Evaluating Eligibility for FMLA Leave: Federal Case Law Underscores the Need for Informed Decision Making

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I. Introduction

The federal Family and Medical Leave Act (FMLA) affords eligible employees the right to take job-protected leave for up to twelve workweeks.[1] The Act defines the term "eligible employee" as an employee who has been employed for at least twelve months and worked at least 1,250 hours in the past twelve months.[2] The Act excludes from eligibility any employee who is employed at a worksite with fewer than fifty employees if the total number of employees who work within seventy-five miles of that worksite is also under fifty.[3] From the statutory text, it appears that an employer therefore can determine an employee's eligibility for leave by answering three fairly straightforward questions:

> Was the employee hired more than one year ago?
> Did he or she work at least 1,250 hours in the past twelve months?
> Do at least fifty employees work at or within seventy-five miles of his or her worksite?[4]

However, even a cursory review of the regulations issued by the U.S. Department of Labor and federal case law reveals this subject matter has considerable depth.[5] For example, to answer the first question, the

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1. 29 U.S.C. § 2612(a)(1). "Workweek" is a term of art and is not necessarily synonymous with calendar week.
2. *Id.* § 2611(2)(A). The Act refers to "1,250 hours of service." *Id.* § 2611(2)(A)(ii). The Act then refers to the federal Fair Labor Standards Act (FLSA) for the corresponding definition. *Id.* § 2611(2)(C). *See also* 29 C.F.R. § 825.800 (definitions).
3. 29 U.S.C. § 2611(2)(B)(ii). The regulations list several other exclusions. 29 C.F.R. § 825.800.
4. 29 U.S.C. § 2611(2).
5. The Labor Department regulations are entitled to deference from the courts. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 86 (2002).

employer arguably should investigate whether the employee worked for the company at any *prior period* of time. The regulations state that "[t]he 12 months an employee must have been employed by the employer *need not be consecutive months.*"[6]

Mistakes concerning an employee's eligibility can lead to serious misunderstandings between the employer and employee and, in the worst case scenario, costly litigation with a plaintiff who may present a sympathetic version of events to jurors. For example, the regulations state that an employer *who mistakenly* confirms an ineligible employee's eligibility "may not subsequently challenge the employee's eligibility."[7] Additionally, restricting FMLA leave to *truly eligible* employees is one of the most important strategies available to employers to protect against the overuse, misuse, and abuse of FMLA leave. Therefore, to answer the key eligibility questions, Human Resources professionals and employment counsel (particularly for multistate employers) must familiarize themselves with the FMLA regulations *and* case law.

This article surveys federal cases examining eligibility issues. Especially noteworthy are the "estoppel" cases. These cases endorse the notion that, depending on the circumstances, employees may be able to continue job-protected leave even when they *cannot* satisfy the statutory standard. The estoppel cases require consideration of particularized information well beyond the three basic questions posed above. These cases also underscore the need for informed decision making.

This article discusses recent federal cases but is not intended as a comprehensive treatment of the topic.[8] Furthermore, while state family and medical leave laws are beyond the scope of the article, familiarity with these state laws (which have broader remedies than the FMLA) is at least equally important.[9]

II. Case Law Survey

A. *The Months-in-Service Standard*

1. The Regulations

The Department of Labor's FMLA regulations provide:

> 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

6. 29 C.F.R. § 825.110(b) (emphasis added).

7. *Id.* § 825.110(d). Some courts reject this expansive provision in the regulations. *See generally* Woodford v. Cmty. Action of Greene County, Inc., 268 F.3d 51 (2d Cir. 2001); Seaman v. Downtown P'ship of Baltimore, Inc., 991 F. Supp. 751 (D. Md. 1998).

8. For further reading, *see* William D. Goren, *Who Is Eligible Employee Under § 101(2) of Family and Medical Leave Act*, 166 A.L.R. Fed. 569 (West Group 2000).

9. The California Family Rights Act (CAL. GOV'T CODE § 12945.2 (Deering 2006)) is one example. For example, while punitive damages are unavailable under the FMLA, such damages may be recovered under California law. Commodore Home Sys. v. Superior Court, 649 P.2d 912, 918 (Cal. 1982); and *see also* CAL. CIV. CODE § 3294 (Deering 2006).

> 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.[10]

The regulations further state that whether an employee has been employed for a total of at least twelve months is evaluated with respect to "the date on which any FMLA *leave is to commence*," not on the date of the request for leave.[11]

2. Timing Issues

In some jurisdictions, even if an employee is not FMLA eligible when he or she needs to start a leave, the employee may become eligible during an otherwise approved leave. Not all courts agree, however.

