AN UNEVEN PLAYING FIELD: PUBLIC EMPLOYEES ARE DISADVANTAGED IN FMLA ELIGIBILITY/NOTICE DISPUTES

Sean McCormick[1]

I. INTRODUCTION

Imagine that you are a school monitor at a public high school. Your spouse is suffering from a severe illness and in order to care for him or her, you can only work at the school part-time. One day, your spouse's condition worsens, and the deputy superintendent of the school informs you that you may take leave under the Family and Medical Leave Act ("FMLA") to care for your spouse. Unbeknownst to both of you, you are not technically eligible for such leave. Relying on this assurance, you take what you believe to be FMLA leave in order to care for your ailing spouse.

Thereafter, you are so grateful to the deputy superintendent for his generosity that you write him a note thanking him for allowing you to take FMLA leave. Because of your spouse's health difficulties, you have to take leave intermittently over the next several months and are repeatedly assured by officials within your school district that you are covered under FMLA. Tragically, after battling for months, your spouse succumbs to his or her illness. Concerned about your absence from work, you contact the school

---

[1] Research Editor 2010–2011, Staff Writer 2009–2010, University of Dayton Law Review; B.A. Centre College. I would like to thank my brother Brian Borchers for lending his mastery of the English language to this comment. I would also like to thank my girlfriend Liz Forster for her love and support.

and are assured that you can take as much time as needed before returning to work; in fact, the deputy superintendent himself assures you that there is nothing to worry about. Then, with the grief of your spouse's passing still raw, you receive a telephone call from the school and are informed that your employment is terminated effective immediately. Thereafter, school district officials inform you that you were in fact never eligible for FMLA leave and have no viable claim under the statute.

This unjust factual scenario may seem farfetched but, unfortunately, it is all too real.[2] Since the passage of the FMLA in 1993, both private and public employees across this country have struggled to prevent employers from arguing that they were not eligible for leave, even though they were given affirmative misrepresentations to the contrary.[3] Employees trust their employers to give them accurate guidance regarding leave. However, when employers make mistakes, it is the employees who suffer the adverse consequences.[4]

Recently, private employees have successfully employed equitable estoppel as a common law defense to a claim of FMLA ineligibility.[5] Indeed, the implementation of equitable estoppel may be a crude remedy to put public employees on equal footing with their private sector peers.[6] However, in factual scenarios similar to the one above, equitable estoppel was an effective shield to a private employer's claim of ineligibility.[7]

Unfortunately, because of the age-old rule prohibiting estoppel of the government, the argument has failed public employees in FMLA eligibility disputes.[8] Even in sympathetic cases, like the aforementioned one, courts have been extremely reluctant to apply estoppel against the government.[9] Although the United States Supreme Court has never allowed an equitable estoppel claim against the government to proceed, it has opined that the doctrine may be applied when governmental interests are outweighed by standards of decency and fairness.[10] The hesitancy of courts to permit use of equitable estoppel as against the government has put public employees on an uneven playing field with their peers in the private sector with regard to seeking redress for relying on assurance of FMLA eligibility.

---

[2] *See* Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 8 (1st Cir. 2009).

[3] *See, e.g.*, *id.* (finding against public employee despite employer's misrepresentations about her FMLA eligibility); Minard v. ITC Deltacom Commc'ns, Inc., 447 F.3d 352, 358 (5th Cir. 2006) (finding that a private employer made misrepresentations about an employee's FMLA eligibility).

[4] *See generally Nagle*, 576 F.3d 1 (1st Cir. 2009) (an employee was terminated after her supervisor's misrepresentations led her to take FMLA leave when she was not eligible to take it).

[5] *Minard*, 477 F.3d at 359.

[6] *Nagle*, 576 F.3d at 4-5.

[7] *Minard*, 447 F.3d at 358.

[8] *See Nagle*, 576 F.3d at 6; *see also* Austin v. Winter, 286 F. App'x 31, 37 (4th Cir. 2008).

[9] Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 65-66 (1984).

[10] *See id.*

Therefore, it is essential that stronger administrative solutions are enacted to provide a remedy for public employees in FMLA eligibility disputes. One possible solution is implementing federal regulations to allow for the application of the doctrine of equitable estoppel, even though recent regulations that attempted to do so were struck down by courts.[11] Hence, if Congress or the Department of Labor ("DOL") is unwilling to explicitly create such a safeguard, it will be up to the courts to re-examine the use of equitable estoppel against the government in this context, because public employees are entitled to the same level of protection under the FMLA as private employees.

Section II of this comment briefly explains the policy aims of the FMLA and the DOL's regulatory attempts to implement those goals. In addition, this section traces the historical development of the use of equitable estoppel against the government, the recent history surrounding the use of equitable estoppel in FMLA eligibility cases, and the development of two very different standards for its use when applied by governmental employees as opposed to those in the private sector.

Section III of this comment argues that it is necessary for Congress and/or the DOL to enact a solution to this notice/eligibility problem. More specifically, the solution must protect wronged employees asserting FMLA interference or retaliation claims who reasonably relied on the employers' misrepresentations. This section will also argue that such an administrative solution, though preferable, is unlikely. Therefore, this section primarily focuses on why courts should allow public employees to use equitable estoppel as a shield to an eligibility defense.

II. BACKGROUND

The background section of this comment will focus on the general policy aims of the FMLA, illustrating the unique nature of the statute. Then, the focus will shift to the history of equitable estoppel, how that common law doctrine has been used in FMLA eligibility disputes with private employers, and why the doctrine of sovereign immunity precludes public employees from using it in this context. Next, it will address the failure of the DOL to address the problem of misrepresentations by employers to employees regarding eligibility with substantive regulations. Finally, the last section will address the DOL's newly enacted regulation that may or may not solve the problem at hand.

---

[11] *See* Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,942-43 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825).

A. Policy Aims of the Family and Medical Leave Act of 1993[12]

The FMLA was enacted "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[13] The FMLA allows "eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve month period" for a variety of reasons.[14] If an employee's FMLA rights are violated, he or she may file a complaint with the DOL or institute a private action in federal or state court.[15] Prior to the enactment of the FMLA, leave determinations were left to the discretion of individual employers. This resulted in great inconsistencies regarding when leave was allowed and when it was not.[16] As a result, approximately 150,000 Americans lost their jobs annually because their companies had no leave benefits.[17]

The FMLA was also enacted to address the modern reality that both parents are employed full-time in many households.[18] Additionally, lawmakers recognized the increasing commonality of the single-parent home,[19] which was that two-thirds of women with young children worked,[20] and that "one out of every five American workers has some responsibility for an older parent or relative."[21] However, Republican opposition to the federal legislation was palpable because "[ninety-three] percent of small businesses already offer[ed] such leave."[22] In fact, one Congresswoman stated, "[b]y passing this bill, Congress will put people out of work, cause the loss of other benefits, and take away benefit choice from employers and employees—just to mandate a benefit that not all employees can afford to take advantage of."[23]

Even though the private sector had slowly begun to adjust to the changes in the workforce, "Congress passed the FMLA [to] fill in the gaps and provide a national minimum standard for employers to meet with

---

[12] For a more in depth look at the FMLA, see WILL AITCHISON, THE FMLA: UNDERSTANDING THE FAMILY AND MEDICAL LEAVE ACT (2003).

