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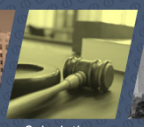
## Agenda


FMLA: What Triggers Employee Eligibility?

FMLA Eligibility and the Sale of a Business

Timing of FMLA Requests



Calculating Hours Worked for FMLA Purposes

Employee's Duty to Provide Notice of Eligibility



## Family Medical Leave Act (FMLA): What Triggers Employee Eligibility?



## FMLA Eligibility 29 U.S.C. § 2611/2612

An employee is generally eligible for leave if he/she has been employed for at least 12 months by the employer with respect to whom leave is requested; and for at least 1,250 hours of service with such employer during the previous 12-month period.

# FMLA Eligibility and the Sale of a Business



## Hypothetical 1

- Patty Plaintiff worked for Company A for **four years** as a hospital transport coordinator. Company A, however, decided to sell the business to Company B.
- Company B acquired several of Company A's assets, including vehicles, equipment and several assignments of contracts with hospitals. Company B also rehired 19% of Company A's employees, including Patty Plaintiff.
- Patty Plaintiff started the job with Company B just 15 days after the sale. Patty Plaintiff maintained the same job position, job duties and worked in the same basement office.



## Hypothetical 1

- Four months after the sale, Patty Plaintiff learned she was pregnant, so she notified Human Resources that she would be requiring FMLA leave.
- Patty Plaintiff was told by Human Resources that she was not eligible for FMLA leave because she had not worked for Company B for 12 months. Thus, her FMLA request was denied.
- Instead of FMLA leave, Patty Plaintiff was only offered two weeks' unpaid leave pursuant to Company B's FMLA-ineligible policy.

## Questions

- Was Patty Plaintiff an eligible employee?
- What issues was Human Resources required to consider under the FMLA?
- Was Patty Plaintiff entitled to more than two weeks unpaid leave pursuant to her request?
- What affect did the timing of Patty Plaintiff's request have on her eligibility status?



## The Successor Interest Issue: 29 U.S.C. § 2611(4)(II)

- The term "employer" under the FMLA also includes any successor in interest of an employer.
- When dealing with FMLA requests following the sale of a business, it is important for Human Resources to consider certain aspects of the sale and the affect it may have on certain employee's eligibility status.
- Courts analyzing this issue apply a multi-factor test to calculate how an employee's 12-month period of employment should be measured. It will not always be triggered by the employee's hire date.



## Eight-Factor Successorship Status Test

1. Substantial Continuity of the same Business

Did Company B purchase assets and contractual rights from Company A?

2. Use of the Same Plant

Is Company B using the same facilities used by Company A?

3. Continuity of the Workforce

Did Company B hire a substantial number of Company A's employees?

4. Similarity of Jobs and Working Conditions

Did Patty Plaintiff maintain the same job duties/title/rate of pay at Company B as at Company A?

*Minor changes to workplace policies is not a fundamental change that defeats this element in favor of successorship.

5. Similarity of Supervisory Personnel

Is Patty Plaintiff supervised by the same individuals?

## Eight Factor Successorship Status Test

6. Similarity in Machinery, Equipment, and Production Methods

Did Employer B purchase a significant quantity of equipment from Employer A? Is the plaintiff using the same materials to carry out her job function?

7. Similarity of Products or Services

8. Ability of the Predecessor to Provide Relief

This factor is only addressed if the FMLA request is made prior to the sale of the business.



## Benjumea v. GEM North LLC (D. N.J. 2020)

Facts central to the application of the test:

- Company B purchased several assets and contractual rights from Company A
- Patty Plaintiff used the same office while at Company B
- Company B hired 19% of Employer A employees
- Patty Plaintiff's job duties did not change
- The equipment used by Company B was substantially the same as equipment used by Company A
- Company B offered the same services

Under these facts, Company B would be considered the successor in interest of Company A. Thus, to measure Patty Plaintiff's period of employment, Human Resources should have considered the four years she was employed by Company A plus the four months she was employed by Company B. Patty Plaintiff would, therefore, satisfy the 12-month threshold and was an eligible employee under the FMLA.



## Timing of FMLA Requests

## Hypothetical 1

- Polly Plaintiff started her employment with Bad Choices, Inc. in January 2021. In April 2021, Polly Plaintiff found out she was expecting a baby girl.
- Polly Plaintiff immediately notified Bad Choices, Inc.'s Human Resources department that she intended to take FMLA maternity leave after the baby was born **in January 2022**.
- At the time Polly Plaintiff made her FMLA request, she had not been employed for 12 months and was not an eligible employee under the FMLA. But, she would be eligible at the time she gave birth to the child.