For example, in *Ruder v. Maine General Medical Center*, the district court held that an employee may pass the twelve-month eligibility threshold during his or her vacation.[12] Ruder was hired on January 17, 2000, and left work for medical reasons on January 5, 2001.[13] At the time, Ruder had two weeks of accumulated vacation.[14] Ruder's employer denied his request for statutory FMLA leave, but permitted him to take a *policy-based* medical leave through April 1, 2001.[15] Ruder reported to work at the end of his leave, but was fired.[16] He sued.[17] The district court denied the employer's motion to dismiss, holding that, because Ruder had worked for fifty-one weeks and had accrued two weeks of vacation by early January, Ruder was entitled to show that he was protected by the FMLA.[18]

Similarly, in *Babcock v. Bellsouth Advertising and Publishing Corp.*, the Fourth Circuit held that the plaintiff was eligible for FMLA leave because her FMLA leave did not begin until after her *unexcused* absence from work ended.[19] Babcock was hired on June 1, 1999.[20] She went on short-term disability leave from May 19 to May 27, 2000.[21] Her employer cut off this short-term disability leave on May 27 and de-

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10. 29 C.F.R. § 825.110(b). The balance of the regulation states: "For purposes of determining whether intermittent/occasional/casual employment qualifies as 'at least 12 months,' 52 weeks is deemed to be equal to 12 months." *Id.*

11. *Id.* § 825.800 (emphasis added). As will be shown, the leave commencement date is used for purposes of the months-in-service and hours-in-service standards, but not the worksite standard. The latter is assessed relative to the date of the request for leave.

12. 204 F. Supp. 2d 16, 20 (D. Me. 2002).

13. *Id.* at 17.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 18.

18. *Id.* at 20.

19. 348 F.3d 73, 78 (4th Cir. 2003).

20. *Id.* at 75.

21. *Id.*

manded that Babcock return to work by June 9.[22] Babcock's employer then denied her June 9 request for FMLA leave.[23] Management believed Babcock's leave would have started on May 19—*before* her June 1 one-year anniversary date.[24] Upholding the jury's verdict in favor of Babcock, the court of appeals held that Babcock was on an unexcused absence from May 27 to June 9 and, thus, could not have been on FMLA leave *at the same time*.[25] After June 1, Babcock was eligible for FMLA leave, and, therefore, the court of appeals held, a jury could reasonably conclude that when Babcock requested her FMLA leave on June 9, she in fact was an eligible employee.[26]

In marked contrast, the district court in *McEachern v. Prime Hospitality Corp.* held that the plaintiff's ninety-day *unpaid* leave, pursuant to company policy, did not count toward the twelve-month standard.[27] McEachern was hired on March 30, 2000.[28] She requested FMLA leave for medical reasons during the week of February 9, 2001.[29] McEachern was told she was not eligible for FMLA leave because she had not yet been employed for twelve months, but that she could take up to ninety days of unpaid personal leave.[30] Reinstatement was not guaranteed by the employer's policy.[31] Upon McEachern's return to work, she was offered and declined an alternative position.[32] McEachern claimed she was "constructively discharged" and alleged her employer violated the FMLA because she became eligible for FMLA leave *during* her ninety-day personal leave.[33] Denying summary judgment, the district court held that McEachern began her leave in February 2001, before she had attained twelve months of employment, and therefore she could not qualify as an eligible employee under the FMLA.[34]

Another district court reached the same conclusion in a different context. In *Willemssen v. The Conveyor Company*, the district court held that the plaintiff's eligibility for coverage under the FMLA's twelve-month requirement is determined as of the date on which the plaintiff first begins her leave, not on the date of her ensuing termination.[35] Willemssen was hired on August 29, 2000.[36] Ten months later, begin-

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22. *Id.*
23. *Id.*
24. *Id.* at 77.
25. *Id.*
26. *Id.* at 77–78.
27. No. 02-536 ADM/ABJ, 2003 U.S. Dist. LEXIS 7997, at *9 (D. Minn. May 8, 2003).
28. *Id.* at *2.
29. *Id.* at *3.
30. *Id.* at *4.
31. *Id.* at *5.
32. *Id.* at *6–*7.
33. *Id.* at *7.
34. *Id.* at *9–*10.
35. 359 F. Supp. 2d 813, 819 (N.D. Iowa 2005).
36. *Id.* at 815.

ning on June 1, 2001, Willemssen took unpaid leave to participate in activities with her children.[37] Willemssen remained on leave until August 29, 2001, a total of thirteen consecutive weeks.[38] At that point, Willemssen's employer notified Willemssen that her employment was being terminated effective August 31, 2001, because she had been on unpaid leave for more than twelve weeks and failed to say when, if ever, she was coming back to work.[39]