[13] 29 U.S.C. § 2601(b)(1) (2006).

[14] Family and Medical Leave Act of 1993, 73 Fed. Reg. 7,876, 7,876 (Feb. 11, 2008) (to be codified at 29 C.F.R. pt. 825).

[15] *Id.*

[16] LINDA LEVINE, EXPLANATION OF AND EXPERIENCE UNDER THE FAMILY AND MEDICAL LEAVE ACT, CONGRESSIONAL RESEARCH SERV., 2 (2009) *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/197; *see also* ELLEN GALINSKY, ET AL., NATIONAL STUDY OF EMPLOYERS 2008, FAMILIES AND WORK INSTITUTE (2008), *available at* http://familiesandwork.org/site/research/reports/2008nse.pdf.

[17] 139 CONG. REC. H366 (daily ed. Feb. 3, 1993) (statement of Rep. Gordon).

[18] LEVINE, *supra* note 16, at 1.

[19] Caitlyn M. Campbell, *Overstepping One's Bounds: The Department of Labor and the Family and Medical Leave Act*, 84 B.U. L. REV. 1077, 1079 (2004) (citing S. REP. NO. 103-3, at 5-6 (1993)).

[20] 139 CONG. REC. H366 (daily ed. Feb. 3, 1993) (statement of Rep. Gordon).

[21] *Id.*

[22] 139 CONG. REC. H367 (daily ed. Feb. 3, 1993) (statement of Rep. Quillen).

[23] 139 CONG. REC. H396 (daily ed. Feb. 3, 1993) (statement of Rep. Grams); *see also* 139 CONG. REC. S10362 (daily ed. Aug. 4, 1993) (statement of Mrs. Kassebaum).

regards to leave."[24] Although the statute maintained minimal federal requirements, employers were still encouraged to provide more liberal leave policies than those minimum requirements.[25] The statute also empowered the DOL to enact regulations "necessary to carry out" the FMLA.[26] Armed with a grant of rulemaking authority from Congress, the DOL passed substantive regulations intended to assist in implementation of the law in 1995.[27] For the most part, those regulations remained unchanged until the DOL revised them in 2009.[28] In preparation for the revisions to the new regulations, the DOL solicited and received over 2,500 comments on the proposed changes.[29] The newly revised regulations became effective in January of 2009.[30]

After more than fifteen years in existence, the law has been met with both praise and criticism.[31] Its supporters have generally lauded the reality that the statute allows troubled employees to take time off for a serious illness, or to care for a family member, without having to quit or worry about losing their jobs.[32] On the other hand, FMLA detractors have leveled the following criticisms: (a) the law's high cost to employers; (b) many employees cannot afford to take unpaid leave; and (c) the sometimes ambiguous language of the law and its accompanying regulations.[33] To its credit, the DOL recognized that the regulations used to "fill in the gaps" of

---

[24] Campbell, *supra* note 19, at 1079.

[25] *See* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 84 (2002).

[26] 29 U.S.C. § 2654 (2006).

[27] *See generally* 29 C.F.R. pt. 825 (1995) (for the codification of the Family and Medical Leave Act).

[28] 29 C.F.R. § 825 (2009).

[29] Ashley Hawley, *Taking a Step Forward or Backward? The 2009 Revisions to the FMLA Regulations*, 25 WIS. J.L. GENDER & SOC'Y 137, 138 (Spring 2010). For an in-depth look at the DOL's notice of proposed rulemaking, see Family and Medical Leave Act of 1993, 73 Fed. Reg. 7,876 (Feb. 11, 2008) (to be codified at 29 C.F.R. pt. 825). Subsequently, the DOL issued its notice of final rules, which contained an in-depth explanation of the purpose and reasoning behind the changes. Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825).

[30] Family and Medical Leave Act of 1993, 73 Fed. Reg. at 67,934. *See generally* Darrell VanDeusen and Kelly Hoelzer, *VanDeusen and Hoelzer on the DOL's Final FMLA Regulations*, 2008 EMERGING ISSUES 3194 (2008) (generally analyzing the changes to the DOL's FMLA regulations).

[31] *See, e.g.,* Campbell, *supra* note 19, at 1100; *see also* Katherine Reynolds Lewis, *Workers Cheated Out of Time Off, Report Says: Unpaid Leave Law is Difficult to Read*, THE STAR LEDGER, June 22, 2008, at Bus. 1. *But see, e.g.,* Sen. Christopher J. Dodd, Letter to the Editor, *Another View of the Family and Medical Leave Act*, WALL ST. J., Feb. 16, 2008, at A9 (arguing that the FMLA is not as unfriendly to employees as its critics contend).

[32] Diane Cadrain, *Noble Headache: The Family and Medical Leave Act Achieves a High Purpose- - at a Price*, HR MAG., July 1, 2008 at 54; *see also* Patricia Wilson, *Clinton Expands Family Leave for Federal Workers*, REUTERS NEWS, Apr. 12, 1997.

[33] *See* Judith L. Lichtman, *Many Can't Afford to Take Family Leave*, CLEVELAND PLAIN DEALER, Sept. 8, 1999 at 9B; s*ee also* Heather Boushey, *A Family-Leave Safety Net*, AM. PROSPECT, June 2009 at 27; Carrie Mason-Draffen, *Can They Do That?*, CHI. TRIB., July 23, 2006 at Bus. 8; Lily Garcia, *When Your Supervisor Wants a Doctor's Note Every Time*, WASH. POST, Dec. 28, 2008 at K01; Amy Joyce, *Too Often, Family Leave Leaves Much to be Desired*, WASH POST, Aug. 27, 2006 at F01; Priya Ganapati, *FMLA Costs Hit $21 Billion in 2004*, INC. (Apr. 28, 2005), http://www.inc.com/news/articles/200504/fmlastudy.html; Carl C. Bosland, *FMLA Verdict Could Cost Chase Manhattan Over $8 Million*, FMLA BLOG (Apr. 3, 2008), http://federalfmla.typepad.com/fmla_blog/damages.

the Act needed to be revised.[34]

More specifically, the notice requirements of the statute have caused conflict, especially as interpreted and applied by the DOL.[35] For example, the Fifth Circuit Court of Appeals held that individualized notice requirements were consistent with the language and aims of the FMLA.[36] Disputes over the stringent timing requirements promulgated by the DOL, however, forced it to attempt balancing an employee's right to timely and accurate notice of FMLA leave with an employer's administrative struggle to quickly make such a determination.[37] Although the DOL has reacted by instituting and amending regulations, the problem has not been resolved.[38]

B. Equitable Estoppel

As one commentator stated, "[w]hen the law is against you . . . counsel should consider equity."[39] Equitable estoppel[40] was allegedly developed from the teachings of Aristotle, with ancient English Chancellors implementing it in some form.[41] The use of equitable estoppel was predominately limited thereafter to "formal matters of deeds and records" until the doctrine broadened to include "a variety of conduct and activities."[42]

The doctrine began to take its modern form in the mid-nineteenth century when a New Hampshire court determined that a misrepresentation did not need to be malicious if a reasonable person would believe it and act on it to his or her detriment.[43] Most courts today have adopted some version of the Restatement (Second) of Torts which explains:

> [i]f one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act . . . the first person is not entitled . . . to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it

---

[34] Kris Maher, *Is Family Leave Act Too Soft or Too Tough? Workers, Employers Face Off Over How to Handle the FMLA*, WALL ST. J., Nov. 21, 2007 at D1.

