Shipman & Goodwin LLP

CLIENT ALERT

January 25, 2007

FMLA – What Counts and What Doesn't When Determining Eligibility

Two recent decisions from the federal appeals court in Boston provide answers to some vexing problems employers face when determining whether an employee is eligible for Family Medical Leave Act (FMLA) leave. In the first case, the appellate court determined that someone who would not have been eligible for leave based on the length of his present employment could use his previous time working for the same employer to reach the service threshold for eligibility. This was so, even though there was an employment gap of 5 years. In the second case, the court determined that an employee whose employer did not have enough employees locally to qualify for FMLA coverage was not permitted to combine the employee populations of the employer with that of its parent corporation, which was local, to establish eligibility as there was not joint control of employment policies.

Reviewing how long someone has been employed and whether they have worked a sufficient number of hours to be eligible for leave should be an easy task - one looks at how long the person has been employed and can see whether he/she has worked for the company for 12 months. That task has been made more complicated as the First Circuit Court of Appeals has determined that past employment may be used to allow an employee to qualify for leave.

Ken Rucker had worked for several years for Lee Auto Mall. He then left to pursue other opportunities. Five years later he returned to work for Lee Auto Mall. Seven months later, he requested a medical leave because of a ruptured disk in this back. He took medical

leave at various times over the course of a month as severe back pain prohibited him from working. After having taken 13 days off and still not being back at work, he was terminated for excessive absences. The Company had not considered him eligible for a medical leave under FMLA as he had not worked for 12 continuous months, although he had worked more than the minimum number of hours to be eligible for the leave.

Mr. Rucker then sued his employer alleging he was terminated for taking a medical leave for which he was eligible under the FMLA. He asserted that his past employment should have been added to his present employment making him eligible for the leave.

The appeals court found that the statute had not addressed the issue of the employment "gap", and believed that bridging of the periods of employment was reasonable. The Department of Labor, which supported Mr. Rucker, took the position that 5 years was the outer bounds for such bridging. The court refused to limit the time period to 5 years. The court downplayed the consequences of its decision by pointing out that the re-hired employee still had to satisfy the hours of service requirement to be eligible. The court, however, overlooked practical problems relating to the record keeping burden as under FMLA an employer need only maintain records for 3 years. It also ignored the problem of employers who have multiple locations in multiple states and might not realize that the person who was recently hired had been employed 5 or more years earlier at another location. Such records might not be easily accessible.

While it technically applies only in Massachusetts, Maine, New Hampshire, Puerto Rico and Rhode Island, it may become the way in which the law is generally interpreted. As a result, it is imperative for employers to be alert to the fact that the date of last hire may not be the date to use in deciding whether to grant a medical leave. It is important before terminating a employees or denying a leave of absence under FMLA that his/her past employment be considered in determining eligibility for leave.

In the second case, Leanne Engelhardt, a customer service representative, was fired after taking time off from work to care for her daughter. She sued her employer, S.P. Richards Company, claiming that while the company had less than 50 employees who worked within a 75 miles radius of her office, the number of employees should be combined with the parent corporation's employees who were located within that distance. She argued that the companies were a single integrated enterprise. There was an overlap in the administration of employment policies. The court found that the two companies were not

integrated employers. There was no common management, no integrated operations and no centralized control over labor relations issues. As a result, Ms. Engelhardt's employer was not covered by FMLA, she was not eligible for FMLA leave, and her termination did not violate the law.

This case, however, is a cautionary tale. Affiliated companies should review the degree to which they are "integrated" if one has less than 50 employees and together they would have more than 50 employees within a 75 mile radius to be sure that employees are not covered by the law and that a termination does not turn into a litigation nightmare.

QUESTIONS OR ASSISTANCE?

If you have any questions about FMLA – What Counts and What Doesn't When Determining Eligibility, please do not hesitate to contact Gary Starr at (860) 251-5501, Brian Clemow at (860) 251-5711, or Richard Mills at (860) 251-5706.