In opposing her employer's motion for summary judgment, Willemssen argued that the leave she used during her first year of employment was not FMLA leave because she had not yet worked for twelve months.[40] Willemssen argued that "she was entitled to twelve weeks of FMLA leave after her one-year employment anniversary on August 29, 2001."[41] The district court disagreed, holding that Willemssen was not an "eligible employee" on the date her leave commenced, and therefore was not entitled to the protections of the FMLA, even though her leave extended beyond the end of the twelve-month eligibility period.[42] Thus, the district court reasoned, the FMLA was not implicated, and it was not unlawful for the employer to fire Willemssen for taking excessive non-FMLA leave.[43]

The decisions above demonstrate that courts are split on whether an otherwise ineligible employee becomes eligible for FMLA leave during his or her absence for other reasons. The outcome varies depending on jurisdiction. Considering the judicial uncertainty in this area, employers must familiarize themselves with the controlling legal authority on the subject in their respective jurisdiction and structure their leave policies accordingly.

3. Temporary Workers

Some district courts have ruled that the time spent working at the employer's place of business through a temporary agency can be aggregated with post-hire work time for purposes of establishing FMLA eligibility.

For example, in *Miller v. Defiance Metal Products, Inc.*, a temporary agency assigned Lisa Miller to work at Defiance Metal Products beginning on December 4, 1994.[44] On July 24, 1995, Miller ended her employment with the temporary agency and commenced full-time employment with Defiance.[45] On January 30, 1996, Miller requested a

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 817.
41. *Id.*
42. *Id.* at 819.
43. *Id.*
44. 989 F. Supp. 945, 946 (N.D. Ohio 1997).
45. *Id.*

medical leave.[46] Defiance advised Miller that she was ineligible for FMLA leave.[47] Defiance thereafter terminated Miller for absenteeism.[48] She sued under the FMLA.[49] The district court concluded that Miller was an eligible employee under the FMLA, holding that the time Miller spent working for Defiance through the temporary agency had to be counted for purposes of the twelve-month eligibility requirement.[50] The district court reasoned that this was one example and a natural consequence of "joint employment" within the meaning of the FMLA regulations.[51]

Another district court reached a similar conclusion. In *Salgado v. CDW Computer Centers, Inc.*, the district court held that the plaintiff was "eligible" for leave under the FMLA based on the combined months of service working for the employer directly and on assignment through a temporary agency.[52] The district court noted that the FMLA regulations specifically state that workers who are "jointly employed" must be counted by both employers in determining employer coverage under the Act.[53] The district court further reasoned that the one-year eligibility standard only requires that the person be "suffer[ed] o[r] permit[ted] to work."[54]

B. *The Hours-in-Service Standard*

1. The Regulations

The Department of Labor's FMLA regulations provide in pertinent part:

> Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.[55]

Importantly, the regulations continue:

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 948.
51. *Id.* at 947–48; 29 C.F.R. § 825.106.
52. No. 97 C 1975, 1998 U.S. Dist. LEXIS 1374, at *12 (N.D. Ill. Feb. 5, 1998).
53. *Id.* at *10; 29 C.F.R. § 825.106(d).
54. *Salgado*, 1998 U.S. Dist. LEXIS 1374, at *12. Regarding employer coverage under the FMLA and temporary workers, *see also* Russell v. Bronson Heating and Cooling, 345 F. Supp. 2d 761 (E.D. Mich. 2004).
55. 29 C.F.R. § 825.110(c).

> In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), *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 *deemed* to have met this test.[56]

The regulations further state that "[t]he 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.*"[57]

2. Narrow Construction

Courts appear to endorse a fairly narrow construction of the Act when addressing issues arising in connection with the 1,250 hours-of-service requirement. For example, in *Aldrich v. Greg*, the district court held that the plaintiff's paid vacation and holiday days during the twelve-month period before his leave started were not included in the 1,250 hours-of-service calculation.[58] Aldrich requested medical leave on

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56. *Id.* (emphasis added). The balance of the regulation states:

> For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

57. *Id.* § 825.110(d) (emphasis added). The balance of section 825.110(d) states:

> If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

Some district courts have refused to follow the two-day notice rule imposed by this regulation. *See* Alexander v. Ford Motor Co., 204 F.R.D. 314 (E.D. Mich. 2001); Wolke v. Dreadnought Marine, Inc., 954 F. Supp. 1133 (E.D. Va. 1997).

58. 200 F. Supp. 2d 784, 788 (N.D. Ohio 2002).

