

ELIGIBLE EMPLOYEE
DOL Topic: A¹

PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION (“RFI”) ABOUT WHO MEETS THE STATUTORY AND REGULATORY DEFINITION OF AN “ELIGIBLE EMPLOYEE.”²

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.

PART ONE

The DOL requested information about the application of the definition of “eligible employee.” Currently, an “eligible employee” is defined in the statute as an employee who has been employed:

- For at least 12 months by the employer,
- For at least 1,250 hours of service during the 12-month period preceding the start of leave, and
- At a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.³

With regard to this definition, the DOL asked for comments on three topics:

- Aggregating Time Periods
- Dates for Determining Employee and Employer Eligibility
- Joint Employment

¹ This topic is discussed in the Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), available at <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>, primarily in Chapter X.

² The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the “Digest of Comments Submitted in Response to the Department of Labor's Request for Information on the Family and Medical Leave Act,” available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

³ 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110.

ISSUE: Aggregating Time Periods

- **The RFI asked: May non-consecutive work periods be combined to meet the 12 month requirement in 29 C.F.R. § 825.110?** Section 825.110(b) appears to address this issue by stating that “the 12 months an employee must have been employed by the employer need not be consecutive months.” The RFI’s request for comments cited a case that was subsequently reversed:
 - **Rucker v. Lee Holding Co.**, 419 F. Supp. 2d 1 (D.Me. 2006). The lower court held that separate and distinct work periods for the same employer could not be aggregated to determine whether an employee satisfied the FMLA’s requirement that an employee work for an employer for 12 months to be eligible for FMLA leave.
 - After the DOL issued the RFI, the First Circuit, on appeal, reversed the lower court’s ruling and held that previous employment periods with the same employer – even if the periods are separated by “a period of years” – may be counted when determining whether an employee has worked for that employer for a cumulative 12 months.⁴

ISSUE: Dates for Determining Employee and Employer Eligibility

- **The RFI asked: What date should be used to determine employee eligibility? If an employee satisfies the 12-month tenure requirement while on leave, is the leave that the employee takes after that date FMLA-qualified?** 29 C.F.R. § 825.110(d) states that employee eligibility determinations must be made as of the date leave commences; however, 29 C.F.R. § 825.110(f), which is used in determining whether an employer meets the “covered employer” definition, states that the eligibility determination is to be made as of the date that the leave request is made. The DOL asked commenters to address how to “appropriately clarify this situation.” The DOL cited three cases:
 - **Babcock v. BellSouth Advertising & Publ’g Corp.**, 348 F.3d 73 (4th Cir. 2003). The court held that the employee had already met the 12-month requirement and was, therefore, an “eligible employee” under the FMLA as of the date of request for leave.
 - **Beffert v. Penn. Dep’t of Pub. Welfare**, No. Civ. A. 05-43, 2005 WL 906362 (E.D. Pa. April 18, 2005). The court held that an employee who requested FMLA when she had not yet worked for her employer for 12 months was not barred from

⁴ *Rucker v. Lee Holding Co.*, 471 F.3d 6 (1st Cir. 2006).

ISSUE: Dates for Determining Employee and Employer Eligibility

bringing a retaliation claim based on the denial of FMLA leave where her requested leave was to begin after she achieved a 12-month tenure with her employer.

- **Willemssen v. Conveyor Co.**, 359 F. Supp. 2d 813 (N.D. Iowa 2005). The court held that eligibility should be determined as of the date leave is first taken, not the date of employee termination.

ISSUE: Joint Employment

- **The RFI asked: How should “worksite” for purposes of joint employment be defined?** 29 C.F.R. § 825.111 sets forth the requirements for determining employer coverage pursuant to 29 U.S.C. § 2611, which requires employers to employ 50 employees within 75 miles to be covered by the FMLA. Section 825.111(a)(3) specifically addresses the situation of an employee who is employed jointly by two or more employers, and defines worksite as “the primary employer’s office from which the employee is assigned or reports.” This provision was ruled invalid by the Tenth Circuit Court of Appeals in the following case of an employee with a long-term fixed worksite at a facility of the secondary employer:
 - **Harbert v. Healthcare Servs. Group, Inc.**, 391 F.2d 1140 (10th Cir. 2004). The court held that the regulation’s definition of “worksite” as “the primary employer’s office” is arbitrary and contrary to both congressional intent and the plain meaning of “worksite.”

