

## Section 200

# FMLA—Basic Employer Requirements, Coverage, And Employee Eligibility

## BASIC REQUIREMENTS OF THE FMLA

This chapter will help you answer important questions about what the FMLA requires, which employers are covered, and when employees are eligible for FMLA leave.

The basic requirements of the FMLA (all of which are discussed in detail in subsequent sections of this book) are:

- A guarantee of up to 12 weeks of job protected leave in a 12-month period for eligible employees.
- A guarantee of 26 weeks of leave in a single 12-month period for eligible employees to care for a spouse, son, daughter, parent, or next of kin recovering from a serious injury or illness incurred in the line of duty on active duty in the armed forces.
- A guarantee of continued medical insurance benefits while the employee is on leave, provided the employee continues to pay any portion of the premium for which the employee would ordinarily be responsible.
- A guarantee that employees on leave may return to the position held prior to leave, or an equivalent position, at the same or an equivalent rate of pay and benefits.
- The FMLA provides for unpaid leave, but allows employees to substitute paid leave or for employers to require employees to substitute their paid time off (e.g., sick days, vacation, personal days, etc.) under certain conditions.
- The FMLA allows employers to require medical certification to prove the employee's need for leave for the employee's own serious illness or for the employee's care of a covered family member with a serious health condition, or an injury or illness incurred in the line of duty on active duty in the armed forces.
- The FMLA does not preempt state or local leave laws that provide greater rights than the FMLA.

## EMPLOYER COVERAGE

Any employer coming to grips with the FMLA must first determine whether it meets the threshold requirements to be covered by the Act. The general rule is that an employer covered by the FMLA is “any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year” (29 CFR 825.104(a)). The requirement that an employer be “engaged in or effecting interstate commerce” is interpreted quite liberally by the federal government and the courts, with the result that for practical purposes, virtually all employers at or near the 50 employee mark are presumed to be engaged in or effecting commerce in some way.

Determining whether an employer has the requisite number of employees can be more complex. In order to be covered, employers must have 50 or more employees for each working day during each of 20 or more calendar workweeks in either the current or the preceding calendar year. Any employee whose name appears on the employer’s payroll will be considered employed each working day of the calendar week and must be counted whether or not any compensation is received for the week.

### Example

*ABC Inc. met the 50 employees/20 workweeks test in the calendar year as of September 1, 2008. However, ABC subsequently dropped below 50 employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009. ABC would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (i.e., 2008) calendar year.*

## Determining Who Should Be Counted as Employees

The definition of “employee” for purposes of FMLA is taken from the **Fair Labor Standards Act (FLSA)** (Sec. 3(g), 29 USC 203(g)). In general, the test of whether an individual is counted as an “employee” depends on whether there is a continuing employment relationship and whether the employee is being maintained on the payroll. Consider the following factors:

- Employees on the payroll are assumed to be employed each working day of the calendar week. This means that an employee listed on the payroll who has not received any compensation for a calendar week still is counted for purposes of determining the 50-employee threshold.
- Employees on paid or unpaid leave, such as a disciplinary suspension, a leave of absence, or an FMLA leave, are counted as long as the employer reasonably expects the person to return to work.
- Part-time, seasonal, and temporary employees are counted as working for the entire week during any week in which they appear on the payroll.
- Employees who are disabled and unable to work are counted only if there is a reasonable expectation that the employee later will return to work.
- The FMLA applies only to employees who are employed within any state of the United States, the District of Columbia, or any territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.
- Employees on temporary or permanent layoff status are not maintained on the payroll and are not counted.
- Special workers, such as volunteer workers, are not employees for the purpose of counting the number of employees to meet the 50-employee minimum employee count or for the purpose of taking leave.

- Independent contractors are not employees. Accordingly, independent contractors are ineligible for leave under the FMLA, even if employers for whom they work are covered by the Act. They also are not counted as employees to determine if an employer is covered. DOL uses standards employed by the FLSA to determine if a person is an independent contractor. Just calling a worker an independent contractor does not prove that status. The right to control the work of a person, however, is likely to be a key factor in determining whether a person is an independent contractor.

## **Public Employers and Schools Are Covered by the Act**

Any public employer is covered by the Act, no matter how few employees it employs. Public agencies include most federal, state, and municipal governments and any political subdivisions. Elementary and secondary schools are covered by the Act, no matter how few employees they employ.

## **Joint and Integrated Employers**

The definition of employer can be confusing, because corporate structures can be complex. Not every company is a stand-alone entity. There are parent corporations, wholly and partially owned subsidiaries, affiliated companies, and joint ventures between two distinct corporations, just to name a few relationships.