[35] *See, e.g.,* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 96 (2002) (invalidating 29 C.F.R. § 825.700(a) (1995)).

[36] Downey v. Strain, 510 F.3d 534, 541 (5th Cir. 2007).

[37] Dep't of Labor, *Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information*, 72 Fed. Reg. 124 (June 28, 2007).

[38] *See* 29 C.F.R. § 825.300(b) (2009) (implementing new notice requirements).

[39] T. Leigh Anderson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 378 (Spring 2008).

[40] *See generally* 28 AM. JUR. 2D *Estoppel & Waiver* § 1 (2000) (looking in depth at the history of estoppel in American law).

[41] *See id.*

[42] Anderson, *supra* note 39, at 385.

[43] Horn v. Cole, 51 N.H. 287, 295-96 (1868).

> would be unjust to deprive him of that which he thus acquired.[44]

The comment section of the Restatement clarifies that estoppel is appropriately used even where "the one making the representation believes his statement is true," and, "it is immaterial whether the person making the representation exercised due care in making the statement."[45]

However, courts have historically been extremely reluctant to apply this doctrine to governmental entities.[46] This reluctance arose from English common law concerns that the Crown could not be subject to suit absent its consent.[47] In the United States, this doctrine of sovereign immunity prevents private individuals from estopping government, except in extraordinary circumstances.[48] As a result, those attempting to hold government to its word through the use of equitable estoppel face extremely high hurdles.

1. Equitable Estoppel: FMLA and Private Employers

As previously mentioned, equitable estoppel is an effective tool in shielding ineligibility defenses in FMLA interference and retaliation claims.[49] Specifically, equitable estoppel prevents an employer from maintaining an ineligibility defense under the FMLA where: (1) it has made a misrepresentation of fact with reason to believe its employee will rely upon it; (2) the employee reasonably relied upon it; and (3) the employee suffered a detriment as a result.[50]

One attorney recently cautioned employers to "exercise extreme care when evaluating whether or not an employee is eligible for FMLA leave" because a mistaken assurance of coverage "could cost the employer thousands of dollars in litigation costs" in the future.[51] Yet another group of lawyers warned employers to carefully review their policies on the FMLA because "[w]hen giving the gift of FMLA leave when not required to do so,

---

[44] RESTATEMENT (SECOND) OF TORTS § 894(1) (1979).

[45] *Id.*

[46] *See* P.H. Vartanian, *Applicability of Doctrine of Estoppel against Government and its Governmental Agencies*, 1 A.L.R. 2D 338, 1 (2009).

[47] Alden v. Maine, 527 U.S. 706, 715 (1999).

[48] *See* Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60 (1984).

[49] *See* Minard v. ITC Deltacom Commc'ns, Inc., 447 F.3d 352, 358 (5th Cir. 2006); *see also* Dobrowski v. Jay Dee Contractors, Inc., 571 F.3d 551, 557 (6th Cir. 2009); Murphy v. Fed Ex Nat'l. LTL, Inc., 618 F.3d 893, 899 (8th Cir. 2010) (citing Reed v. Lear Corp., 556 F.3d 674, 678 (8th Cir. 2009)).

[50] *Heckler*, 476 U.S. at 59; *see also* Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 6 (1st Cir. 2009) (citing Mimiya Hosp., Inc. SNF v. U.S. Dep't of Health & Human Servs., 331 F.3d 178, 182 (1st Cir. 2003)).

[51] Sean F. Darke, Esq., *Is Your Company Inadvertently Extending FMLA Rights? It Could Cost You!*, MIDWEST LAB. & EMP. (Oct. 2009), http://www.w-p.com/CM/Articles/Articles324.asp.

employers have to be prepared to eat the entire Ox, tail and all."[52]

Many courts have reached similar conclusions. In *Minard v. ITC Deltacom Communications, Inc.*, the Fifth Circuit Court of Appeals determined that summary judgment for an employer was improperly granted, and that a genuine issue of fact existed as to whether the employee would have acted differently had her employer correctly informed her that she was ineligible for FMLA leave.[53] Although Minard's employer had granted her request for FMLA leave, the employer subsequently terminated her employment when it later discovered that she was ineligible under the 50/75 exception.[54] The court determined that ITC had made a definite misrepresentation to Ms. Minard regarding eligibility, and that she reasonably relied on it.[55] On remand, the only question was one of detriment because a genuine issue existed as to whether Minard could have delayed her leave for surgery regardless of whether or not it was FMLA leave.[56]

Analogous to *Minard*, in *Duty v. Norton-Alcoa Proppants*, an employee was injured at work, and he received a letter guaranteeing him FMLA leave.[57] He relied on the letter, and his employer subsequently terminated him when the company discovered he was ineligible for FMLA leave under the law.[58] The Eighth Circuit Court of Appeals determined that the trial court did not abuse its discretion when it estopped the employer from asserting an eligibility defense because the employer's "unintentional misleading behavior caused the employee to justifiably and detrimentally rely on the FMLA leave."[59]

Addressing noticeable discrepancies in previous opinions, the Sixth Circuit Court of Appeals recently determined that an employer may be equitably estopped from denying FMLA coverage if the aforementioned elements are shown.[60] Although the complaining employee in *Dobrowski v. Jay Dee Contractors, Inc.* could not show that he detrimentally relied on his employer's affirmative misrepresentations regarding eligibility, the court insinuated that its decision may have been different if he had proved that he would not have undergone a surgical procedure absent FMLA leave.[61] The

---

[52] Matthew T. Deffebach & Brenna Nava, *FMLA & Equitable Estoppel*, LAW 360 (Aug. 12, 2009), http://www.haynesboone.com/files/Publication/725025f7-389a-4747-a001-544564c419d9/Presentation/PublicationAttachment/6376fd52-d062-4cc8-af89-609ccd921eab/FMLA_and_Equitable_Estoppel.pdf.

[53] *Minard*, 447 F.3d at 359.

[54] *Id.* at 354 (explaining that FMLA excludes from compliance any employer that employs less than fifty employees at or within seventy-five miles of the worksite).

[55] *Id.* at 359.

[56] *Id.*

[57] Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 494 (8th Cir. 2002).

[58] *Id.*

[59] *Id.* (citing Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 724-25 (2d Cir. 2001)).

[60] Dobrowski v. Jay Dee Contractors, 571 F.3d 551, 557 (6th Cir. 2009).

[61] *Id.* at 558.

court explained that an "FMLA plaintiff arguing for eligibility by estoppel must have some evidence permitting a finder of fact to conclude that the employee relied on the erroneous representation of eligibility."[62] Unfortunately, most of the foregoing courts have refused to allow public employees in similar circumstances to raise the shield of equitable estoppel in FMLA eligibility disputes.