## Hypothetical 2

- Polly Plaintiff's relationship with management went south after she expressed her intent to take maternity leave. She received a negative performance review for the first time during her employment and was often denigrated by her boss. The stress of the job caused her to suffer pregnancy-related issues.
- Polly Plaintiff had to take non-FMLA leave after her doctor put her on bed rest and she was later fired by Bad Choices, Inc.



## Questions

- Was Polly Plaintiff's report of the intent to take FMLA leave a protected activity?
- Could Bad Choices, Inc. be liable for FMLA retaliation?
- What is the relevance of Polly Plaintiff's FMLA leave not starting until January 2022?
- Did Polly Plaintiff have any rights under the FMLA?



## Pre-eligibility Request for Post-eligibility Leave
## Pereda v. Brookdale Senior Living Communities, Inc. (11th Cir. 2012)

- A pre-eligible request for post-eligible leave is a protected activity under the FMLA. This means, an employer can be liable for FMLA retaliation or interference following an employee's expression of intent to take FMLA leave at a definite time.
- In this case, Polly Plaintiff has a cause of action for FMLA retaliation or interference. Even thought the triggering event has not occurred (the child's birth), the advance notice provided by Polly Plaintiff is considered a protected activity.
- The purpose of the rule is that employees would otherwise be deterred from reporting intended leave well in advance.



## Calculating Hours Worked for FMLA Purposes



## Hypothetical 3

- Pete Plaintiff worked for the railroad for 15 years. Under the railroads FMLA policy and federal law, employees had to work at least 1,250 hours during the 12 months immediately preceding the start of their requested leave to be an eligible employee.
- As part of Pete Plaintiff's job at the railroad, he spent a lot of time on-call. During these hours, he was not required to do any work, but he was still being paid.
- Pete Plaintiff made an FMLA leave request due to issues with his asthma.

## Hypothetical 3

- Pete Plaintiff's record showed he only worked 1,100 hours in the year preceding his request because the record did not include his on-call hours. Pete Plaintiff's FMLA leave request was denied because he did not meet the 1,250 working hours required under the FMLA.
- Pete Plaintiff was very confused. The railroad paid him for his "on-call" hours, which totaled 2,300 paid hours in the preceding 12 months. Pete Plaintiff felt the FMLA required the railroad to include his "on-call" time when determining his FMLA eligibility.



## Questions

- Was the railroad required to include Pete Plaintiff's on-call hours in the calculation for determining whether he satisfied the FMLA's 1,250 hour threshold?
- Does it matter that the railroad already paid Pete Plaintiff for 2,300 hours worth of work?
- What other laws are at play in this scenario?
- Does the type of job affect how FMLA eligibility is calculated?



## FMLA and the FLSA: What Does it Mean for Eligibility?

- The Fair Labor Standards Act (FLSA) sets the framework for determining whether an employee meets the FMLA's 1,250 hours-worked requirement. 29 U.S.C. § 2611(2)(C).
- The FLSA permits break time to count toward an employee's hours worked if the break is spent predominantly for the employer.
- To consider "break time" or "on-call" time towards hours worked under the FMLA, you must analyze the specific circumstances of the business.



## Employment Circumstances Courts will Consider When Analyzing Break Time

- Nature of the industry
- Contracts defining on-call hours
- Employee's ability to have personal free time
- Restrictions enforced by the employer
- Schedules imposed
- Whether any work was actually performed during break time or on-call hours



## Jackson v. BNSF Railway Co. (N.D. Ill. 2018)

Pete Plaintiff's on-call hours do not count towards the working hours calculation during the FMLA. Pete Plaintiff was under a voluntary contract which acknowledged that he was not to perform any work during his on-call hours. Pete Plaintiff was, therefore, able to go about his activities at his leisure. It was not relevant that Pete Plaintiff was paid for those hours in which he was not working.



## Employer's Duty to Provide Notice of Eligibility

## Hypothetical 4

- Employee begins experiencing neck and back pain, headaches and dizziness after moving from one department to another at work.
- Employee mentions these symptoms to her supervisors but does not state that her symptoms prevented her from performing her job.
- Employee ultimately suffers a dizzy spell passes out briefly at work.
- When she is moved back to the first department, her symptoms are lessened.



