THE FAMILY-MEDICAL LEAVE ACT
You May Have More Eligible Employees Than You Think

The FMLA affords eligible employees with up to 12 weeks of unpaid leave for certain qualifying reasons, the primary being a serious health condition of the employee, or if the employee is needed for the care of a serious health condition of a spouse, son, daughter or parent.[1] For serous health conditions, the employee can exhaust the 12 weeks intermittently in increments of an hour or less. Except in very limited circumstances, an employer has to return the employee to the same position held when the leave began, or provide the employee a comparable position (substantially similar pay and benefits, and working conditions). An employer may not interfere with or retaliate for an employee's exercise of FMLA leave rights. For example, an employer cannot consider FMLA-covered time away from work as a violation under an attendance program, including "no fault" policies.

Employees are eligible for these FMLA protections if they work for a covered employer, and: (1) have worked for their employer for at least 12 months, (2) have worked at least 1,250 hours during the 12 months immediately preceding the start of leave, and (3) work at a worksite where the employer employs at least 50 employees at the site or within 75 miles of the site. Many employers mistakenly believe they are free from the burdens of the FMLA based on the size of the workforce or period of time an employee is on payroll. There are three interpretations of these requirements that expand the reach of the FMLA to the surprise of many employers.

Worked for at least 12 months: The FMLA does not require 12 *CONSECUTIVE* months. An employee who works for a covered employer for four months, leaves for six months and then returns and works for eight months is eligible for FMLA leave. Twelve months is considered to consist of 52 weeks. If an employee is on the payroll for any part of a week, whether or not the employee actually works, the employer has to count that week in calculating the twelve month period. The time an employee is on leave also must be counted if the employee is expected to return from leave.

An employer cannot simply look at its own payroll. Many employers secure workers from temporary staffing or employee leasing companies. In some instances, after a certain amount of service, the employer hires the temporary / leased employee and places him or her on its payroll. In calculating the twelve month period for FMLA eligibility, the employer must include the time the employee worked as a temporary or leased employee. For

[1] A "serious health condition" is an "illness, injury, impairment, of physical or mental condition that involves – (A) inpatient care in a hospital (even a single night), Hospice or residential medical are facility; or (B) continuing treatment by a health care provider."

example, ABC Leasing Agency provides an employer a temporary worker for eight months with the employee paid by ACME. The employer then hires the employee directly and places the employee on its payroll. After four months of direct employment, the employee is eligible for FMLA leave from the direct employer.

Your own payroll does not end the FMLA inquiry. If you use leased employees or so-called temporary "contract labor," you must account for these workers in FMLA coverage and employee eligibility determinations. You may think the employees are not yours, but the FMLA may say otherwise.

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