

FMLA Coverage For Employees Who Are Not Yet Eligible

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Employees are eligible for protection under the Family and Medical Leave Act (“FMLA”) once they have been employed (a) by the employer for 12 months; (b) for at least 1250 hours of service during the 12-month period immediately preceding the leave; and (c) at a work site where 50 or more employees are employed within 75 miles of the work site. [29 U.S.C. § 2611(2) (A); 29 C.F.R. § 825.110(a)]

But what happens if an employee who is not yet eligible for FMLA leave, because they have been employed for only 10 months, notifies an employer that they intend to take such leave once they become eligible?

This is what happened in the case of [Corral v. Hersha Hospitality Management, Inc.](#), No. 12-cv-02375 (DRD Sept. 24, 2012). Corral, a pregnant hotel housekeeper, notified her employer that she would take pregnancy leave six months later after she became eligible.

Her employer fired her, citing poor performance. She brought suit claiming, among other things, a violation of her FMLA rights. The employer tried to have the FMLA claim dismissed since her leave notice was given before she was eligible for FMLA coverage.

The court framed the issue as “whether the FMLA protects a non-eligible employee who requests leave that would commence after she gains eligibility under the Act.”

The Court held for the housekeeper, noting that “a finding that non-eligible employees are not protected by the statute for requested leave effective once they gain eligibility, when the statute itself mandates a minimum of thirty days' notification, would lead to an inconsistent result where both the employer and the employee must submit to gamesmanship.”

As for concerns that a loophole protecting non-eligible employees would be created, the Court noted that “employers remain free to terminate employees for reasons unrelated to the notification to take FMLA leave.”

In sum, the Court held that “pursuant to the FMLA, pre-eligible employees are entitled to covered rights and attempts to exercise such rights, including the right to foreseeable future leave once eligibility is gained.”

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