2. Equitable Estoppel: FMLA and the Government

Historically, sovereign immunity has prevented individuals from estopping the federal government, states, municipalities, or other governmental entities.[63] Drawing on English common law, the founding fathers "considered immunity from private suit central to sovereign dignity."[64] As the legendary William Blackstone explained it, "the law ascribes to the king the attribute of sovereignty, or pre-eminence . . . [h]ence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power."[65] In the United States, the Supreme Court has held that sovereign immunity applies to suits seeking either monetary damages or injunctive relief.[66]

In short, even though facts exist that may support the use of equitable estoppel between individuals, government "may not be subject to an estoppel against the assertion of its rights, when it has not consented to their defeat."[67] However, the Supreme Court, generally holding firm to the foregoing principle, has not completely barred the use of estoppel against the government in certain unforeseen circumstances.[68] For the most part, lower courts have followed the general rule, but not without hinting at the latent ambiguity associated with it.[69]

In *Heckler v. Community Health Services of Crawford County, Inc.*, the Court explained that the primary reason estoppel may not lie against the government is because the misconduct of government agents should not override society's interest in ensuring that "obedience to the rule of law is

---

[62] *Id.* at 559.

[63] Vartanian, *supra* note 46, at 1; *see also* Utah Power & Light Co. v. U.S., 243 U.S. 389, 409 (1917); Schweiker v. Hansen, 450 U.S. 785, 788 (1981).

[64] Alden v. Maine, 527 U.S. 706, 715 (1999).

[65] 1 W. BLACKSTONE, COMMENTARIES *234-35 (1765).

[66] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996).

[67] Phillips Exeter Acad. v. Exeter, 90 N.H. 472, 495-96 (1940).

[68] Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60-61 (1984).

[69] *See generally* Lucas Outdoor Adver., LLC v. City of Crawfordsville, 840 N.E.2d 449, 455 (Ind. Ct. App. 2006) (finding that generally, governmental entities are not subject to estoppel; however, in some circumstances, government entities may be estopped). *See also* Barr v. Galvin, 584 F. Supp. 2d 316, 320 (D. Mass. 2008) (explaining that circumstances in which equitable estoppel may be asserted against the government are rare and extraordinary), *summary judgment granted*, 659 F. Supp. 2d 225, 230 (D. Mass. 2009).

not undermined."[70] However, the Court opined that the government's interest in enforcing "the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government," leaving open the possibility that estoppel may be used against the government in the future. [71] The Court stated, albeit in dictum, that "affirmative misconduct" by government agents may lead to the allowance of estoppel.[72] The Court retreated from its statements in *Heckler* in a subsequent opinion in which it concluded that allowing equitable estoppel would undercut the policy aims of the law at issue.[73]

In *Office of Personnel Management v. Richmond*, a man received false information from a government official as to what his limit was on earnings that would disqualify him for a disability annuity and, as a result, he lost six months worth of disability benefits.[74] Although the Court stopped short of holding that no case existed which would allow for estoppel of the government, it determined that misstatements by government agents "cannot grant [a] respondent a money remedy that Congress has not authorized."[75] In declining to apply the doctrine of estoppel against the government, the Court indicated that such a decision might open the floodgates to a cascade of litigation.[76] Moreover, the Court declared that if Congress "wishes to recognize claims for estoppel, it knows how to do so, as it has done by statute in the past."[77]

Applying this precedent to an FMLA eligibility dispute, the First Circuit Court of Appeals did not allow a public school employee to assert equitable estoppel against the government, though it acknowledged that she may have been permitted to use the shield against a private employer.[78] In *Nagle v. Acton-Boxborough Regional School District*, a public school employee claimed she was informed multiple times that she was eligible for FMLA leave.[79] She was thereafter fired for taking leave, and thus instituted an FMLA retaliation claim.[80] However, her employer argued that she was never eligible for FMLA leave and therefore could not maintain a cause of action under the statute.[81]

---

[70] *Heckler*, 467 U.S. at 60.
[71] *Id.* at 60-61.
[72] Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 7 (1st Cir. 2009) (citing *Heckler*, 467 U.S. at 60).
[73] Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 424 (1990).
[74] *Id.* at 416.
[75] *Id.* at Syl. ¶ (b).
[76] *Id.* at 433.
[77] *Id.* at Syl. ¶ (b).
[78] Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 3 (1st Cir. 2009).
[79] *Id.* at 2-3.
[80] *Id.* at 2.
[81] *Id.* at 4.

Although the First Circuit Court indicated that "some mechanism should exist for employees to get rulings on whether they are entitled to FMLA leave," it did not allow the plaintiff to implement equitable estoppel based upon Supreme Court precedent.[82] Indeed, the court seemed conflicted with its decision, opining that the use of equitable estoppel, though a "crude tool for making the needed policy choices and marking out limits," would "have its attractions" in certain instances.[83] Nevertheless, it ultimately concluded that the Supreme Court forbade such a course of action, and that allowing estoppel to lie in the case at hand "would be tantamount to allowing it in the mine run of cases."[84]

Given the rigidity of the foregoing precedent, several influential judges have voiced their opinions that government should take responsibility for its affirmative misrepresentations. One former U.S. Supreme Court Justice argued:

> [o]ur Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government.[85]

Similarly, the Supreme Court explained in a different context, that "men naturally trust in their government, and ought to do so, and they ought not to suffer for it."[86]

In the aforementioned *Nagle* opinion, the dissent asserted that FMLA eligibility disputes offer the ideal opportunity to allow a public employee to prevent the government from raising an eligibility defense because the FMLA does not prevent employers from granting more generous leave policies. Therefore, the use of estoppel does not violate the policy aims of the statute.[87] The dissenting judge also argued that repeated assurances by a school administrator that an employee could take FMLA leave, for which that employee is not eligible, is the type of "affirmative misconduct" by a government official the Supreme Court requires for an

---

[82] *Id.* at 6.
[83] *Id.*
[84] *Id.* at 10.
[85] St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting).
[86] Menges v. Dentler, 33 Pa. 495, 500 (1859); *see also* Giglio v. United States, 405 U.S. 150, 154-55 (1972); Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 386 (1947) (Jackson, J., dissenting) (arguing that "one should not . . . have to employ a lawyer to see [if] his own government is issuing him a policy which in case of loss would turn out to be no policy at all.").
[87] *See* Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 8-9 (1st Cir. 2009) (Lipez, J., dissenting).

estoppel claim to lie.[88]

Incidentally, courts have allowed the shield of equitable estoppel in other disputes involving various federal laws.[89] Not long ago, in *In re M & S Grading, Inc.*, a group of union workers filed a Chapter 11 administrative expense claim in the amount of $559,533.55 for delinquent Employee Retirement Income Security Act ("ERISA") plan contributions against the estate of their bankrupt employer and the Internal Revenue Service ("IRS").[90] The IRS maintained a $1,108,047.15 claim in post-petition employment taxes, interest, and penalties.[91] There was not enough money in the estate to cover the full amount of either claim.[92] The IRS then filed a motion to dismiss for failure to state a claim.[93]

The union argued that the IRS's administrative claim should have been subordinated to its claim under the doctrines of equitable subordination and equitable estoppel.[94] The union's primary argument focused on the fact that the IRS had affirmatively misrepresented, by court order, that it would collect the tax monies due from the employees' paychecks.[95] The union contended that it detrimentally relied on the IRS's promise to collect the tax monies via paycheck, thus it now had to battle the IRS's huge claim.[96]

The District Court denied the United States' motion to dismiss, and found that while the union faced a difficult path to showing that the IRS's conduct "should lead to equitable subordination or equitable estoppel of its claim, the allegations in the complaint [were] sufficient 'to raise a right to relief above the speculative level.'"[97] In allowing the equitable claims to move forward, the court pointed to *Office of Personnel Management v. Richmond*, stating that "the ability of a litigant to assert equitable estoppel against the Government is an open question."[98]

C. The Failure of 29 C.F.R. § 825.110(d)

The DOL has struggled to implement equitable principles into FMLA regulations. A prior DOL regulation made an employee eligible for FMLA leave if his or her employer either failed to timely advise him or her

---

[88] *Id.* at 9 n.10 (Lipez, J., dissenting).

