption of interpretation,¹³⁷ validity of its

133. Steele, *supra* note 17, at 1896–97 (“The entire purpose of minimum labor standards statutes is to provide individuals or groups with the rights contained therein The heightened but-for causation standard . . . allow[s] employers to escape liability for factoring in protected activity when making adverse employment decisions, as long as the employer can pair the impermissible motive with a permissible one.”).

134. This distinction would more appropriately balance the interests of employees and employers. *Id.* at 1893 (arguing but-for causation “strikes the wrong balance”).

135. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024). The Court cites *Skidmore* in this section of the opinion, which suggests the factors identified in that opinion may still have the power to persuade even without *Chevron* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (“The weight [given to an agency’s interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

136. *Compare* 29 C.F.R. § 825.220 (1995) (“[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions”), *with* 29 C.F.R. § 825.220 (2009) (“[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions”).

137. *See id.*

reasoning,¹³⁸ and formality of procedures.¹³⁹ All of these factors weigh in favor of interpreting section 2615(a)(1) to require only a showing of motivating factor causation, and judges may consider the persuasiveness of these factors when exercising their own independent judgment.

Analyzing FMLA retaliation claims under a motivating factor causation standard balances the interests of employees and employers without increasing the risks of frivolous litigation. The Supreme Court has expressed worries of increased frivolous litigation and overloading of judicial resources by adopting a lesser causation standard.¹⁴⁰ While it is undeniable that the number of FMLA retaliation actions could increase as plaintiffs feel more confident in their chances of prevailing, the characterization of these actions as “frivolous” is misguided. By lessening the causation standard, courts not only set an evidentiary threshold—they are also increasing the number of impermissible actions under the Act.¹⁴¹ This widening of the types of impermissible acts to align with the goals and purpose of the FMLA would logically result in more employees bringing cognizable claims for FMLA retaliation when they are terminated after taking leave.¹⁴²

CONCLUSION

In the world of at-will employment, federally protected medical leave is integral to ensuring employee well-being and familial integrity is valued above the profit margins of their employer.

138. *See Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 169 (2d Cir. 2017) (“The rule was promulgated after notice-and-comment rule-making, and it comports with the FMLA’s broad salutary purposes [I]t reflects the well-reasoned judgment of the executive officer charged with enforcing the rights granted to this country’s employees.”).

139. *Id.* (“The rule was promulgated after notice-and-comment rulemaking”).

140. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 358 (2013) (“In addition lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment.”).

141. *Gourdeau v. City of Newton*, 238 F. Supp. 3d 179, 192 n.17 (D. Mass. 2017) (“When courts or Congress reduce the causation standard from but-for to negative or motivating-factor, they are also increasing the number of conducts for which an employer might be held liable, not simply increasing the number of false positives.”).

142. This is especially true in cases where any prior disciplinary or performance issues have gone unacted upon until the employee attempts to exercise or does exercise their FMLA rights.

The FMLA is meant to ensure that employees can exercise their rights under the statute, and some federal circuits inappropriately added employer liability limitations through heightened causation standards. Analyzing FMLA retaliation claims under the interference clause and subsequently adopting motivating factor causation is the better reading of the statutory language. This reading effectuates the intent of Congress and furthers the purposes of the FMLA. Motivating factor causation gives plaintiffs a fair chance at proving their retaliation claims without unduly burdening the employers who terminate individuals for legitimate reasons—precisely the balance Congress hoped to strike in enacting the FMLA.