October 6, 1999.[59] In ruling on the employer's motion for summary judgment, the district court held that, to be eligible for FMLA leave, Aldrich had to have worked at least 1,250 hours between October 6, 1998, and October 6, 1999.[60] However, Aldrich had only worked 1,152 hours during that period.[61] Aldrich argued that hours attributed to paid holiday and vacation days had to be included.[62] The district court disagreed, holding that these paid hours "represent periods during which [Aldrich] was completely relieved from duty; hence they [could not] be included in the calculation of hours worked."[63]

In another case, the district court reached the commonsense conclusion that only hours of work *for the employer* count toward the hours-of-service requirement.[64] In *Koontz v. USX Corp.*, the district court held that the plaintiff could not use his time spent on union business to satisfy the FMLA's 1,250 hours-of-service requirement.[65] Zuczek worked 1,242.9 hours during the twelve-month period in question.[66] Zuczek argued that he satisfied the FMLA's 1,250-hour minimum requirement because his "union business hours," which allegedly accounted for thirty-three percent of his time, should have been included in the FMLA hours-of-service calculation.[67] The employer moved for summary judgment.[68] The district court granted the motion, holding that the hours Zuczek spent conducting "union business" did not constitute "hours worked" for purposes of the FMLA.[69] The district court noted that the employer neither tracked nor compensated the hours its employees spent performing union business and that the union compensated Zuczek as *its* employee for his work related to union matters.[70]

3. Labor-Related Cases

The above cases notwithstanding, there is still room for disagreement over the proper interpretation of the hours-of-service standard. For example, the First and Sixth Circuit Courts of Appeals reached conflicting decisions in cases raising the issue of whether a union employee reinstated after prevailing in arbitration is entitled to credit for his or her time away from work.

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59. *Id.* at 787.
60. *Id.*
61. *Id.* at 788.
62. *Id.*
63. *Id.*
64. Koontz v. USX Corp., No. 99-3191, 2001 U.S. Dist. LEXIS 9319, at *29 (E.D. Pa. July 2, 2001).
65. *Id.*
66. *Id.* at *27.
67. *Id.* at *28–*29.
68. *Id.* at *27.
69. *Id.* at *29.
70. *Id. See also* Adams v. Honda of Am. Mfg., Inc., 111 Fed. Appx. 353, 356 (6th Cir. 2004) (employee ineligible for FMLA leave without 1,250 hours of service); Pennant v. Convergys Corp., 368 F. Supp. 2d 1307 (S.D. Fla. 2005).

The Sixth Circuit in *Ricco v. Potter* took the position that an employee may credit toward the 1,250 hours-of-service requirement hours that he or she would have worked *but for* the unlawful termination.[71] In December 1997, Ricco was terminated from the U.S. Postal Service.[72] In February 1999, an arbitrator ruled that Ricco's termination violated the labor contract and ordered reinstatement with back pay and full credit for seniority purposes for the time she was away from work.[73] Ricco requested FMLA leave in May 1999 due to depression and migraines stemming from the death of her husband.[74] The Postal Service denied her request for FMLA leave because she had not worked the requisite 1,250 hours during the preceding twelve-month period (due to her December 1997 termination).[75] On Ricco's appeal from the district court's order granting the employer's motion to dismiss, the Sixth Circuit Court of Appeals held that the FMLA's hours-of-service requirement includes hours that the employee wanted to work but was *unlawfully* prevented from doing so.[76] The court held that the employer's unlawful conduct prevented Ricco from satisfying the 1,250 hours-of-service requirement, and, further, to deny employees credit toward the hours-of-service requirement for hours that they would have worked, but for their unlawful termination, would reward employers for their unlawful conduct.[77]

However, in *Plumley v. Southern Container, Inc.*, the First Circuit reached the opposite result.[78] Plumley was awarded reinstatement and compensation for the work weeks from March 22, 1998, to October 11, 1998, as part of an arbitration award.[79] Soon after Plumley's plant manager learned of the arbitration award, the plant manager directed Plumley to return to work.[80] Plumley did not report to work, but instead visited his father, who was sick and in the hospital.[81] Plumley was then terminated.[82] Affirming summary judgment, the court of appeals held that Plumley was ineligible for FMLA leave.[83] The court reasoned that the hours for which Plumley was compensated under the arbitration award did not count toward the FMLA's 1,250 hours-of-service requirement because the statute contemplates only those hours that an em-

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71. 377 F.3d 599, 605–06 (6th Cir. 2004).
72. *Id.* at 600–01.
73. *Id.* at 601.
74. *Id.*
75. *Id.*
76. *Id.* at 605–06.
77. *Id.*
78. 303 F.3d 364, 372 (1st Cir. 2002).
79. *Id.* at 367–68.
80. *Id.* at 367.
81. *Id.*
82. *Id.*
83. *Id.* at 372.

ployer "suffers or permits" an employee to work.[84] Furthermore, under the Fair Labor Standards Act, "work" means "physical or mental exertion (whether burdensome or not) controlled or required by the employer. . . ."[85]

Considering the conflicting opinions on this subject matter, employers must carefully monitor further legal developments in this area.

