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EMPLOYER LAW BLOG

FMLA Math: 1+1 = 1?

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When are two corporations really one corporation?

This question becomes crucial for employers when we enter “FMLA World.”

Many small business owners keep their eye on that magic number of 50 employees that triggers application of the FMLA. This article discusses some pitfalls for small employers in this counting game.

When one corporation owns part of another corporation -

Normally, a corporation is considered a single employer under the FMLA rather than its separate divisions or locations. When one corporation has an ownership interest in another, they will generally be considered separate employers for FMLA purposes.

That is, unless they meet either the “integrated employer” test or the “joint employer” test.

The integrated employer test -

Under the “integrated employer” test, separate entities are considered to be parts of a single employer if certain factors are present. No one factor determines inclusion. Instead, the total circumstances, and the following factors, are considered:

(1) common management;

(2) interrelated operations;

(3) centralized control over labor relations; and

(4) the degree of common ownership or financial control.

NOTE: *When two or more entities are considered to be an “integrated employer”, the employees of all entities that form the employer are counted in determining employer coverage and employee eligibility. 28 CFR 825.104*

The “integrated employer” test is not a new concept created solely for purposes of the FMLA. It is based upon established case law arising under Title VII of the Civil Rights Act of 1964 and the Labor Management Relations Act (LMRA).

Under Title VII and other employment-related legislation, including the LMRA, when determining whether to treat separate entities as a single employer, individual determinations are highly fact-specific and are based on the following factors:

1. interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment;
2. common management, common directors and boards;
3. centralized control of labor relations and personnel, i.e., hire and fire employees; and,
4. common ownership and financial control.

A determination of whether or not separate entities are an "integrated employer" is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality.

The "interrelation of operations" factor focuses on the degree to which the parent company "excessively influenced or interfered with the business operations of the subsidiary … beyond that found in the typical parent-subsidiary relationship." *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997).

Courts have found centralized control where separate entities share policies concerning hiring, firing, and training employees, and in developing and implementing personnel policies and procedures.

"No single factor is dispositive; rather, single employer status under this test „ultimately depends on all the circumstances of the case." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 486 (3d Cir. 2001).

The joint employer test -

Sometimes, separate corporations, with no common ownership, will be considered "joint employers" of the same employee because they both exercise some control over the work and working conditions of the employee, as is common when workers are supplied by a staffing services firm.

A "joint employer" situation may exist where two or more businesses exercise some control over the employee's work or working conditions (such as occurs with temporary workers hired through a staffing services firm). When an employee's work simultaneously benefits two or more employers, or the employee works for more than one employer at different times during the week, the arrangement usually is considered a joint employer relationship if:

(1) the employers have arranged to share an employee's services or to interchange employees;

(2) one employer acts for the other employer in relationship to the employee; or

(3) the employers have some association related to the employee and are considered to share control of the employee because one employer controls, is controlled by, or is under common control with the other employer. The joint employer relationship is determined by a review of all the circumstances rather than by any one factor.

When organizations are considered joint employers, only the primary employer is responsible for giving notices concerning FMLA leave, providing the leave, and maintaining health benefits. A joint employer will be viewed as the primary employer if it has the authority and responsibility to hire or fire, assign or place the employee, and provide pay and benefits.

For example, a staffing services firm usually would be considered the primary employer of a temporary or leased employee. The primary employer is responsible for job restoration, and the secondary employer is responsible for accepting an employee returning from leave if the secondary employer continues its relationship with the placement agency and the agency chooses to return the employee to that job. This is required even if the secondary employer is not covered by the FMLA.

A joint employee must be counted by both the primary and secondary employers for purposes of determining whether the employee is protected by the FMLA and whether the employer is covered. This is true even if the employee appears on the payroll of only one of the employers. For example, an employer is covered by the FMLA if it has 20 leased employees hired through an agency and 30 other regular employees.

A good example –

The manager at a pizza store filed an FMLA lawsuit. *Cousin v. Sofono Inc.,* No. 01-30186-MAP, (D. Mass 2003).

The employer argued that the law didn't apply to his store because it doesn't employ 50 or more people. He admitted that it would cross the 50-employee threshold if each of its three pizza franchises together were deemed "integrated." But each store stood alone in management structure and financial control.

The court disagreed and let the case proceed. Reason: Enough linkage existed among those three stores to make them an “integrated employer”, pushing them over the 50-employee limit. The stores were part of the same franchise and they shared a workers' comp policy.

For more information on the Family Medical Leave Act, see our full archive of FMLA blog entries.

By Courtney Cox

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