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Employee Eligibility for FMLA Benefits Includes Time Worked for an Employer Through Staffing Agency

By Scott Mirsky

SUMMARY: *An employee's eligibility for FMLA benefits requires that he/she works for an employer for at least 12 months and provides over 1250 hours of service to the employer during the preceding 12 months. According to a recent press release from the U.S. Department of Labor, the Wage & Hour Division determined that an employer in Louisiana violated the FMLA when it failed to recognize that it was a "joint employer" during the time that an employee worked for the employer through a staffing agency. Based upon this error, the employer wrongfully concluded that the employee had not met the 12-month eligibility requirement of the FMLA and denied the employee's request for FMLA leave.*

The Family & Medical Leave Act ("FMLA") requires employers with 50 or more employees to provide 12-weeks of leave for the birth or adoption of a child or for a serious health condition of an employee (or to care for a serious health condition of the employee's spouse, son, daughter or parent). In order for an employee to be eligible for this leave, they must have worked for their employer for 12 months and worked at least 1250 hours during the last 12 months.
Generally, it is fairly easy to determine if the employee has worked for an employer for at least 12 months. However, what happens when the employee starts as a temporary employee through a staffing agency and then is later hired directly by the business? Under the FMLA, both the staffing agency and the secondary employer are "joint employers" and the 12-month clock starts for the secondary employer the first day the employee begins their "temporary" role. Additionally, any employee working through a staffing agency must also be counted when determining if a business meets the 50-employee numerosity requirement of the FMLA.

A business in Louisiana learned this lesson the hard-way when it failed to recognize that it was "joint employer" of an employee under the FMLA even though the worker started her job with the business through a staffing agency and was later hired directly by the business. The Louisiana business terminated the worker even though the worker was sick and was required to spend several nights in the hospital. The U.S. Department of Labor ("DOL") investigated the business and determined that the business, when rejecting the employee's FMLA-leave request, wrongfully concluded that she was not an employee of the business for 12-months. The employer failed to include the time that the employee worked for the employer through the staffing agency. As such, the DOL concluded that the business violated the FMLA and the employer agreed to pay the employee almost $25,000 to resolve the violation.
While many businesses hire workers through a staffing agency on a temporary basis prior to offering them a permanent position on their own payroll, it is important to recognize that for purposes of the FMLA, both the secondary employer and the staffing agency are "joint employers." Thus, when determining whether the worker has been employed with a business for 12 months or more, the business must include the time that the worker provided service through the staffing agency.

When employers are transitioning workers from a staffing agency's payroll to their own payroll, they should document in the employee's personnel file the first date that the worker provided services for the employer. When an FMLA-leave request is received, the time worked through the staffing agency must be included in the calculation. Additionally, if an employer is using a third-party vendor to track and approve FMLA leave requests, the third-party vendor should be advised of the employee's start date – in temporary and permanent capacities.

If you have questions regarding the FMLA and/or employee leave, please contact the employment attorneys at Paley Rothman.