C. *The Worksite Standard*

1. The Regulations

The Department of Labor's FMLA regulations provide:

> 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.* Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave.[86]

2. The 75-Mile Standard

At least one circuit court has held that the 75-mile radius has to be measured by the distance it takes to travel via public roadways and not by the linear miles.[87] In *Bellum v. PCE Constructors, Inc.*, the Fifth Circuit upheld the Department of Labor's conclusion that the FMLA's 75-mile distance requirement is measured by surface miles, not linear miles.[88] The FMLA states that an employee is ineligible for FMLA leave if his or her employer "employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that

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84. *Id.* at 370, 372.
85. *Id.* at 370–71.
86. 29 C.F.R. § 825.110(f) (emphasis added). The balance of the regulation states:

> Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

Further and detailed guidance is provided by 29 C.F.R. § 825.111.

87. 407 F.3d 734, 738–40 (5th Cir. 2005).
88. *Id.*; 29 C.F.R. § 825.111(b) states:

> 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 eligible 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).

worksite is less than 50."[89] Bellum's employer had a staff of fourteen employees at its headquarters in Baton Rouge, Louisiana, and forty-one at its worksite in Fernwood, Mississippi.[90] The distance between the headquarters and the worksite was between 66.5 and 69.5 linear miles but 88.5 miles over public roadways.[91] The Department of Labor regulation provides that 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 eligible employee needing leave is employed."[92]

Bellum argued on appeal of the district court's grant of summary judgment that the regulation was contrary to the statutory text and that he was eligible for FMLA leave because the linear distance between his employer's headquarters and the worksite was fewer than seventy-five miles.[93] The court of appeals disagreed, concluding that Bellum's interpretation would lead to absurd results and that the Department of Labor's regulation was based on a permissible construction of the FMLA statute and entitled to deference.[94]

D. *The Estoppel Doctrine*

1. Cases Where the Employee Prevailed

Some district courts have ruled that an employer may be estopped from denying leave to an ineligible employee after mistakenly notifying the employee he or she was eligible for FMLA leave. For instance, in *Headlee v. Vindra Inc.*, the district court agreed with the plaintiff's argument that her employer was equitably estopped from denying her intermittent FMLA leave.[95] Headlee applied for intermittent leave on Fridays for twelve weeks to drive her *adult* daughter to the hospital for chemotherapy appointments.[96] Headlee's request was approved, effective February 14, 2003, in a letter dated February 27, 2003.[97] On March 18, 2003, the authorization for leave was rescinded.[98] Headlee sued.[99] In moving to dismiss the complaint, the employer argued that the FMLA does not provide leave to care for an adult child and that, although Headlee was "eligible" for FMLA leave, she was not "entitled"

89. 29 U.S.C. § 2611(2)(B)(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").
90. *Bellum*, 407 F.3d at 737.
91. *Id.*
92. 29 C.F.R. § 825.111(b).
93. Bellum v. PCE Constructors, Inc., 407 F.3d 734, 738 (5th Cir. 2005).
94. *Id.* at 740.
95. No. C 04-05521 SI, 2005 WL 946981, at *2 (N.D. Cal. Apr. 25, 2005).
96. *Id.* at *1.
97. *Id.*
98. *Id.*
99. *Id.*

to statutory leave for this purpose.[100] The district court agreed that, under the law, Headlee was not entitled to FMLA leave.[101] However, because the employer's February 27, 2003, letter explicitly granted Headlee's request for leave and stated that the leave would be "treated as Family Medical Leave for which [Headlee is] eligible," Headlee was entitled to proceed on an equitable estoppel theory.[102]

Even though some employees are clearly ineligible for FMLA leave, employers should promptly notify an affected employee of his or her ineligibility. In *Nagy v. Tee Vee Toons, Inc.*, the district court held that the plaintiff could amend her complaint to plead detrimental reliance to establish her equitable estoppel claim and to allege facts demonstrating she would have been eligible for FMLA leave when her leave started.[103] Nagy was hired in January 2002.[104] Two months later, Nagy informed her supervisor she was pregnant.[105] At some unspecified time thereafter, Nagy's supervisor told her that she was eligible for FMLA leave (when clearly she was not).[106] On August 8, 2002, Nagy advised her supervisor that she intended to begin her maternity leave on September 13.[107] On August 16, however, Nagy was fired, assertedly for poor job performance.[108] The district court granted the employer's motion to dismiss.[109] However, the court dismissed the lawsuit with leave to amend so that Nagy could plead detrimental reliance as part of her equitable estoppel claim.[110] The employer argued for a dismissal with prejudice, because given the timetable alleged in Nagy's complaint, she was due to deliver her baby, and thus had to start her FMLA leave, *before* she would have been employed for the requisite twelve-month period.[111] The district court rejected the employer's argument, holding that Nagy could potentially allege facts demonstrating that she could have *delayed* her leave notice until she *was* eligible under the statute.[112]