EMPLOYER-SIDE COMMENTS

Each bold-faced heading below sets forth a particular subject of commentary from employers or employer organizations, and is followed by explanatory text describing the comment in more detail.

- **Aggregating Time Periods** – Employers commented that employees should not be permitted to satisfy the 12-month tenure requirement by tacking together non-consecutive periods of work. Further, employers should not be saddled with the administrative burden of maintaining employees’ FMLA records for years.
 - Employers’ Suggested Change: Revise § 825.110 to require 12 consecutive months of employment.

EMPLOYER-SIDE COMMENTS

- **Dates for Determining Employee and Employer Eligibility** – Employers expressed the view that all eligibility determinations should be made on the date that leave commences.
 - Sections 825.110(d) (“as of the date leave commenced”) and 825.110(f) (“when the employee gives notice of the need for leave”) set forth different tests to determine the date that eligibility determinations must be made. Further, § 825.110(f) is inconsistent with the FMLA because it requires eligibility determination prior to the date leave starts, which is not required by the language of the statute.
 - Employers report a lack of clarity under the current regulations regarding whether an employee who starts employer-approved leave before meeting FMLA eligibility requirements, but becomes eligible for FMLA leave during the absence is entitled to: FMLA leave starting on the date of first eligibility; FMLA leave from the date that the employer-approved leave began; or no FMLA leave at all.
 - Employers face administrative burdens when an employee starts leave before being eligible for FMLA leave and subsequently becomes eligible while out on leave.
 - Employers’ Suggested Changes – Revise § 825.110(f) to determine whether an employer is a covered entity as of the date leave commences. Alternatively, change the regulations to allow employers to count leave starting prior to the FMLA eligibility date and ending after the eligibility date, towards the 12 week allotment.
- **Joint Employment** –
 - **Worksite Determinations** – Employers report that the DOL should distinguish between a jointly-employed employee assigned to a fixed worksite and a jointly-employed employee without a fixed worksite. For the former, the worksite would be the fixed worksite of the secondary employer. For the latter, the worksite should remain as the primary office from where the employee is assigned or reports.
 - A few commenters seek clarification regarding how to treat jointly-employed employees working from home and telecommuters.
 - Employers’ Suggested Changes: Amend § 825.111(a)(3) to define an employee’s worksite as the primary employer’s place of business.

EMPLOYER-SIDE COMMENTS

- **Professional Employer Organizations (“PEOs”)** – Commenters explain that the regulations should treat PEOs and temporary employment agencies differently. PEOs provide services to existing company employees and lack the authority to place employees at a given worksite. In contrast, temporary employment agencies provide labor to a third party employer. Section 825.106(d) should be revised to clarify that employees of a PEO’s client are not counted as employees of any other client of a PEO.
 - Suggested Change: Amend § 825.106(d) to exclude the staff of PEOs from coverage determinations. *E.g.*, clarify that PEOs are secondary employers and the PEO’s client is the primary employer.
- **Other Comments - Definition of “Parent”** – 29 C.F.R. § 825.202 allows employers to limit the total amount of FMLA leave taken by a husband and wife that are employed by the same employer to 12 weeks. However, unmarried parents of a child that may work for the same employer are not similarly prohibited.
 - Employers’ Suggested Change: Define “parent” to allow employers to limit the total amount of leave taken by two employees of the same employer that are parents of the same child, regardless of whether they are married.

