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Recent Cases Underscore the Need to Avoid Hasty Decisions About an Employee's Eligibility for FMLA Leave

By Rod M. Fliegel

Requests for time off from work under the Family and Medical Leave Act ("FMLA") (29 U.S.C. §§ 2601 et seq.) raise several vexing issues for HR professionals and in-house counsel; for example, whether the requesting employee has a "serious health condition" and, if so, whether he or she is entitled to so-called "intermittent" leave. The requesting employee's "eligibility" for leave, on the other hand, seems to involve three fairly straightforward questions: (1) Has the requesting employee been employed for at least one year? (2) Did he or she work at least 1,250 hours in the 12 months preceding the leave request? And (3) are there at least 50 employees at or within 75 miles of the employee's worksite? 29 U.S.C. § 2611; 29 C.F.R. § 825.110(a).

Simple enough, right? Well, the "eligibility issue" is actually much more complicated than one might first expect. HR professionals and in-house counsel should familiarize themselves with the eligibility issue in order to make informed and considered decisions about an employee's FMLA eligibility.

The DOL Regulations

The federal Department of Labor ("DOL") has responsibility for implementing the FMLA. Not surprisingly, the DOL has adopted a fairly expansive (i.e., "employee-friendly") interpretation of the FMLA's eligibility standard. The DOL has taken the position that an *ineligible* employee is eligible for FMLA leave if *the employer*

fails to comply with stringent notice requirements set forth in the regulations. For example, the regulations state that an employer *who mistakenly* confirms an ineligible employee's eligibility "may not subsequently challenge the employee's eligibility." 29 C.F.R. § 825.110(d). Likewise, if an employee notifies his or her employer of the need for FMLA leave before he or she is eligible for FMLA leave, the employee may be deemed eligible if the employer fails to timely advise the employee of his or her ineligibility for FMLA prior to the date the requested leave is scheduled to commence. *Id.*

The DOL has also taken the position that employees who are exempt from the federal overtime laws (such as bona fide executive, administrative, and professional employees), and who have worked for the employer for at least 12 months, will be *deemed* to have worked at least 1,250 hours during the previous 12 months unless *the employer* can prove otherwise. *Id.* at § 825.110(c). Full-time teachers and professors are likewise deemed to meet the 1,250-hour standard unless the employer can "clearly demonstrate" otherwise. *Id.*

Several federal courts have *roundly criticized*, and indeed *refused to adhere to*, the DOL's expansive interpretation of the eligibility standard, including the Seventh, Eighth, and Eleventh Circuits. On the other hand, on June 25, 2001, the U.S. Supreme Court agreed to review

a decision from the Eighth Circuit invalidating a DOL regulation on a related FMLA topic—the timely “designation” of medical leave as FMLA leave. *Ragsdale v. Wolverine Worldwide Inc.*, 218 F.3d 933 (8th Cir. 2000) (rejecting the DOL’s position that an employer’s failure to timely designate an employee’s FMLA leave may give the employee a right to *more than* 12 work weeks of leave). HR professionals and in-house counsel should consider the law in their jurisdiction when evaluating FMLA eligibility issues.

Court Decisions

HR professionals and in-house counsel should note, moreover, that according to one recent court decision, the eligibility determination is made based upon *the date the leave commences* (or is scheduled to commence), *not on the date the leave request is submitted*. The distinction is material. For example, Tina submits her leave request on December 1, 2000. She was hired on December 31, 1999. On December 1, 2000, Tina is not eligible for immediate FMLA leave (because she has not been employed for at least 12 months). However, if Tina requests a leave which is scheduled to start on January 1, 2001, Tina is eligible (assuming that Tina can satisfy all of the other eligibility requirements). See *Meyer v. Imperial Trading Co.*, ___ F. Supp. 2d ___, 2001 WL 304038 (E.D. La 2001); and see 29 C.F.R. § 825.110(d) (stating this general rule). (On the other hand, the date for determining whether the company employs at least 50 employees within 75 miles of the requesting employee’s worksite is the date *the employee submits notice of the need for leave, not the date the leave commences* (or is scheduled to commence). 29 C.F.R. § 825.110(d).)

Some courts have even concluded that the “time-in-service” requirement can be satisfied based upon time worked at an employer’s facility as a *temporary* employee on assignment from a tempo-

rary staffing agency. E.g., *Miller v. Defiance Metal Products, Inc.*, 989 F. Supp. 945 (N.D. Ohio 1997). These courts have concluded that the employer and staffing agency may “jointly employ” the worker for purposes of the FMLA. See also 29 C.F.R. § 825.106.

Furthermore, an ineligible employee may have a *contractual* right to FMLA leave, depending on the employer’s personnel and benefits policies. This situation is illustrated by the very recent case of *Thomas v. Pearle Vision, Inc.*, ___ F.3d ___, 2001 WL 576478 (7th Cir. 2001). Thomas worked at a store with 12 employees. Fewer than 50 total employees were employed in the neighboring 75 miles. Thomas was allowed to take FMLA leave, but was denied reinstatement when her leave ended. Thomas sued for breach of contract, arguing she had a contractual right to FMLA leave under the company’s policies, and in particular the company’s Summary Plan Description of Employee Benefits (“SPD”). The Seventh Circuit agreed with Thomas and reversed the summary judgment for Pearle Vision in the trial court. The SPD, the court observed, granted “all” employees FMLA rights and did not exclude employees based on store size. Additionally, Pearle Vision management treated Thomas as an FMLA-eligible employee by, among other things, providing her with FMLA forms (e.g., Certification of Health Care Provider), assuring Thomas that she could return to her job when her leave ended, and telling Thomas during her leave that her replacement was only “temporary help.”

Conclusion

The lesson to be learned from the DOL regulations and developing case law is that HR professionals and in-house counsel should not make hasty decisions regarding an employee’s eligibility (or non-eligibility) for FMLA leave. HR professionals and in-house counsel in all

jurisdictions should:

- Review the requesting employee’s employment history with the company (for example, anniversary date, actual hours worked in the year preceding the leave request, etc.);
- Review the date the requested leave is scheduled to commence relative to the employee’s anniversary date;
- Timely notify employees of ineligibility for FMLA leave;
- Review (and possibly revise) statements about FMLA leave in personnel policies, benefit plans, and related documents;
- Train managers and supervisors about the FMLA, including the FMLA’s eligibility requirements; and
- Consult upper management or experienced labor and employment law counsel about any “close calls.”

As an aside, HR professionals and in-house counsel should note that some states restrict an employer’s ability to cancel or modify policies that benefit employees. See *When May Employers Change Employment Policies?* Littler A.S.A.P. (June 2000). Thus, employers should research the law in their jurisdiction before canceling or modifying FMLA and related leave of absence policies.

Rod M. Fliegel is a shareholder in Littler Mendelson’s San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, www.littler.com, or email info@littler.com, or Mr. Fliegel at RFliegel@littler.com.