## Hypothetical 4

- Employee visits a physician regarding her neck and back pains and dizziness. The doctor gives her a note saying she should "work in another setting until evaluated by an optometrist and pending further workup."
- Employee gives letter to supervisor who leaves the note in his desk and does not convey the message to HR.
- Shortly thereafter, employee calls in saying she "will not be at work," even though she had exhausted her paid time off. After multiple days of absence, she is terminated for failure to come to work.



## Question

- Was the employer on notice that employee was requesting leave for a medical condition?

## 29 C.F.R. § 825.300

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 employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances.



## 29 C.F.R. § 825.303(b)

Content of notice. An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a healthcare provider…



## 29 C.F.R. § 825.303(b)

…Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means…

## Shoemaker v. Alcon Labs (4th Circuit 2018)

- The court held that the employer had not interfered with the employee's FMLA rights because the employee did not do enough to put employer on notice that absences were due to a medical condition.
- The court held that an employer's knowledge of a medical condition was not the same as knowledge that the employee needed medical leave.
- The employee's phone call was not enough to constitute a request for leave and there was not enough information for the employer to determine that FMLA could apply.



## Hypothetical 5

- Employer utilized an electronic system for requesting FMLA leave.
- Employee requests to use paid sick time and informs the employer that the reason is that the employee will be getting injections for back issues.
- Employee uses additional sick time to care for father diagnosed with cancer.
- Employee uses additional sick time to care for her husband when he tears his rotator cuff.
- Employee never uses the electronic FMLA request system.



## Hypothetical 5

- Employer never sends an eligibility notice to Plaintiff for FMLA and does not designate any of the time off as FMLA.
- Employee is later terminated for poor performance, and files suit for FMLA interference for employer's failure to designate the time off as FMLA.



## Questions

- Was the employer required to send an eligibility notice to the employee if the employee never asked for FMLA leave?
- Can an employee choose not to use FMLA leave and opt to use sick time instead?



## 29 C.F.R. § 825.303(c)

When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances… an employer may require employees to call a designated number or a specific individual to request leave.

(Exception for emergency situations)



## March v. Board of Commissioners of Erie County (N.D. Ohio 2020)

- If an employee chooses to take another type of leave (such as sick leave) instead of FMLA, the employer does not violate the FMLA by failing to designate the time as FMLA.
- Careful though—the U.S. DOL may disagree with this.

## Hypothetical 6

- Employee is injured at work and files a workers' compensation claim.
- The employee can work light duty, which is available on some days.
- The employee is paid by the employer on days when light duty is available, and by workers' compensation when it is not.
- Employee satisfies the eligibility requirements for FMLA, but the employer does not send an eligibility notice because the employee is being fully paid. Employee retains his FMLA entitlement for future use.
- Employee is later laid off as part of a reduction in force and sues for FMLA interference based on the employer's failure to designate the leave time as FMLA.



## Questions

- Is an employer required to send a notice of eligibility for FMLA when an employee is on workers' compensation leave?
- Is an employee entitled to FMLA if they are being fully paid for their time away through workers' compensation?
- Does it matter that there was no prejudice to the employee since he received all the leave to which he was entitled (and was paid for all of the time)?



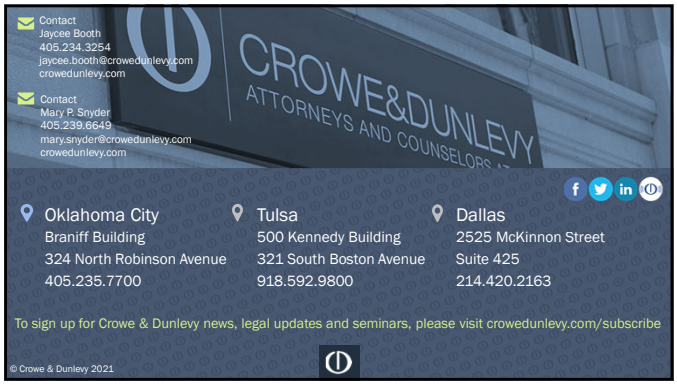
## Skerce v. Torgeson Electric Co. (10th Cir. 2021)

- Court found that the employer did interfere with the employee's FMLA rights by failing to send a Notice of Eligibility.
- The court found that the lack of any prejudice to the employee did not matter.

## Takeaways Regarding Notice of Eligibility

- Always send Notice of Eligibility if there is any indication that time away might be for an FMLA-qualifying reason.
- Court decisions are inconsistent.
- The DOL takes a more hard-line approach than the courts.



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