EMPLOYEE-SIDE COMMENTS

Most substantive employee-side comments come from organizations. Employees report that the existing eligibility rules properly balance employer and employee needs and that any changes should focus on ways to expand coverage to more workers, particularly those who work for employers with less than fifty employees. The majority of individual employee comments express the need for paid sick leave. Each bold-faced heading below sets forth a particular subject of commentary from employee organizations, and is followed by explanatory text describing the comments about this subject in more detail.

- **Aggregating Time Periods** – Employees express the view that § 825.110(b) should not be changed; employees should be able to apply non-consecutive periods of work toward the 12 months needed for FMLA eligibility. Some commenters note that the law does not prohibit an employee from adding non-consecutive work periods or state that work periods must have occurred within certain time limitations in order to be combined. Indeed, commenters note that in addition to the absence of statutory language supporting the promulgation of restrictive regulations in this area, the DOL specifically rejected a proposed two year limit between non-consecutive work periods in the preamble to the final FMLA regulations.

EMPLOYEE-SIDE COMMENTS

- Employees state that time limits on combining non-consecutive work periods would unfairly and disproportionately affect female employees' ability to return to the workforce after spending time with children.
 - Employees also note that a time limit would provide an incentive to employers not to rehire employees who have taken time out from work and would allow employers to delay absent employees' return to work long enough to preclude them from accumulating the 12 months of work necessary for FMLA eligibility.
 - Employees state that it is unreasonable to assume that proof of prior employment is hard to obtain. They note that many employers keep records for over five years and employees may also have kept pay stubs and tax returns which would serve as evidence of past employment.
- **Dates for Determining Employee and Employer Eligibility –**
 - Employees state that there are valid reasons to use different dates to determine employee eligibility and employer coverage. First, an employee's eligibility for leave should be determined as of the time that leave is to commence to ensure that all the time the employee worked is taken into account. If eligibility is determined from the date leave is requested, employees may be deterred from requesting leave in advance, thereby making it harder for employers to make appropriate preparations for employees' absences. Second, determining whether an employer is a "covered" employer "as of the date that the leave request is made" prevents an employer from avoiding FMLA compliance by arguing that it might not be a "covered" employer in the future. Indeed employers could use the period between the leave request and the date leave is to start to avoid "covered" employer status. Further, given the technological advances in human resources administration, employers should not face any obstacles in keeping track of two eligibility requirements.
 - **Joint Employment –**
 - **Worksite Determinations** - Section 825.111 does not need to be changed.
 - Employees state that the preamble emphasizes that the concept of an employee's "worksite" should be interpreted in the same way as the term "single site of employment" under the Worker Adjustment and Retraining Notification (WARN) Act regulations, which state that the worksite of an employee who moves from site to site or who has no fixed worksite is the office from which work is assigned or to which the employee reports.

EMPLOYEE-SIDE COMMENTS

- The principles addressing “no fixed worksite” situations should apply where an employee is jointly employed and has a long-term fixed worksite.
 - The primary worksite of a jointly employed employee with no fixed worksite should be the primary employer’s office from which the employee was assigned or reports. Thus, § 825.111(a)(3) is a permissible exercise of agency rulemaking.
 - Employees’ Suggested Change: If anything, broaden § 825.111(a)(2), which applies to employees with no fixed worksite, to apply to telecommuters.
- **Professional Employer Organizations (“PEOs”)** – Additional protection is needed for employees whose primary employer is a PEO. Section 825.106(c) states that in joint employment situations for employees of “temporary help or leasing agencies,” the placement agency would be considered the primary employer and bear the job restoration responsibilities of § 825.106(e). However, PEOs should not be considered the primary employer because they do not conduct any hiring or related functions. They engage in “payrolling,” in which client employers transfer the payroll and related responsibilities to the PEO, but not rely on the PEO for placement services. In these cases, the client business should be held responsible for restoring the returning employee to his or her job.
- Suggested Change: Revise § 825.106 to account for PEOs.
- **Other comments** – The American Association of University Professors and a number of individual commenters state that contingent faculty who are not continuously employed should be covered under the FMLA.

PART TWO

THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC A HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.