[89] *See* W. Fulton Broemer, *Equitable Estoppel in ERISA Benefit Claims*, BROEMER & ASSOCS., http://www.broemerlaw.com/articles/Estoppel%20in%20ERISA%20Litigation.pdf (last visited Mar. 19, 2011).

[90] Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Benefit Plan v. IRS (*In re* M & S Grading, Inc.), A09-8056-TJM, No. BK02-81632-TJM, 2010 Bankr. LEXIS 1258, at *1, *4 (Bankr. D. Neb. Apr. 8, 2010).

[91] *Id.*

[92] *Id*. at *1.

[93] *Id.* at *2-3.

[94] *Id*. at *5.

[95] *Id.* at *7.

[96] *Id*.

[97] *Id.* at *10.

[98] *Id*. at *16 (citing Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 423 (1990)).

of eligibility or inaccurately determined that he or she was eligible for leave.[99] Under this regulation, employers could not "subsequently challenge the employee's eligibility."[100] However, several courts invalidated the regulation because it exceeded the DOL's "rulemaking powers by making eligible under the FMLA employees who do not meet the statute's clear eligibility requirements."[101]

Applying the now famous *Chevron* test for administrative rulemaking, the Seventh Circuit Court of Appeals determined that 29 C.F.R. § 825.110(d) "impermissibly widen[ed] the statutory definition of an eligible employee."[102] The court found that the FMLA was clear on the issue of eligibility in that it only provided leave to those who had worked at least 1,250 hours in the past twelve months.[103] Continuing with that reasoning, a Minnesota district court opined that "[t]he regulation is essentially a rewriting of the statute."[104]

However, one Ohio district court determined that the regulation was a permissible interpretation of the FMLA.[105] That court found that the regulation did no more than reiterate the expressed intent of Congress when it passed the law to balance the needs of family and the workplace.[106] Since Congress had not expressed a clear intent contrary to the regulation, the court moved on to the second part of the *Chevron* test and upheld the regulation, determining that it was not arbitrary or capricious.[107]

The Supreme Court heard its first FMLA case in 2002.[108] In *Ragsdale v. Wolverine World Wide, Inc.*, the Court invalidated 29 C.F.R. § 825.700(a), which penalized an employer for failing to designate an employee's leave as FMLA leave.[109] Per the regulation, if an employer failed to designate leave as FMLA leave then the leave did not count towards an employee's FMLA entitlement.[110] The Court invalidated the regulation because it required employers to provide more than twelve weeks

---

[99] 29 C.F.R. § 825.110(d) (1995).

[100] *Id.* (revised in 2009) (many of the cases holding that this section of the regulation overstepped the authority of the DOL were decided between 2000 and 2003, but the DOL did not revise the language of this section until 2009).

[101] Woodford v. Cmty. Action of Greene Cnty., Inc., 268 F.3d 51, 57 (2d Cir. 2001); *see also* Brungart v. Bellsouth Telecomms., Inc., 231 F.3d 791, 796-97 (11th Cir. 2000); Dormeyer v. Comerica Bank-Ill., 223 F.3d 579, 582 (7th Cir. 2000).

[102] *Id.* at 55. The U.S. Supreme Court's *Chevron* analysis for reviewing administrative regulations requires a court to determine: (a) whether Congress has spoken directly to the question at issue, and if so, the regulation may not contradict it; but (b) if the regulation is silent or ambiguous on the issue the court must decide whether the agency's interpretation is based on a reasonable construction of the law. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

[103] *Dormeyer*, 223 F.3d at 582.

[104] Scheidecker v. Arvig Enters., Inc., 122 F. Supp. 2d 1031, 1045 (D. Minn. 2000).

[105] Miller v. Defiance Metal Prods., Inc., 989 F. Supp. 945, 948 (N.D. Ohio 1997).

[106] *Id.*

[107] *Id.*

[108] *See* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002).

[109] 29 C.F.R. § 825.700(a) (1995).

[110] *Id.*

of leave in a twelve-month period.[111] Although the Court "did not invalidate the notice and designation provisions in the regulations, it made clear that any categorical penalty for a violation of such requirements set forth in the regulations would exceed the [DOL's] statutory authority."[112] The Supreme Court reasoned that this regulation constituted too high a penalty for an employer because the employee did not have to show the violation somehow interfered with his or her FMLA leave.[113] However, the Court also reasoned that if an employer interfered with an employee's FMLA rights, he or she may be able to show damages under his or her statutory rights.[114]

Nevertheless, even though most federal courts determined that § 825.110(d) fundamentally altered the clear eligibility requirements of the FMLA, several still permitted a wronged employee to use the common law shield of equitable estoppel against his or her employer.[115] More specifically, when an employer either failed to inform an employee of his or her eligibility, or inaccurately informed the employee she was eligible, some courts allowed the employee the use of equitable estoppel.[116] As previously discussed, a variety of courts continued this trend and permitted employees to use the shield of equitable estoppel on a case-by-case basis.[117]

D. 29 C.F.R. § 825.300 as an Administrative Solution

Six years after the Supreme Court's decision in *Ragsdale*, the DOL proposed several changes to § 825.110.[118] Similar to § 825.700(a), the DOL reasoned that § 825.110(d) "may result in an employee who is not eligible for FMLA leave being 'deemed eligible' based on the employer's lack of (or incorrect) notice to the employee."[119] As a result, the DOL decided to delete the "deemed eligible" provisions in both paragraphs (c) and (d) of § 825.110.[120] The DOL explained that:

> [i]n light of the Supreme Court's decision in Ragsdale, the Department believes that it does not have regulatory authority to deem employees eligible for FMLA leave who do not meet the 12-month/1,250-hour requirements, even where the employer fails to provide the required eligibility

---

[111] *Ragsdale*, 535 U.S. at 84.

[112] Family and Medical Leave Act of 1993, 73 Fed. Reg. 7,876, 7,887 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825).

[113] *Ragsdale*, 535 U.S. at 96.

[114] *Id.* at 89.

[115] *See, e.g.*, Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 723-25 (2d. Cir. 2001).

[116] Dormeyer v. Comerica Bank-Ill., 223 F.3d 579, 582 (2000).

[117] *See* Minard v. ITC Deltacom Commc'ns, Inc., 447 F.3d 352, 358 (5th Cir. 2006); Duty v. Norton-Alcoa Proppants, 293 F.3d 481, 493-94 (8th Cir. 2002); *Kosakow*, 274 F.3d at 723-25; Kesler v. Barris, Scott, Denn, & Driker, No. 04-40235, 2008 WL 1766667, at *10 (E.D. Mich. 2006).

[118] Family and Medical Leave Act of 1993, 73 Fed. Reg. 7,876, 7,882-83 (Feb. 11, 2008) (to be codified at 29 C.F.R. pt. 825).