Another example is *Kosakow v. New Rochelle Radiology Associates, P.C.*[113] In *Kosakow*, the court of appeals held that the employer could be equitably estopped from denying the plaintiff's FMLA eligibility due to the employer's failure both to post the required FMLA notices and

100. *Id.* at *2.
101. *Id.*
102. *Id.*
103. No. 03 Civ. 7838, 2004 U.S. Dist. LEXIS 8400, at *3–*7 (S.D.N.Y. May 12, 2004).
104. *Id.* at *1–*2.
105. *Id.* at *2.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at *6.
110. *Id.* at *4–*7.
111. *Id.* at *5.
112. *Id.* at *6.
113. 274 F.3d 706 (2d Cir. 2001).

to promptly inform the plaintiff she was ineligible for FMLA leave.[114] When Kosakow began her medical leave for elective surgery in January 1997, it was unclear whether she had worked the requisite 1,250 hours during the previous twelve months.[115] Kosakow was subsequently terminated during her medical leave, assertedly due to downsizing.[116] The employer argued that Kosakow was ineligible for FMLA leave because she did not meet the FMLA's hours-of-service requirement.[117] Reversing summary judgment, the court of appeals held that, assuming the employer was right, there was a sufficient basis for Kosakow to invoke the estoppel doctrine.[118] The court reasoned the employer's silence—specifically, not informing Kosakow that the employer believed her to be ineligible for FMLA leave because she was fewer than 100 hours short of the 1,250 minimum—was properly construed as an affirmative misrepresentation.[119] The court emphasized the employer's legal duty to inform Kosakow of her ineligibility when she first announced her plan to take FMLA leave.[120] The court reasoned further that if the employer had properly notified Kosakow of her ineligibility, she could have rescheduled her elective surgery.[121]

Another example is *Sorrell v. Rinker Materials Corp.*[122] In *Sorrell*, the court of appeals vacated summary judgment and remanded the case to the district court to consider the equitable estoppel doctrine.[123] Sorrell informed his employer of his intent to retire in mid-November 2000.[124] The parties agreed that Sorrell's last day of work would be December 21, 2000, but that his termination would not be effective until January 16, 2001.[125] Sorrell was notified that he would be permanently replaced by a new person upon his retirement.[126] Sorrell's retirement decision was prompted in part by his desire to care for his ill wife, and at some point between announcing his retirement in mid-November and December 21, Sorrell decided instead to take FMLA leave.[127] On or about February 19, 2001, the employer "executed a personnel change notification form, which indicated that Sorrell would not be retiring and which reinstated him to active employee status," so that

114. *Id.* at 740.
115. *Id.* at 713.
116. *Id.*
117. *Id.* at 714.
118. *Id.* at 727.
119. *Id.* at 726.
120. *Id.* at 725–26.
121. *Id.* at 727.
122. 395 F.3d 332 (6th Cir. 2005).
123. *Id.* at 336.
124. *Id.* at 333.
125. *Id.*
126. *Id.*
127. *Id.* at 334.

he would be entitled to take FMLA leave.[128] However, upon Sorrell's return from leave, the employer failed to restore him to his former position.[129] The district court granted the employer's motion for summary judgment on the ground that Sorrell had relinquished his position prior to requesting FMLA leave and, therefore, was not entitled to reinstatement.[130] The court of appeals vacated the judgment and remanded the case to the district court to consider the equitable estoppel doctrine.[131] Additionally, the district court was ordered to consider whether the employer was precluded from contesting Sorrell's eligibility due to its failure to comply with, or to avail itself of, certain procedures under the FMLA (e.g., its failure to seek clarification of Sorrell's wife's medical certification).[132]