When an employer is determining if it has 50 employees, should it include employees of a subsidiary, parent, joint venture, etc.? The regulations from DOL provide that employees of another entity will be counted as your employees, if your company and the other entity are “joint” or “integrated” employers. A corporation with an ownership interest in another corporation is a separate employer, unless it meets the “joint employer” or the “integrated employer” test.

### **Joint Employer Test**

Joint employers may be separate companies wholly distinct from each other, with separate owners, managers, and facilities. Conversely, joint employers may be two related companies with common ownership, management, and facilities. The factors in determining if a joint employer relationship exists include:

1. The nature and degree of control of the workers
2. The degree of supervision, direct or indirect, of the work
3. The power to determine the pay rates or the methods of payment of the workers
4. The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers
5. Preparation of the payroll and payment of wages
6. Any other factor that evidences a common control of the workforce

No one factor is determinative of whether a joint employer relationship exists. The entire relationship must be viewed in its totality. Generally, a joint employment relationship exists:

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.
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.

For example, joint employment ordinarily will be found to exist when a temporary or leasing agency supplies employees to a second employer.

### **Integrated Employer Test**

Separate entities will be deemed to be one employer for purposes of the FMLA where the operations of both employers are found to be “integrated.” Factors considered in determining if two or more employers are integrated include:

1. Common management
2. Interrelation between operations
3. Centralized control of labor relations
4. Degree of common ownership/financial control

As with the joint employer test, no one factor is determinative of whether an integrated employer relationship exists. The entire relationship must be viewed in its totality.

### **The Effect of Being a Joint or Integrated Employer**

Employees of joint or integrated employers must be counted by both employers, whether or not they are maintained on both employers’ payrolls, in determining employer coverage and employee eligibility.

#### **Example**

*An employer who jointly employs 15 workers from a leasing or temporary help agency and who has 40 regular workers is covered by the FMLA.*

### **Primary and Secondary Employers**

In joint and integrated employment relationships there may be a **primary** and a **secondary** employer. For example, an employer that hires employees of a temporary placement agency may be a joint employer. The primary employer has the authority to hire and fire, assign/place the employee, make the 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.

The **primary employer** is responsible for giving required notices to its employees, providing FMLA leave, maintaining health benefits, and providing job restoration.

The **secondary employer** (including employers that hire employees of a temporary placement agency) is responsible for accepting the employee returning from leave in place of the replacement employee, as well as compliance with the prohibited acts provisions of the FMLA, such as interfering with an employee’s attempt to exercise rights under the Act. A covered secondary employer is responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

### **Professional Employer Organizations (PEOs)**

A PEO contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. According to the DOL’s 2009 final FMLA regulations, the determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances (29 CFR 106(b)(2)).

According to the 2009 final FMLA regulations, a PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending on all the facts and circumstances.

## Secondary Worksites

The 2009 final FMLA regulations established that, for purposes of determining an employee's eligibility, the worksite of a jointly employed employee is the primary employer's office from which the employee is assigned or reports. However, the final rule provides an exception when the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees (29 CFR 825.111(a)(3)).

“Virtual” employees who work out of their homes do not have their personal residence as their worksite. Rather, they are considered to work in the office to which they report and from which assignments are made. The worksite for construction employees who travel from their headquarters to a construction site is their home base, i.e., the company's headquarters.

## Successors in Interest

An employer may be covered, and employees considered continuously employed, if the employer is deemed a “successor in interest” to a covered employer. The situation commonly occurs when one company acquires another. The factors used to determine successors in interest under **Title VII of the Civil Rights Act of 1964** and the **Vietnam Era Veterans Adjustment Act (VEVRAA)** are used under the FMLA. The factors to be considered in determining if an employer is a successor in interest, and therefore covered, include:

- Substantial continuity of the same business operations
- Use of the same plant
- Continuity of the workforce
- Similarity of jobs as well as working conditions
- Similarity of supervisory personnel
- Similarity in machinery, equipment, and production methods
- Similarity of products or services
- The ability of the predecessor to provide relief

The circumstances must be considered in their totality when determining whether a successor in interest exists. In other words, satisfaction of a single criterion is not sufficient to establish successor in interest status.

In addition, when an employer is a successor in interest, the employees' entitlements are the same as if the employment by the predecessor and successor were continued as employment by a single employer.

### Example

*XYZ Co. acquires ABC Co., which was covered by FMLA. Whether or not it meets FMLA coverage criteria, XYZ must grant leave for eligible former ABC employees who had provided appropriate notice to ABC or continue leave begun by former ABC employees while employed by ABC, including maintenance of group benefits during the leave and job restoration at the conclusion of the leave.*

Keep in mind that a successor that meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

## Public Agencies

Per the statute and regulations, public agencies are covered by the Act regardless of the number of employees employed. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that they work at a site with 50 employees on site or within 75 miles.

