

Joint Employment Responsibilities Under FMLA

DOL Issues New Fact Sheet

The new guidance from the DOL identifies common scenarios in which two or more employers jointly employ an employee and are, as a result, jointly liable for compliance. The interpretation and fact sheet compile statutory provisions, regulations, and case law to provide comprehensive guidance on joint employment under FLSA, MSPA, and FMLA so that employers can properly analyze a potential joint employment scenario.

Introduction

The Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

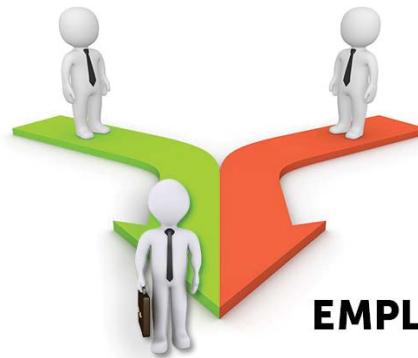
Generally, private employers with at least 50 employees are covered by the FMLA. Government agencies (including local, state and federal employers) and public and private elementary and secondary schools are covered by the FMLA, regardless of the number of employees. Only eligible employees are entitled to take FMLA leave. To be eligible, an employee must: have worked for the employer for at least 12 months; have worked at least 1250 hours during the 12 months preceding the start of leave; and be employed at a worksite where the employer has at least 50 employees within 75 miles.

Two (or more) businesses may simultaneously employ an employee, making them joint employers of the employee. Joint employment exists when an employee is employed by two (or more) employers such that the employers are responsible for compliance with the FMLA. The analysis for determining joint employment under the FMLA is the same as under the Fair Labor Standards Act (FLSA).

Joint employment is important in determining employer coverage and employee eligibility under the FMLA. Joint employers' responsibilities under the FMLA vary depending on whether they are the primary or secondary employer of the employee taking FMLA leave. This fact sheet explains how joint employment affects FMLA coverage and eligibility determinations and the FMLA responsibilities of primary and secondary employers.

Primary & Secondary Employers Under FMLA

When an individual is employed by two employers in a joint employment relationship under the FMLA, in most cases one employer will be the primary employer while the other will be the secondary employer. Determining whether an employer is a primary or secondary employer depends upon the particular facts of the situation. Factors to consider include:



- ▲ who has authority to hire and fire, and to place or assign work to the employee;
- ▲ who decides how, when, and the amount that the employee is paid; and,
- ▲ who provides the employee's leave or other employment benefits.

In the case of a temporary placement or staffing agency, the agency is most commonly the primary employer.

Employer Coverage and Employee Eligibility under the FMLA

Employees who are jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility under the FMLA, regardless of whether the employee is maintained on one or both of the employers' payrolls.

For purposes of employee eligibility, in determining whether a jointly-employed employee works at a worksite where the employer employs at least 50 employees within 75 miles, the employee's worksite is the primary employer's office from which the employee is assigned or to which the employee reports. However, if the employee has physically worked for at least one year at a facility of a secondary employer, then the employee's worksite is that location.

Responsibilities of Primary Employers

Under the FMLA, the primary employer is responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same job or an equivalent job upon return from leave. The primary employer is prohibited from interfering with a jointly-employed employee's exercise of or attempt to exercise his or her FMLA rights, or from firing or discriminating against an employee for opposing a practice that is unlawful under the FMLA. Primary employers must keep all records required by the FMLA with respect to primary employees.

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A primary employer must meet all of its obligations under the FMLA even when a secondary employer is not in compliance with the law or does not provide support to the primary employer in meeting these responsibilities.

Responsibilities of Secondary Employers

The secondary employer, whether an FMLA-covered employer or not, is prohibited from interfering with a jointly-employed employee’s exercise of or attempt to exercise his or her FMLA rights, or from firing or discriminating against an employee for opposing a practice that is unlawful under the FMLA. The secondary employer is responsible in certain circumstances for restoring the employee to the same or equivalent job upon return from FMLA leave, such as when the secondary employer is a client of a placement agency and continues to use the services of the agency and the agency places the employee with that client employer. Secondary employers must keep basic payroll and identifying employee data with respect to any jointly-employed employees. A covered secondary employer is also responsible for compliance with all the provisions of the FMLA for its regular, permanent workforce.

Example: “Staffing Company ABC”

A large medical staffing company, Staffing Company ABC, places registered nurses in jobs at public and private hospitals operating in several U.S. states. For purposes of this example, Staffing Company ABC is an FMLA-covered employer, and the nurses meet all of the FMLA eligibility requirements. The nurses are placed at various hospitals throughout the year.

Staffing Company ABC pays the nurses and provides them with retirement and insurance benefits. When the employees need leave, they call Staffing Company ABC to request time off. At the hospitals, the nurses are given their job assignments and are supervised by hospital staff. The nurses treat hospital patients, use hospital equipment, and are obliged to follow the same work protocols day to day as the hospital’s regular workforce.

In this example, the nurses are jointly employed by Staffing Company ABC and the client hospitals. Staffing Company ABC is the primary employer and therefore is responsible for following all of the FMLA requirements of FMLA-covered employers, including giving FMLA notices, providing FMLA leave, and maintaining health benefits. Each hospital is the secondary employer of the Staffing Company ABC’s employees that are placed at that hospital. Each hospital must keep and maintain payroll records for the employees placed at that hospital, as well as count the temporary registered nurses placed at each hospital as employees for their own FMLA coverage and employee eligibility tests. The hospitals are prohibited from interfering with Staffing Company ABC’s employees’ FMLA rights, or from retaliating or discriminating against Staffing Company ABC’s employees.

Enforcement

It is unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by the FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to the FMLA.

Comparing Joint Employer Responsibilities Under the FMLA

(Note that the chart assumes both employers are FMLA-covered and that the employee is eligible for FMLA leave.)

FMLA Responsibilities of Joint Employers	Primary Employer	Secondary Employer
Count jointly-employed employees for coverage and eligibility determinations (DOL Fact Sheet #28)	Yes	Yes
For employee-eligibility determination, use its worksite for the eligibility test (50 employees within 75-miles of the worksite)(DOL Fact Sheet #28)	Yes, unless the employee has physically worked at the secondary employer’s facility for at least one year.	No, unless the employee has physically worked at the secondary employer’s facility for at least one year.
Provide FMLA notices to the jointly-employed employee (DOL Fact Sheet #28D)	Yes	No; however the secondary employer must provide FMLA notices to its own employees.
Provide FMLA leave to the jointly-employed employee (DOL Fact Sheet #28F)	Yes	No; however the secondary employer must provide FMLA leave to its own eligible employees.
Maintain benefits for the jointly-employed employee (DOL Fact Sheet #28A)	Yes	No; however the secondary employer must maintain benefits for its own employees who take FMLA leave.
Restore the jointly-employed employee to work (DOL Fact Sheet #28A)	Yes	No, unless the secondary employer is continuing to use the placement agency and the agency places the employee with that secondary employer.
Not retaliate, discriminate or interfere (DOL Fact Sheets #28A and #77B)	Yes	Yes
Keep records	Yes, the primary employer keeps all required records.	Yes, the secondary employer keeps payroll data and identifying employee information.