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www.mintz.com

One Financial Center
Boston, Massachusetts 02111
617 542 6000
617 542 2241 fax

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202 434 7300
202 434 7400 fax

666 Third Avenue
New York, New York 10017
212 935 3000
212 983 3115 fax

707 Summer Street
Stamford, Connecticut 06901
203 658 1700
203 658 1701 fax

First Circuit Outlines Requirements for an Employee's Eligibility for FMLA Leave

Overview

In a case of first impression, the United States First Circuit Court of Appeals held that an employee may count periods of past employment with an employer to meet the 12-month eligibility requirement for leave under the Family and Medical Leave Act (FMLA). See *Rucker v. Lee Holding Co.*, No. 06-1633, 2006 WL 3704457 (1st Cir. Dec. 18, 2006).

FMLA requires covered employers to grant eligible employees up to 12 weeks of unpaid leave during any 12-month period for a number of reasons, including a serious health condition, the birth or adoption of a child, and to care for an immediate family member. To be eligible to take FMLA leave, the employee must have worked for the employer for at least 12 months and for at least 1,250 hours of service during the previous 12-month period. *29 C.F.R. 825.110*. Prior to *Rucker*, covered employers generally considered only employees who had worked 12 consecutive months as eligible under FMLA. Now, under *Rucker*, employers must combine both current and previous periods of an employee's service, even those separated by years of service, towards the FMLA's 12-month eligibility requirement.

Rucker's Employment with Lee Holding

Kenneth Rucker worked for five years as a car salesman for Lee Auto Malls ("Lee") in Maine. Rucker then left his job, severing all ties with Lee. Five years later, he rejoined the company. Seven months after his return, Rucker hurt his back and took intermittent medical leave. While out on medical leave, Lee fired him for excessive absenteeism. Rucker sued Lee, claiming that Lee unlawfully terminated him for taking leave in contravention of the FMLA. The United States District Court for the District of Maine granted Lee's motion to dismiss, on the basis that Rucker did not satisfy the FMLA's 12-month employment requirement because he had worked only seven

1620 26th Street
Santa Monica, California 90404
310 586 3200
310 586 3202 fax

1400 Page Mill Road
Palo Alto, California 94304
650 251 7700
650 251 7739 fax

9255 Towne Centre Drive
San Diego, California 92121
858 320 3000
858 320 3001 fax

The Rectory
9 Ironmonger Lane
London EC2V 8EY England
+44 (0) 20 7726 4000
+44 (0) 20 7726 0055 fax

months (*i.e.*, his most recent employment term).

The First Circuit's Decision

On appeal, the First Circuit reversed, holding that Rucker could combine his earlier employment with his current service to meet the 12-month eligibility period under the FMLA, despite his 5-year gap in employment.

The First Circuit held the applicable FMLA provision defining an “eligible employee” as one employed “for at least 12 months by the employer” ambiguous. The Court also held that neither legislative history nor any canons of statutory construction eliminated the ambiguity. In addition, the court did not find any guidance from the United States Department of Labor’s (DOL) regulation implementing the FMLA provision in question.

In light of the ambiguity, the Court relied on DOL interpretations of the provision (in the form of a preamble to FMLA regulations), and an amicus brief filed by the DOL. The DOL’s interpretation stated that a break in employment does **not** bar employees from counting an earlier period of employment towards the 12-month FMLA requirement.

The First Circuit found the DOL’s interpretation reasonable and controlling. Accordingly, it held that discontinuous periods of employment marked by breaks in service may be combined to constitute the 12-month period required for FMLA eligibility.

Notably, the First Circuit refused to place any limits on what constitutes too long of a gap in employment to be permissible under the FMLA. While the DOL’s amicus brief urged the court to establish a rule that a break of service of more than five years was the outer limit under the FMLA, the Court asserted that it would play no role in undermining the administrative rulemaking process by creating such a rule.

Action Items for Employers

It is critical for employers to understand the Rucker decision when determining an employee’s eligibility for FMLA leave. More specifically, employers now must consider the length of an employee’s prior terms of employment (if any) when determining if the employee has met the 12-month and 1,250 hour service thresholds for FMLA eligibility.

Additionally, since the First Circuit failed to restrict the permissible length of an employee’s interlude in employment for eligibility purposes, employers must keep records of the employee’s entire service history, in order to properly assess his/her FMLA eligibility.

Indeed, the court noted in a footnote that this finding is inconsistent with a FMLA regulation that only requires employers to maintain employment records for three years.

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If you have any questions regarding the subject covered in this Advisory, or any related issue, please feel free to contact Maura Pelham (mmpelham@mintz.com, 617.348.1851) or the Mintz Levin attorney who ordinarily handles your legal affairs.

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