2. Cases Where the Employer Prevailed

On the other hand, some courts have refused to permit equitable estoppel claims absent *reasonable* reliance upon the employer's mistake. In *Wells v. Wal-Mart Stores, Inc.*, the district court denied the plaintiff's equitable estoppel claim, holding that the plaintiff's reliance on the employer's mistake—labeling the plaintiff's leave as "workers compensation/FMLA leave"—could not have been reasonable because the plaintiff "plainly was not eligible for any benefits under the FMLA."[133] Wells worked as a forklift driver.[134] In October 1997, Wells injured his back on the job.[135] He returned to work but was reinjured.[136] Wells then missed five months of work.[137] Wells eventually returned to work and was placed in the employer's sixty-day Temporary Alternative Duty (TAD) program.[138] After sixty days in the TAD program, Wells' employer told him that he would be placed on workers' compensation leave.[139] Wells was then released to work by his employer's workers' compensation physician but had not been released to work by his personal physician.[140] Thus, Wells did not return to work.[141] On February 1, 1999, the employer mailed a letter to Wells informing him that he had been terminated for violating the employer's "three-day no call, no show rule."[142] He sued under the FMLA.[143]

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128. *Id.*
129. *Id.* at 334–35.
130. *Id.* at 335.
131. *Id.* at 336.
132. *Id.* at 336–37.
133. 219 F. Supp. 2d 1197, 1208 (D. Kan. 2002).
134. *Id.* at 1200.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1200–01.
140. *Id.* at 1201.
141. *Id.*
142. *Id.*
143. *Id.*

In moving for summary judgment, the employer argued that Wells was not eligible for FMLA leave at the time because he had only worked 993 hours during the previous twelve months.[144] Wells responded the employer was estopped from contesting his FMLA eligibility because the employer's human resources manager placed Wells on "workers compensation/FMLA leave."[145] The district court granted summary judgment, holding that Wells' reliance on the employer's mistake could not have been reasonable because Wells "plainly" was not eligible for FMLA leave *and* conceded that he failed to work the requisite 1,250 hours.[146]

E. Waiver Issues

One district court recently held that an employer does not waive an FMLA eligibility requirement by failing to explicitly state that requirement in the employer's handbook.[147] In *Dinkins v. Varsity Contractors, Inc.*, the district court held that the omission of an FMLA eligibility requirement in an employer's handbook did not necessarily constitute an express statement of guaranteed FMLA eligibility if the other FMLA eligibility requirements were met by an employee.[148] The employer's handbook omitted the requirement that the employer must employ at least fifty employees within seventy-five miles of the worksite.[149] Whether the company employed the necessary fifty employees was unclear.[150] Dinkins argued that regardless, because the employee handbook omitted the fifty employees within seventy-five miles requirement from its statement of FMLA eligibility, his "FMLA rights vested when he worked 1,250 hours within a twelve month period."[151] In ruling on the employer's motion for summary judgment, the district court disagreed, holding that the omission of the fifty employees within seventy-five miles requirement was not tantamount to an employer's clear promise of FMLA eligibility if the twelve months and 1,250 hours-of-service requirements are met.[152]

Compare *Dinkins* to the result the Seventh Circuit reached in an earlier case, *Thomas v. Pearle Vision, Inc.*[153] Pearle's Summary Plan Description of Employee Benefits listed the hours-in-service and months-in-service eligibility requirements for FMLA leave, but not the worksite standard.[154] Tina Thomas, an optometrist at a store with fewer than

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144. *Id.* at 1207–08.
145. *Id.* at 1208.
146. *Id.*
147. Dinkins v. Varsity Contractors, Inc., No. 04 C 1438, 2005 U.S. Dist. LEXIS 6732, at *45 (N.D. Ill. Mar. 10, 2005).
148. *Id.*
149. *Id.* at *44.
150. *Id.* at *19.
151. *Id.* at *44.
152. *Id.* at *44–*45.
153. 251 F.3d 1132 (7th Cir. 2001).
154. *Id.* at 1133.

fifty employees in seventy-five miles, applied for maternity leave.[155] When Thomas was prepared to return to work, Pearle notified her that there were no positions available in her region.[156] Representations of job security were made before Thomas' leave started.[157] Thomas sued for breach of contract, alleging that Pearle incorporated the FMLA into her contract through the Summary Plan Description of Employee Benefits.[158] The district court granted summary judgment for Pearle, but the Seventh Circuit reversed.[159] The court of appeals held that Thomas had a viable claim, stating: "[I]t is hard to construe the statement in the [Summary Plan Description of Employee Benefits] that '*all* employees with one year of service who worked 1,250 hours with Pearle in the 12 months immediately prior to requesting leave' are eligible for the FMLA as anything other than an express promise."[160]

F. Retaliation Claims

Retaliation claims may be subject to a different analysis altogether.[161] In *Beffert v. Pennsylvania Department of Public Welfare*, the district court held that a plaintiff may proceed with a retaliation claim under the FMLA without twelve months of service.[162] Beffert was hired on July 28, 2003.[163] On January 6, 2004, Beffert notified her employer she was pregnant.[164] Beffert did not expect to deliver her baby until after July 28, 2004, more than twelve months after she began her employment.[165] Beffert was terminated effective January 21, 2004.[166] She sued.[167]

