

All periods of employment count toward FMLA eligibility

For the purpose of determining FMLA eligibility, all time spent working for an organization counts toward the minimum one year of service the law requires. That's true even if there was a gap in employment.

If you have an employee who works seasonally or who has been laid off and recalled, make sure you check whether she meets the one-year requirement before you turn down a request for FMLA leave. The same is true if you fired the employee and later rehired her.

Bottom line: All time served counts toward FMLA eligibility, not just consecutive periods of service.

Recent case: Nancy Cox worked for True North Energy Corp. from September 2001 through May 2006, when she was terminated. True North rehired Cox on June 30, 2006. In September 2006, she was diagnosed with kidney cancer and needed time off for surgery and treatment.

Cox requested FMLA leave, but True North turned her down. However, the company promised to find her an open position when she was ready to return. When Cox tried to come back to work in November, she was told there were no open positions.

Cox sued, alleging the company had violated the FMLA by denying her both leave and reinstatement to her prior position. The court agreed. It reasoned that the FMLA doesn't state employees must be employed continuously for a year before taking leave. Instead, the one-year requirement is satisfied if the employee has worked for the company for a total of one year.

Since Cox easily met the law's other eligibility requirements (*see box below*), she was eligible for FMLA leave. (*Cox v. True North Energy*, No. 1; 07-CV-1372, ND OH, 2007)

Final note: The court also said Cox could sue for emotional distress under Ohio law, based on the company's broken promise to let her return to work. That's not the case under the federal FMLA—employees can't receive damages for emotional distress or punitive damages. But the court said state law allowed Cox to get those damages if she could show that her employer acted with malice and conscious disregard of her leave rights. Plus, the court said the employer's promise to find an open position for Cox when she was ready to return worked to her detriment. It said that promise can be enforced.

FMLA service eligibility

Employees who meet all of the following requirements are eligible for 12 unpaid weeks of FMLA leave:

- The employer has a total of 50 employees within a 75-mile radius of the workplace. Count all employees, whether full- or part-time, toward the 50-employee threshold.
- The employee has worked for the company for at least one full year, even if that time is not consecutive. Count all employment periods.

- The employee worked at least 1,250 hours for the employer during the last 12 months.
- The employee has a serious health condition, needs to care for a spouse, parent or child with a serious health condition, is pregnant or has just given birth, is caring for a newborn or just adopted a child.