

When does 50 not equal 50? FMLA coverage versus FMLA eligibility

Most people think of 50 as the magic number for the FMLA. “Oh, we have 50 employees, so now we have to comply with the FMLA,” is a popular refrain among HR departments. It is not that simple.

The FMLA has two different rules that must be met before you have to offer FMLA leave to an employee—coverage and eligibility. Coverage applies to the employer; eligibility applies to the employee. They both have the magic number 50 as a key component, but are very different in application.

Coverage: 50 or more employees

The FMLA covers any private employer that has 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

Who counts as an employee for coverage purposes?

- Any employee whose name appears on the payroll any workday during a week, including part-time employees.
- Employees on any paid or unpaid leave, as long as the employer has a reasonable expectation that the employee will later return to active employment.

Note: Employees on temporary or permanent layoff are not counted. An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year.

Thus an employer who met this threshold in 2010, drops below it later that year, and never crosses it again during 2011, would remain covered until Dec. 31, 2011.

Eligibility: 50 or more, but where?

Just because the FMLA covers a particular employer, does not mean the FMLA requires that employer to provide FMLA leave to any of its employees. An employee must still meet the FMLA's eligibility requirements.

To be eligible for FMLA leave, an employee must work for a covered employer, and have:

1. Been employed by the employer for at least 12 nonconsecutive months
2. Worked 1,250 hours during the 12-month period preceding the start of the requested leave
3. Worked at a location where the employer employs 50 or more employees within 75 miles.

If you are a business that has 50 or more employees who are fragmented across smaller locations, each more than 75 miles from the others, then you may fall into the weird vortex of being covered by the FMLA, but never having any employees who are eligible for leave.

Notice and record-keeping

There are two key areas where this distinction makes a difference: the FMLA's notice and record-keeping requirements.

Notice: Every employer *covered* by the FMLA is required to post a notice explaining the FMLA's provisions, even if no employees are eligible for FMLA leave. If, however, an FMLA-covered employer has at least one FMLA-*eligible* employee, it must also provide this same general notice to each employee by including the notice in employee handbooks or other written guidance concerning employee benefits or leave rights (if such written materials exist) or by distributing a copy of the general notice to each new employee upon hiring.

Record-keeping: The FMLA also requires *covered* employers to maintain the following records for all employees:

- Basic payroll and identifying employee data, including name, address, and occupation
- Rate or basis of pay and terms of compensation
- Daily and weekly hours worked per pay period
- Additions to or deductions from wages
- Total compensation paid.

Covered employers that have *eligible* employees must additionally maintain the following:

- Dates FMLA leave is taken by FMLA eligible employees. Time records and leave request forms are sufficient as long as the leave in those records is designated as FMLA leave.
- The hours of the leave, if FMLA leave is taken by eligible employees in increments of less than one full day.
- Copies of employees' FMLA-leave requests (if in writing), and copies of all written FMLA designations and other notices given to employees. Copies may be maintained in employee personnel files.
- Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.
- Premium payments of employee benefits.
- Records of any disputes between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee regarding the reasons for the designation and for the disagreement.