FMLA bases its definition of "public agency" on that of the **Fair Labor Standards Act (FLSA)**. Public agencies are the government of United States; the government of a state or political subdivision of a state; or an agency of the United States, a state, or a political subdivision of a state, or any interstate governmental agency. "State" is further defined by the FLSA to include any state of the United States, the District of Columbia, or any territory or possession of the United States.

To determine whether an entity is public or private, it must be determined whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or whether their appointment is subject to approval by an elected official.

A state or political subdivision of a state constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility.

## State Employers

Although the FMLA and its regulations specifically include state governments and their political subdivisions as covered employers under FMLA, a number of courts have disagreed. However, the U.S. Supreme Court held in *Nevada Dept. of Human Resources v. Hibbs* that state employees may sue their employers under FMLA to enforce their right to take leave under FMLA (*Nevada Dept. of Human Resources v. Hibbs*, 123 S. Ct. 1972 (U.S. 2003) (serious health condition of a covered family member)).

## EMPLOYEE ELIGIBILITY REQUIREMENTS

Full-time, part-time, temporary, or even seasonal workers may be eligible for FMLA leave, as long as they are on the payroll and satisfy a three-prong test that includes a minimum service requirement, a minimum hours requirement, and a minimum worksite requirement.

## Three-Prong Test

To be eligible for a leave, an employee must satisfy all three tests:

1. He or she has worked for the employer for at least 12 months at the time the leave is to commence. (These 12 months do not have to be consecutive months.)
2. He or she has worked for the employer for at least 1,250 hours during the 12-month period before the leave begins. (These months are consecutive.)
3. He or she works at a worksite that employs at least 50 employees at or within a 75-mile radius of that worksite.

## 12-Month Minimum Service Requirement

The first prong of the three-prong test for employee eligibility is the minimum service requirement, which specifies that an employee must have worked for the employer for at least 12 months.

The minimum service requirement is calculated as of the date leave begins, not the date leave is requested. If an employee requests leave before the eligibility criteria have been met, the employer may have to project to when the date of eligibility begins to see whether the employee will be eligible by the proposed leave date.

The 12-month service requirement does not require consecutive months of service. However, the 2009 final FMLA regulations do state that employment prior to a break in service of 7 years or more will not be counted toward the 12-month service requirement, unless the break in service was caused by the employee's active duty with the National Guard or reserves, or there was a written agreement that the employer intended to rehire the employee after the break in service. These exceptions are discussed in detail, below.

The 2009 regulations do provide an exception to the 7-year limit under two circumstances: Employment periods preceding a break in service of *more* than 7 years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

1. **National Guard or reserve military service.** The employee's break in service is caused by the fulfillment of his or her National Guard or Reserve military service obligation. Under these circumstances, the time served performing the military service must *also* be counted in determining whether the employee has been employed for at least 12 months by the employer. However, this exception does not provide any greater entitlement to the employee than would be available under the **Uniformed Services Employment and Reemployment Rights Act (USERRA)** (38 USC 4301 *et seq.*); *or*
2. **A written agreement,** including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

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 (workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.

To determine whether intermittent, occasional, or casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

## 1,250 Minimum Hours Requirement

The second prong of the three-prong test for eligibility is the minimum hours requirement, which specifies that an employee must have worked for the employer for at least 1,250 hours during the 12-month period before the leave begins.

- The number of hours an employee has worked is determined in accordance with principles established under the FLSA.
- The FLSA requires that nonexempt employees be paid for the hours they actually worked.
- Hours an employee was on vacation or on leave, even if the vacation or leave is paid, do not count as time actually worked and, therefore, are not included in determining if an employee satisfies the 1,250-hour threshold. This is different from the minimum service requirement, where time on sick leave or vacation may be included in determining if the employee satisfies the 12-month requirement.
- If an employer does not maintain an accurate record of hours worked by an employee, the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden, the employee is found to have met the 1,250-hour-requirement test.
- Time spent commuting to and from work does not count toward the minimum hours requirement.

## Military Service Time Counts Toward FMLA Eligibility

The final 2009 FMLA regulations provide that in determining whether an employee has fulfilled 1,250 hours of service, an employee returning from fulfilling his or her National Guard or reserve military obligation must be credited with the hours of service that would have been performed but for the period of military service (29 CFR 825.110(c)(2)).

Accordingly, a person reemployed after military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations.