STATUTE

29 U.S.C. § 2611(2)

Eligible employee

(A) In general - The term "**eligible employee**" means an employee who has been employed—

- (i) **for at least 12 months by the employer** with respect to whom leave is requested under section 2612 of this title; and
- (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions - The term "**eligible employee**" **does not include**—

- (i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or
- (ii) **any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.**

REGULATIONS

29 C.F.R. § 825.106

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA Where the employee performs work which simultaneously benefits

two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

- (1) Where there is an arrangement between employers to share an employee's services or to interchange employees;
- (2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,
- (3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the "primary" employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. . . .

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. . .

29 C.F.R. § 825.110

(a) An "eligible employee" is an employee of a covered employer who:

- (1) Has been employed by the employer for at least 12 months, and
- (2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and
- (3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

(b) **The 12 months an employee must have been employed by the employer need not be consecutive months.** If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment...

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months **must be made as of the date leave commences**

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is **determined when the employee gives notice of the need for leave**...

29 C.F.R. § 825.111(a)

Generally, a worksite can refer to either a single location or a group of contiguous locations

- (2) For employees with no fixed worksite . . . the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. . . An employee's personal residence is not a worksite in the case of . . . employees who work at home, as under the new concept of flexiplace. Rather, their worksite is the office to which the report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, **when an employee is jointly employed by two or more employers** (see § 825.106), **the employee's worksite is the primary employer's office from which the employee is assigned or reports.** . . .

29 C.F.R. § 825.202

(a) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken:

- (1) for birth of the employee's son or daughter or to care for the child after birth;
- (2) for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement; or
- (3) to care for the employee's parent with a serious health condition.

(b) This limitation on the total weeks of leave applies to leave taken for the reasons specified in paragraph (a) of this section as long as a husband and wife are employed by the "same employer." It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. . .

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI⁵

Cases

- *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
- *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).
- *Moreau v. Air France*, 356 F.3d 942 (9th Cir. 2004).
- *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253 (11th Cir. 2004).
- *Beck v. Boce Group, L.C.*, 390 F. Supp. 2d 1255 (S.D. Fla. 2005).
- *Grimsley v. Fiesta Salons, Inc.*, No. 01-10376-BC, 2003 U.S. Dist. LEXIS 298 (E.D. Mich. Jan. 7, 2003).
- *Summers v. Middleton & Reutlinger, P.S.C.*, 214 F. Supp. 2d 751 (W.D. Ky. 2002).
- *Roberson v. Cendant Travel Servs., Inc.*, 252 F. Supp. 2d 573 (M.D. Tenn. 2002).
- *Ruder v. Maine Gen. Med. Ctr.*, 204 F. Supp. 2d 16 (D. Me. 2002).
- *Vasquez v. United Enter. of Sw. Fla., Inc.*, 811 So. 2d 759 (Fla. Dist. Ct. App. 2002).
- *Gulf Ins. Co. v. GFA Group, Inc.*, 554 S.E.2d 746 (Ga. Ct. App. 2001).
- *Snelling & Snelling v. ARICO*, 613 N.E.2d 1107 (Ohio Ct. App. 1993).

DOL Opinion Letters & Guidance

- Dep't of Labor Opinion Letter, FMLA-113 (Sept. 11, 2000),
<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-113.pdf>

Other Materials

- Center for a Changing Workforce, *PEOs and Payrolling: A History of Problems and a Future Without Benefits* (Dec. 2001), available at <http://www.atkinson.yorku.ca/ace/publications/PEOs%20and%20Payrolling.pdf>.
- California Family Rights Act, CAL. CODE REGS. tit. 2, §§ 7297.1(c), 7297.0(1) (2006).
- Rev. Proc. 2002-21, 2002-19 I.R.B. 911.
- Rev. Proc. 2003-50, 2003-29 I.R.B. 119.
- Rev. Proc. 2003-86, 2003-50 I.R.B. 1211.
- Financial Accounting Standards Board, *Interpretation No. 44* (March 2000).

⁵ Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.