[119] *Id.*

[120] *Id.* at 67,942.

notices to employees or provides incorrect information.[121]

In light of this determination, the DOL transferred the notice provisions from § 825.110(d) to § 825.300(b).[122] In addition, the DOL changed the remedy provision for an improper notice violation.[123] Under § 825.300(e), the DOL required that an employee show "individualized harm" resulting from an employer's interference with an employee's FMLA rights.[124] If the employee showed such an interference or denial, then he or she "is entitled to the remedies provided by the statute."[125]

In indicating that public employees should have a means of getting firm rulings on whether or not they are eligible for FMLA leave, the *Nagle* court opined that perhaps 29 C.F.R. § 825.300 might provide the necessary recourse, even though it did not apply to that case.[126] However, even if the Regulation failed to remedy the notice/eligibility problem with the FMLA, the Court determined that it did "suggest that statutory or administrative solutions can be crafted."[127] By the same token, the Supreme Court has deferred to Congress to formulate remedies for statutory problems.[128]

The new regulation first emphasizes the importance of employers responding quickly to employee requests for notification regarding their rights and responsibilities under the FMLA.[129] It next outlines a specific process by which employers should handle designation notice.[130] Lastly, it provides consequences for employers who fail to provide timely notice, including but not limited to "appropriate equitable or other relief."[131] This language is similar to what is found in ERISA, which also provides for equitable relief.[132]

The extent to which the changes to 29 C.F.R. § 825.300 affect cases where an employee has received assurances regarding eligibility is still largely uncertain. As previously mentioned, the notice regulations changed significantly between 2008 and 2009.[133] Whereas the old notice regulation listed very general notice requirements for employers, the new regulation added multiple sections in an apparent attempt to ameliorate the previous

---

[121] *Id.*
[122] *Id.* at 7,876, 7,883.
[123] 29 C.F.R. § 825.300(e) (2009).
[124] Family and Medical Leave Act of 1993, 73 Fed. Reg. at 7,883.
[125] *Id.*
[126] Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 6 (1st Cir. 2009) (citing 29 C.F.R. § 825.300(d) (2009)).
[127] *Id.*
[128] Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, Syl. ¶ (b) (1990).
[129] 29 C.F.R. § 825.300(c)(5) (2009).
[130] *Id.* at § 825.300(d).
[131] *Id.* at § 825.300(e). *See also id.* at § 825.400 (this enforcement provision of the FMLA regulations also authorizes the courts to use equitable relief in remedying wrongs associated with FMLA leave disputes).
[132] *See* Sereboff v. Mid Atlantic Med. Servs., 547 U.S. 356, 363 (2006).
[133] *See* 29 C.F.R. § 825.300 (1995).

version's obvious deficiencies.[134] However, in promulgating the new rule, the DOL clearly indicated that it did not believe it had the statutory authority to grant FMLA leave to those who did not meet the statutory requirements.[135] Contrary to the *Nagle* Court's reasoning, that the new regulation may have helped the plaintiff in that case, the DOL's interpretation could serve as a warning that § 825.300 will not assist wronged public employees who do not otherwise meet the statutory requirements for FMLA leave.

Clearly there is a major disconnect in how the FMLA applies to private and public employees in notice/eligibility disputes. Indeed, it is highly unlikely that Congress intended the law to work differently for private and public employees who are in the same or similar circumstances. Since the Supreme Court's decision in *Ragsdale*, however, that is exactly what has occurred with the implementation of equitable estoppel in private cases, but not in cases involving the government.

III. ANALYSIS/SOLUTION

Ideally, Congress and/or the DOL would work together to craft a remedy to the problem of assurances of FMLA coverage as it applies to all employees. Even though the DOL has worked to address this issue, its attempts thus far have failed.[136] Therefore, courts should be less apprehensive about allowing wronged government employees to use the shield of equitable estoppel when they have been misled by an employer regarding FMLA eligibility. Allowing equity to right this wrong does not violate the law, and it is also consistent with the language and the policy aims of the statute.[137]

A. Administrative/Legislative Remedy

A meaningful administrative and/or legislative remedy is needed for public employees seeking redress for relying on assurances of FMLA coverage. As previously mentioned, it is unclear to what extent 29 C.F.R. § 825.300 addresses this problem.[138] The new regulation may help alleviate the issue, but it does not directly address the problem.[139] Although it allows for equitable relief, it is unlikely this broad language will persuade courts to allow equitable estoppel to lie against the government when mandatory authority generally forbids it.[140]

---

[134] 29 C.F.R. § 825.300 (2009).
[135] Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,942-43 (Nov. 17, 2008).
[136] 29 C.F.R. § 825.110(d) (1995).
[137] *See* 29 U.S.C. § 2651(b) (2006).
[138] *See* 29 C.F.R. § 825.300 (2009). *But cf.* 29 C.F.R. § 825.300 (1995).
[139] *See* 29 C.F.R. § 825.300 (2009).
[140] *Id. See also* Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 10 (1st Cir. 2009).

Although the Regulation has consequences for interference with an employee's FMLA rights, he or she likely has no substantive rights under the statute if an employer mistakenly offers assurance of FMLA eligibility.[141] In interpreting the Court's decision in *Ragsdale*, the DOL determined that it lacked the regulatory authority to confer benefits on employees not expressly enumerated in the FMLA.[142] As a result, since the statute and regulations only expressly protect those employees that meet the statutory requirements for leave, it is quite possible that the DOL simply lacks the power to effectively protect ineligible public employees who reasonably rely on the erroneous FMLA assurances of their employers.[143] In fact, the new remedy provision which addresses an employer's failure to provide proper notice of eligibility under the statute is limited to circumstances where an employee shows that his or her employer "interferes with, restrains, or denies the employee of his or her FMLA rights . . . ."[144] Because the DOL believes that it lacks the authority to confer FMLA benefits on an employee who does not meet the statutory requirements, it is unlikely that § 825.300 will solve the problem at hand.

Based on this reasoning, and since courts are loathe to estop the government, Congress and/or the DOL need to draft a legislative or administrative solution that specifically addresses this problem. As the Supreme Court has explained, the elements of equitable estoppel should be incorporated into either the FMLA and/or the appropriate section of the C.F.R. Such affirmative action would allow courts to simply point to statutory language to protect wronged employees instead of relying on equity.[145] This proposed regulation would remedy the current situation in which the shield of equitable estoppel is at the disposal of private but not public employees in FMLA disputes. However, such a solution may prove difficult to enact because a previous attempt to penalize employers for such misrepresentations was held to improperly broaden the aims of the statute, and also caused many courts to conclude that the DOL had overstepped its regulatory authority.[146]

As previously discussed, the DOL determined that the *Ragsdale* decision barred it from conferring any FMLA benefits on ineligible employees. The latent difficulty with the issue at hand is that while the

---

[141] *Nagle*, 576 F.3d at 10 (holding that a public employee has no recourse under the FMLA for misrepresentations of eligibility by her employer); *see also* 29 C.F.R. § 825.110(d) (1995).

[142] Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,942-43 (Nov. 17, 2008).

[143] *See Nagle*, 576 F.3d at 8 (Lipez, J., dissenting) (arguing that "[t]here would be nothing untoward about requiring the district to follow through on its assurances of FMLA--'type' protection -- notwithstanding the statute's eligibility requirements -- because no law or policy forecloses the district from making such a promise.").

