**ANNOTATIONS AND COMMENTS**

 **Cause of Action**

The Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 *et seq.*, provides for several causes of action, including an interference claim, in which an employee asserts that his employer denied or otherwise interfered with his rights under the FMLA, and a retaliation claim, in which an employee asserts that his employer took an adverse employment action against him because he took an action protected by the FMLA.

Pattern Instruction 4.16 is intended to be used for FMLA interference claims. Pattern Instruction 4.16 is not intended to be used for FMLA retaliation cases; for such claims, please refer to Pattern Instruction 4.15., *supra*. If a plaintiff brings alternative claims for FMLA interference and FMLA retaliation based on the same adverse employment action, Pattern Instructions 4.15 and 4.16 may be merged, though the court should be careful to explain the different causation standards and should be aware of the differences in the availability of a causation affirmative defense. For a discussion of the causation standards and affirmative defense availability, please see annotation § II(H) to Pattern Instruction 4.15, *supra*, and annotation § III(B) to Pattern Instruction 4.16, *infra*.

 **Distinction Between FMLA Interference and FMLA Retaliation Claims**

To state an interference claim, the employee must show that his employer interfered with or denied him an FMLA benefit to which he was entitled. *O’Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349, 1353-54 (11th Cir. 2000). The employee “does not have to allege that his employer intended to deny the right; the employer’s motives are irrelevant.” *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1208 (11th Cir. 2001). In contrast, an FMLA retaliation plaintiff must prove that his employer retaliated against him because he engaged in activity protected by the FMLA. *See Spakes v. Broward Cnty. Sheriff’s Office*, 631 F.3d 1307, 1309-10 (11th Cir. 2011) (per curiam) (noting that an FMLA retaliation plaintiff has an increased burden of proving causal nexus that an interference plaintiff does not have).

 **Elements and Defenses**

 **Elements Common to Interference and Retaliation Claims**

To prevail on an FMLA interference claim or an FMLA retaliation claim, the plaintiff must be eligible for FMLA leave, be entitled for FMLA leave, and give the employer proper notice of the need for FMLA leave. For a discussion of these elements, please see the annotations and comments following Pattern Instruction 4.15, *supra*.

A “pre-eligible” employee may state an interference claim based on interference with “post-eligibility” FMLA leave. *Pereda v. Brookdale Senior Living Cmtys., Inc.*, 666 F.3d 1269, 1275 (11th Cir. 2012) (holding that “a pre-eligible employee has a cause of action if an employer terminates her in order to avoid having to accommodate that employee with rightful FMLA leave rights once that employee becomes eligible”).

 **“Lack of Causation” Affirmative Defense**

To prove an FMLA interference claim, a plaintiff does not have to prove a “causal nexus” between the FMLA leave and the employer’s action. *Spakes v. Broward Cnty. Sheriff’s Office*, 631 F.3d 1307, 1309-10 (11th Cir. 2011). Rather, the plaintiff must prove “that he was denied a benefit to which he was entitled under the FMLA.” *Id*. at 1309. “[T]he causal nexus element is the “increased burden” that a retaliation plaintiff faces that an interference plaintiff does not.” *Id*. at 1310. Eleventh Circuit “cases make clear that a causal nexus is not an element of an interference claim, but that the employer can raise the lack of causation as an affirmative defense.” *Id*. at 1310. Therefore, if the employee alleges that the employer interfered with the employee’s FMLA rights, the employer may prevail if it shows that the employer would have taken the same action – such as refusing to reinstate the employee following FMLA leave – even if the employee had not taken FMLA leave. *Id.; accord Schaaf v. Smithkline Beecham Corp.*, 602 F.3d 1236, 1241 (11th Cir. 2010); *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1208 (11th Cir. 2001) (“[I]f an employer can show that it refused to reinstate the employee for a reason wholly unrelated to the FMLA leave, the employer is not liable.”).

 **Remedies**

For a discussion of the remedies available to a plaintiff who prevails on an FMLA claim, please see the annotations and comments following Pattern Instruction 4.15, *supra*.