### Example

*An employee returning from 31 weeks of active duty who typically works 40 hours per week and who had accrued 840 work hours before military service should be credited with 2,080 hours of work (31 weeks x 40 hours, plus the 840 hours already earned). In that case, the employee would have worked the minimum number of hours (1,250) necessary to qualify for FMLA coverage.*

## Qualifying for Leave During the Leave Period

The determination 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 the FMLA leave is to start. However, the 2009 final FMLA regulations allow that an employee may be on non-FMLA leave at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason *after* the employee meets the eligibility requirement would be FMLA leave (29 CFR 825.110(d)).

## Minimum Employee-Count Worksite Requirement

The third part of the three-prong test for employee eligibility has nothing to do with the individual employee, but relates to the total number of employees at or close to the worksite of the employee requesting leave. To satisfy this portion of the test, an employee must work at a worksite that has at least 50 employees at that site or within 75 miles of that worksite.

The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways, and waterways, by the shortest route from the facility where the employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g., airline miles).

**Practice tip:** If you are uncertain about mileage, contact your local automobile association or check the Internet.

## Counting 50 Employees Within the 75-Mile Radius

The worksite employee count is made when the employee gives notice of the need for leave, not when the employee begins leave (unlike the minimum service and hours requirements). Once an employee is determined eligible for leave, that eligibility is not affected by an employee count that drops below 50.

### Example

*In April, Jane Doe requests to go on leave for the expected birth of a child in November. Jane is deemed eligible in April, but in November the number of employees at or within a 75-mile radius of her worksite drops below 50. Nonetheless, Jane must be allowed full FMLA leave. Similarly, an employer may not terminate leave if the employee is in the middle of the leave and the worker count drops from, for example, 75 employees to 45 employees.*

The rules for determining which employees to count towards the 50-employee threshold are the same for the worksite requirement as they are in determining employer coverage. Employees must be maintained on the payroll for each working day during each of 20 or more calendar workweeks in either the current or the preceding calendar year.

## The Worksite

Generally, a worksite can refer either to a single location or to a group of contiguous locations. Structures within a campus or industrial park, or separate facilities in proximity to one another, may be considered a single employment site.

### Example

*A building with 35 different businesses as tenants will be 35 different employment sites, with each employer's space considered separate employment sites under FMLA. On the other hand, a single employer with three buildings in a single office park would be considered to have one worksite containing three buildings.*

The worksite for a worker with no set worksite is assumed to be the one assigned the employee as a home base, the one from which work is assigned, or the one to which the worker reports before going out on the road. This situation might apply, for example, to construction workers, traveling salespersons, transportation workers, etc.

When an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or to which the employee reports.

This requirement of 50 employees within a 75-mile radius applies only to employee eligibility. As a result, in some cases employers may be covered by the law, but there might not be any employees eligible for leave because not enough employees work at or within 75 miles of the worksite.

### Example

*XYZ Convenience Stores, Inc., employs 1,500 workers nationwide, but has only five workers per store. It has one store in Idaho whose entire five-person team has been employed and working full time ever since the store was opened 8 years ago. The next nearest XYZ Convenience store is 300 miles away. XYZ does not have to grant FMLA leave to any of its Idaho store workers. In the densely populated New York metropolitan area, XYZ has 22 stores employing 10 workers, all within a 75-mile radius of each other. All 110 employees of these stores satisfy the worksite requirement of the Act, but only those who also fulfill the 12-month, 1,250-hour requirements actually will be eligible to take FMLA leave.*

## NOTICE OF ELIGIBILITY—THE “FIVE-DAY RULE”

When an employee requests FMLA leave, or when the employer acquires knowledge that an employee’s leave may be for an FMLA-qualifying reason, the 2009 FMLA regulations mandate that the employer must notify the employee of the employee’s eligibility to take FMLA leave *within 5 business days*, absent extenuating circumstances (29 CFR 825.300(b)). Under the old rules, employers only had 2 days to provide this notice.

Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave, and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

The eligibility notice must state whether the employee is eligible for FMLA leave. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including (if applicable) the number of months the employee has been employed by the employer, the number of hours of service worked for the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

Notification of eligibility may be oral or in writing; but employers are advised to use DOL’s *Notice of Eligibility and Rights & Responsibilities* (Form WH-381) to provide proper eligibility notice to employees. See the **Forms** section of this guide for a copy of the WH-381.

### Change of Eligibility Status

If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee’s eligibility status has not changed, no additional eligibility notice is required. If, however, the employee’s eligibility status has changed (e.g., if the employee has worked less than 1,250 hours of service for the employer in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status *within 5 business days*, absent extenuating **circumstances**. For more information on leave notice and certification requirements, see **Section 400** in this guide.