[144] Family and Medical Leave Act of 1993, 73 Fed. Reg. 7,876, 7,883 (Nov. 17, 2008) (emphasis added).

[145] Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, Syl. ¶ (b) (1990).

[146] Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 96 (2002); *see also* Campbell, *supra* note 19, at 1090, 1099.

FMLA maintains minimum requirements for employee leave, it does not prevent individual employers from granting broader benefit packages.[147] Normally, courts that disallow the use of equitable estoppel against the government simply explain that "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law."[148] However, that reasoning is inapplicable in the FMLA eligibility context because the statute does not limit the extent of coverage—it merely sets a baseline of minimum requirements.

Certainly, a clearer legislative or administrative solution would address some of the criticisms leveled at the FMLA. More specifically, if the elements of equitable estoppel are proven in a given case, the inability of an employer to raise ineligibility as a defense may decrease litigation costs.[149] Moreover, if courts are able to apply the doctrine of equitable estoppel in disputes between private parties, there would be nothing unlawful about implementing those elements in the current regulations. On the other hand, the failure of the DOL to solve this problem over the last seventeen years, coupled with its belief that it lacks the regulatory authority to confer benefits not authorized by the law, could make an administrative solution all but impossible.

Hence, it is unlikely that 29 C.F.R. § 825.300 will effectively remedy the issue at hand. Although the regulation provides for equitable relief in a general sense, that provision only applies if the employee shows that his or her employer interfered with his or her FMLA rights.[150] Based on the DOL's interpretation of the Supreme Court's reasoning in *Ragsdale*, an ineligible employee has no right to FMLA benefits.[151] Unfortunately, the DOL has effectively shackled itself from solving this conflict between private and public employees. Consequently, since an administrative remedy does not seem possible, public employees are left with the herculean task of trying to convince courts that their plight represents one of those rare instances where estoppel should lie against the government. Unless Congress amends the FMLA to allow for the conferral of benefits in circumstances where an employee reasonably relies on his or her employer's faulty notice of eligibility, then it is unlikely that a legislative or administrative solution to this problem exists.

---

[147] *See* 29 U.S.C. § 2651(b) ("[n]othing in [the FMLA] or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act.").

[148] Falcone v. Pierce, 864 F.2d 226, 230-31 (1st Cir. 1988) (citing Heckler v. Cmty. Health Servs. of Crawford Cnty., 467 U.S. 51, 63 (1984)).

[149] *See* Lichtman, *supra* note 33, at 9B.

[150] Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,934, 67,942-43 (Nov. 17, 2008).

[151] *Id*. at 67,942.

B. Common-Law Solution

Alternatively, courts should be less apprehensive in allowing equitable estoppel to shield the government in FMLA notice/eligibility cases for two reasons. First, the statute does not prohibit employers from conveying broader benefits packages than what is provided for in the law.[152] As a result, an agent of the government does not violate the law when he or she informs a public employee that the person is eligible for FMLA leave.[153] The pertinent section of the statute states that "[n]othing in [the FMLA] or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."[154] Based on this language, a public employee who is required to "turn square corners in dealing with [the] Government" is not mistaken when he or she reasonably believes that an employer is granting broader FMLA-type benefits.[155] Such a promise is simply not at odds with either the purpose or the language of the law.[156] Because the FMLA allows for this type of localized permutation, it is not unreasonable for a public employee to believe that more generous leave is lawful.

Second, a misrepresentation regarding FMLA eligibility by a government agent, authorized to make such a determination, is the type of "affirmative misconduct" referenced by the Supreme Court.[157] Although courts have defined affirmative misconduct as "something more than careless misstatements," this threshold is surpassed when a public employee is repeatedly assured of FMLA coverage.[158] As former Supreme Court Justice Robert H. Jackson reasoned, it is unworthy of our great government that it should be held to a lesser standard than are private entities in the same or similar circumstances.[159]

However, as the Supreme Court has explained, there are legitimate reasons for not allowing estoppel to lie against the government.[160] One such reason is that courts will not allow equitable estoppel of the government when doing so would frustrate the purpose of the law.[161] Likewise, when a government agent acts outside the scope of his or her authority, "the United States is neither bound nor estopped by acts of its officers or agents in

---

[152] 29 U.S.C. § 2651(a).
[153] Nagle v. Acton-Boxborough, 576 F.3d 1, 8 (1st Cir. 2009) (Lipez J., dissenting).
[154] 29 U.S.C. § 2651(b) (emphasis added).
[155] St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting); s*ee also Nagle*, 576 F.3d at 8.
[156] *See* discussion *supra* Part II.A.
[157] *See* Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60 (1984); *see also* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 433 (1990).
[158] *Nagle*, 576 F.3d at 5. *See also* Clason v. Johanns, 438 F.3d 868, 872 (8th Cir. 2006).
[159] *See* Fed. Crop Ins. Co. v. Merrill, 332 U.S. 380, 386 (1947) (Jackson, J., dissenting).
[160] *See* Vartanian, *supra* note 46, at 1.
[161] *Heckler*, 467 U.S. at 60.

entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."[162] As previously discussed, the doctrine of sovereign immunity drives this reasoning.[163] This concern is inapplicable in the FMLA context, however, because the law allows public employers to exercise discretion in awarding leave benefits.[164]

A second reason is that courts would not disrupt separation of powers by allowing the use of equitable estoppel because estopping the government from claiming an employee was ineligible for FMLA leave does not result in the misappropriation of government funds. Because the FMLA allows for a public employer to confer broader benefits to employees, any costs associated with such assurances are predictable.[165] Moreover, it is likely such costs were foreseen by Congress when the law was passed, because it not only allows for broader coverage than the statutory minimums, it actually encourages it.[166] Use of estoppel would simply put the issue of notice/eligibility to a jury to decide, as it does in actions involving private parties.[167]

A third reason is that allowance of the shield of equitable estoppel in these circumstances will result in a cascade of litigation that would subject government to inconsistent obligations.[168] This argument fails because the vast majority of federal laws contain specific boundaries, outside of which government agents are prohibited from acting.[169] While the FMLA provides for minimum requirements, states and localities are actually encouraged to grant broader leave benefits.[170] When such latitude is given, citizens should have the ability to hold the government to assurances that are not prohibited by law.

Additionally, FMLA disputes are often local and involve relatively small amounts of money.[171] Hence, this is not a situation where taxpayer dollars would be misappropriated.[172] In this context, the employee has already taken the FMLA leave at issue, and as a result, any economic

---

[162] Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); *see also* United States v. Guy, 978 F.2d 934, 938 (6th Cir. 1992).

[163] *See* discussion *supra* Part II.B.

[164] Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 84 (2002).

[165] *See* 29 U.S.C. § 2651(b) (2006).

[166] *Ragsdale*, 535 U.S. at 84 (2002).

[167] *See* Minard v. ITC Deltacom Commc'ns Inc., 447 F.3d 352, 359 (5th Cir. 2006).

[168] Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 433 (1990) ("To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.").

[169] *See* Heckler v. Cmty. Health Servs. of Crawford Cnty., 467 U.S. 51, 61 (1984) (finding that an entity that received excessive Medicare benefit payments did not incur a detriment because it simply had to return money "that it should never have received in the first place").