In moving to dismiss Beffert's FMLA claim, the employer argued that Beffert had been employed for fewer than twelve months at the time of the alleged adverse employment action in January 2004 and her "expectation that she would still have been employed by the date of her expected delivery was too tenuous and speculative to make her an 'eligible employee' for purposes of the FMLA."[168] The district court

155. *Id.* at 1133–34.
156. *Id.* at 1135.
157. *Id.* at 1134–35.
158. *Id.* at 1135.
159. *Id.* at 1135, 1141.
160. *Id.* at 1136–37.
161. Retaliation is proscribed by the Act. *See* 29 U.S.C. § 2615(a) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title" and "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title").
162. No. 05-43, 2005 U.S. Dist. LEXIS 6681, at *9–*10 (E.D. Pa. Apr. 18, 2005).
163. *Id.* at *2–*3.
164. *Id.* at *3.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at *5–*6.

disagreed.[169] The district court first observed that the FMLA states "an employee" must provide the employer with at least "30 days' notice of the date leave is to begin where such notice is practicable."[170] The district court reasoned that the "reference to 'employee' rather than 'eligible employee' is a recognition that some employees will and should give notice of future leave before they have been on the job for twelve months."[171] Thus, the district court concluded, the FMLA protects from (preemptive) retaliation "non-eligible employees who give such notice of leave to commence once they become eligible employees."[172]

G. *Former Employees*

In *Smith v. BellSouth Telecommunications, Inc.*, the Eleventh Circuit held that the FMLA prohibits employers from using a job applicant's *past use* of FMLA leave as a negative factor in hiring decisions.[173] In October 1998, Smith resigned from his job.[174] Smith had used FMLA during his tenure.[175] When Smith reapplied in January 1999, he was not rehired.[176] The notes from the staffing manager's discussion with Smith's former supervisor stated: "Took a lot of FMLA."[177] In deciding Smith's appeal of the district court's grant of summary judgment, the court of appeals concluded that the term "employee" as used in the FMLA statute was ambiguous as to whether it included an individual such as Smith (a prospective employee).[178] However, because a broad

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169. *Id.* at *9–*10.

170. *Id.* at *8–*9.

> In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) of this section is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

29 U.S.C. § 2612(e)(1).

171. Beffert v. Pennsylvania Dep't of Pub. Welfare, No. 05-43, 2005 U.S. Dist. LEXIS 6681, at *9 (E.D. Pa. Apr. 18, 2005).

172. *Id.*

173. 273 F.3d 1303, 1314 (11th Cir. 2001).

> An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

29 C.F.R. § 825.220(c).

174. *Smith*, 273 F.3d at 1305.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1313.

interpretation of the definition of "employee" furthered the remedial purposes of the FMLA, the court of appeals concluded that the Labor Department's determination that the FMLA applies to prospective employees is reasonable.[179]

H. USERRA

Employers should be mindful of the interplay between the FMLA and federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[180] The Labor Department takes the position that, in assessing the FMLA eligibility of a member of the armed services, the employer must *combine* the months employed and the hours that *were actually worked* for the employer with the months and hours that *would have been worked* during the twelve months prior to the start of the leave requested but for the military service.[181]

III. Conclusion

The text of the FMLA suggests that an employee's eligibility can be assessed by answering three fairly straightforward questions. Not so. The subject of eligibility for FMLA leave has considerable depth and varies from jurisdiction to jurisdiction in some important respects. Informed decision making by experienced personnel therefore is imperative. Mistakes concerning an employee's eligibility can lead to serious misunderstandings between the employer and employee and, in the worst case scenario, costly litigation with a plaintiff who may present a sympathetic version of events to jurors. As noted, broader remedies, including punitive damages, may be available under applicable state law. Restricting FMLA leave to truly eligible employees is also one of the most important strategies available to employers to protect against the overuse, misuse and abuse of FMLA leave.

Accordingly, human resources professionals and in-house counsel (particularly for multistate employers) should familiarize themselves with the FMLA regulations and controlling federal *and* state case and statutory law in their jurisdictions. Additional measures include reviewing and updating FMLA and related benefit policies, forms, plan documents and postings. Furthermore, regular training for managers and supervisors is essential in order to minimize the risk of estoppel issues, and periodic audits of eligibility determinations made by human resources staff are also recommended in order to identify compliance issues before they escalate into compliance problems.

179. *Id.*

180. 38 U.S.C. §§ 4301–4333.

181. Frederico Juarbe Jr., Assistant Secretary for Veteran's Employment and Training, *Memorandum on the Protection of Uniformed Service Members' Rights to Family and Medical Leave* (July 22, 2002).