Under 50 employees? How FMLA could apply to you regardless

The Family and Medical Leave Act (FMLA) provides job-protected unpaid leave for employees who meet eligibility requirements. If they do, the law is an entitlement. Employers cannot deny an eligible worker's leave without severe legal consequences. Eligibility depends on whether the employer is large enough to be covered by the law — with 50 or more employees. It also depends on whether the employee has worked for the employer long enough — at least one year. Finally, the employee must also have clocked in 1250 hours in her last eligibility year.

But there is another way that an employer that isn't big enough can be trapped into having to provide coverage. That can happen if the employer promises or appears to offer FMLA coverage through a handbook provision or policy. It can also happen if the employer mistakenly assures the employee he's eligible when he hasn't met service requirements. Or if the number of employees plummets, but the employer had 50 or more workers the previous year. Given pandemic shutdowns, that's an increasingly common scenario.

It's vital to understand the regulations and if your business is accountable for providing FMLA leave to employees or not, otherwise you could find yourself in unexpected legal trouble.

The 50 employee threshold

The FMLA doesn't kick in unless an organization employed 50 or more workers in 20 or more workweeks. There are two periods of time critical to this calculation. The 50 employee threshold must occur in the current or previous calendar year. If the count is from the previous calendar year, eligible workers remain covered even if the count has fallen. For example, a worker employed last year when there were 50 employees remains eligible this year too.

There is no minimum number of hours worked required in order for a worker to be part of the tally. As long as he worked any part of the week, he's counted. When counting weeks, they do not need to be continuous. This is to allow coverage for erratic or seasonal schedules. If the employer had 50 employees in the first 10 weeks and 50 in the last 10 weeks, it's covered.

Include in the count:

- Only U.S. employees and those in a U.S. territory or possession;
- Any employee on the payroll, whether or not she's received compensation that week;
- Employees on paid or unpaid leave you expect will return;
- Employees working for a foreign firm operating within the U.S.; and
- Part-time, temporary, seasonal, and full-time employees.

Don't include in the count:

- Laid-off employees;

- Volunteers; and
- Employees working outside the U.S.

Large employers with multiple locations may be a covered employer in some locations and not others. In addition to the 50 employee count, those employees only count if they work within 75 miles of each other. Thus, a location more than 75 miles away from headquarters may have fewer workers. Those workers may not be eligible unless the employer chooses to cover them. But you must be sure handbooks and policies are tailored to specific locations.

Example

A restaurant had 50 employees working from January through March 2020 (12 weeks). It stopped operations and laid off all staff on April 1, 2020. It resumed operations at limited capacity on September 1 and shut down again on October 31 (8 weeks) when COVID cases again climbed. During the fall opening, it continued to carry 50 people on payroll, having obtained a Paycheck Protection Program (PPP) grant. It then laid off all staff. On February 1, 2021, it re-opened under a take-out and catering model and rehired 25 workers. Jane was one of the rehired workers. She is pregnant and works 40 hours per week in the kitchen. Her baby is due September 13 and she has requested FMLA leave. If she continues to work her schedule, she will have worked 1280 hours by her due date. That makes her eligible for FMLA leave. That's true even if the restaurant never employs 50 workers in *any* week in 2021.

Promising more than you deliver

Making a promise that a worker relies on to her detriment can spark a lawsuit that she may win. That's due to the legal concept of "detrimental reliance and equitable estoppel." Essentially, by making a promise and not keeping it, the employer may be held to the promise's terms. If the promise was job-protected FMLA leave, the employer must deliver on that promise. The employee may be able to collect damages just as if he really was eligible for FMLA leave.

Here's how that might play out. An employer modifies an existing employee handbook created for a larger company. The handbook includes a standard disclaimer telling workers that the handbook is *not* a handbook. It also states that all employees are at-will employees who can be fired for any otherwise legal reason. Employment is not guaranteed. But because the handbook was designed for a larger employer, it includes an FMLA policy. That policy clearly states that employees who have worked for the employer for a year may be eligible.

At least one federal court has considered exactly this scenario. It ruled that an employee denied FMLA leave and fired when she took time off. Deborah worked for Infohealth as an administrative assistant. When she began working for the company, she got a copy of the handbook. It states that employees were eligible for FMLA leave after one year of service and meeting the 1250 hour threshold. Deborah was approved for FMLA maternity leave. She gave birth and started leave but was fired before her return date. When sued, Infohealth argued that it wasn't a covered employer. It had not had 50 employees in the previous or current year.

The court sided with Deborah. It concluded she had been made a promise and relied on it to her detriment. Therefore, the employer had to provide the promised benefit or pay the penalty for not delivering on the promise. (*Reaux v. Infohealth Management Company,* No. 08-C-5068, ND IL 2009)

A few years after Deborah's case, a similar case made its way through the 3rd Circuit. In that case, Brian worked as an IT manager for Inovio Pharmaceuticals. His doctors told him he needed urgent surgery for diverticulitis. He told his bosses he would be out for 4-6 weeks. His immediate boss approved his leave. No one mentioned the FMLA. He was terminated before returning.

Brian also sued, alleging FMLA interference. The company argued that it never had enough employees to meet the 50 worker threshold. However, it had included FMLA leave in the handbook. The 3rd Circuit Court of Appeals said that in principle, a worker may have a case based on a handbook promise. If that promise was relied on to Brian's detriment, he could win. However, in this case, Brian never claimed to have read the handbook and thus was unaware of the alleged promise. (*Palan v. Inovio Pharmaceuticals,* No. 15-3327, 3rd Cir., 2016)

What employers should do

To avoid accidentally becoming a covered FMLA employer, you can do the following:

- Make sure you know how many employees you have with an accurate FMLA employee count for each location;
- If you aren't a covered employer, scrub your policies and handbook of FMLA language; and
- Consider a separate handbook and policies for locations where there aren't 50 workers within 75 miles.