[170] 29 U.S.C. § 2651(b) (2006).

[171] *See* Nagle v. Acton-Boxborough Reg'l Sch. Dist., 576 F.3d 1, 9 (1st Cir. 2009) (Lipez, J., dissenting).

[172] *Id*. at 10.

damage to the American taxpayer occurred before the employee was terminated since that was when he or she was on leave.[173] At this point, it is hard to envision how keeping such an employee on the government payroll harms the public interest.

The fourth, and perhaps strongest, reason for disallowing estoppel to lie against the state is that it would "encroach upon the sovereignty of the government."[174] As the Government has argued, the "United States, as sovereign, is immune from suit save as it consents to be sued."[175] Although the U.S. Supreme Court has generally accepted this principle, it has not eliminated the possible use of estoppel against the government.[176] In *Heckler*, the Court opined that:

> Though the arguments the Government advances . . . are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.[177]

As illustrated, FMLA eligibility disputes represent cases where the interests of citizens outweigh the Government's sovereign immunity. The Statute provides employees with the opportunity to file interference or retaliation claims against an employer. Allowing the shield of estoppel would not create a new cause of action against governmental entities, rather it would simply give public employees an invaluable tool in holding the Government to its word.[178] The FMLA allows for such a promise.[179] The DOL has incorporated equitable relief into its newest regulation.[180] Quite simply, there is no conceivable objection to holding government to the standard it has set for itself.

Although the DOL may not have the authority to allow for the conferral of FMLA benefits on otherwise ineligible employees, the resulting landscape is untenable. The United States Supreme Court and the DOL have effectively prevented the conferral of benefits upon ineligible public

---

[173] *Id.* at 2 (the facts in *Nagle* indicated that the employee was not fired until after she had taken FMLA-type leave).

[174] Ford v. Bellingham, 558 P. 2d 821, 827 n.1 (Wash. Ct. App. 1977).

[175] United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941).

[176] Heckler v. Cmty. Health Servs. of Crawford Cnty., 467 U.S. 51, 60 (1984).

[177] *Id.* at 60-61.

[178] *See* Brandt v. Hickel, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government.").

[179] 29 U.S.C. § 2651(b) (2006).

[180] 29 C.F.R. § 825.300(e) (2009).

employees but not upon private employees.[181] What is more, private employees have found a viable alternative to the lack of an administrative remedy by using equitable estoppel.[182] As a result, private employees maintain the ability to hold their employer accountable for incorrect notices of eligibility, while public employees are left with no solution at all.[183] Because no viable administrative remedy exists and because the government cannot be estopped, wronged public employees must simply live with the consequences of their employers' mistakes; it is unfathomable to think that this is the type of inequitable application Congress intended when it passed the FMLA.

The federal government has recently offered financial bailouts to auto-manufacturers, major banks, and citizens struggling with credit.[184] Considering this unprecedented generosity, it is ironic that it would provide less protection under an existing law to its own employees. In the FMLA notice/eligibility context, the government is not protecting itself from suit, the age-old reasoning for sovereign immunity, and its position is at odds with one of the express purposes of the FMLA.[185] The federal courts should not allow governmental entities to assert sovereign immunity as a defense in circumstances where its use is inappropriate, at best.[186] To be frank, citizens should expect more from their government.

Therefore, courts should begin allowing public employees seeking redress for assurances of FMLA coverage to use the shield of equitable estoppel. A workable solution is not complicated; the Supreme Court in fact identified it in *Heckler*. Under federal law, equitable estoppel would prevent the government from maintaining an ineligibility defense where: (1) it has made a misrepresentation of fact with reason to believe that a public employee will rely upon it; (2) the employee reasonably relied on the misrepresentation; and (3) suffered a detriment as a result.[187]

---

[181] *Compare* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 96 (2002) (prohibiting the conferral of benefits on public employees), *with* Minard v. ITC Deltacom Commc'ns, Inc., 447 F.3d 352, 358 (5th Cir. 2006) (allowing the conferral of benefits on private employees).

[182] *See, e.g.*, Kosakow v. New Rochelle Radiology Assocs., 274 F.3d 706, 723-25 (2d Cir. 2001).

[183] The *Ragsdale* Court concluded that the DOL lacked the authority to confer FMLA benefits upon an otherwise ineligible employee. *Ragsdale*, 535 U.S. at 96. Therefore, whatever remedy 29 C.F.R. § 825.300(e) provides to ineligible public employees who receive faulty notice, it is clear that she is not entitled to the FMLA promised. *Id.* However, a private employee who is able to satisfy the elements of equitable estoppel is entitled to such a benefit. *See, e.g.*, *Minard*, 447 F.3d at 359 n.36 (citing *Kosakow*, 274 F.3d at 724-25) ("affirming the district court's decision to estop an employer from asserting an affirmative defense challenging an employee's FMLA eligibility when the employer's unintentional misleading behavior caused the employee to justifiably and detrimentally rely on the FMLA leave"). Therefore, whatever remedy § 825.300(e) provides to ineligible public employees, it is certainly a vastly weaker tool than equitable estoppel.

[184] JOE SCARBOROUGH, THE LAST BEST HOPE 9-10 (2009).

[185] *See* 29 U.S.C. § 2601(b) (2006).

[186] *See* discussion *supra* Part II.B.2.

[187] Heckler v. Cmty. Health Servs. of Crawford Cnty., 467 U.S. 51, 59 (1984) (citing RESTATEMENT (SECOND) OF TORTS § 894 (1979)).

It is fundamentally inequitable that government employees in this country are disadvantaged by a federal law that should provide them with at least as much protection as it provides to their private-sector counterparts. Until this inequity is remedied, a federal statute will provide public employees less protection than it does to those in the private sector. Not only is this reality unintended and unjust, it is inescapably ironic.

IV. CONCLUSION

The traditional concerns associated with the use of equitable estoppel against the government do not fit squarely with the somewhat discretionary nature of the FMLA. Allowing equitable estoppel in this context would "not violate federal law and, indeed, advances an important public policy . . . and it relies on more than a casual representation by a government official."[188] Indeed, although most courts determined that the administrative use of estoppel was improper as an impermissible broadening of the FMLA, many of those same courts then allowed wronged individuals to assert common law equitable estoppel.[189]

Government employees seeking redress for false assurances of FMLA eligibility need assistance. As previously explained, it is unlikely that 29 C.F.R. § 825.300 will administratively provide such assistance.[190] Thus, it is imperative that courts apply their powers of equity and implement the common law doctrine of equitable estoppel in this context.[191]

If courts begin to use equitable estoppel in FMLA eligibility cases, perhaps the next public school monitor who is given FMLA-type leave to care for a dying spouse will keep her job when her boss makes a mistake regarding her eligibility. On that day, the FMLA will work for those employed by the government the way it does for those in the private sector. Clearly the FMLA was intended to balance the needs of family and the workplace for all Americans, and it currently fails to accomplish this goal in FMLA notice/eligibility disputes. In short, it is time to level this uneven playing field.

---

[188] Nagle v. Acton-Boxborough, 576 F.3d 1, 10 (1st Cir. 2009) (Lipez J., dissenting).
[189] *See* discussion *supra* Part II.B.
[190] *See* discussion *supra* Part III.A.
[191] *See* discussion *supra* Part III.B.