
DOL to Treat More Entities as Covered by the FMLA via Joint Employment

By Nitya S. Lohitsa, Paul A. Wilhelm / Jan 27, 2016

In connection with last week's [Administrator's Interpretation 2016-1 regarding Joint Employment \(under the Fair Labor Standards Act\)](#) the Department of Labor (DOL) Wage and Hour Division (WHD) issued a new fact sheet regarding "Joint Employment and Primary and Secondary Employer Responsibilities Under the Family and Medical Leave Act (FMLA)." This Fact Sheet sets forth the DOL's position that "[e]mployees who are jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility under the FMLA, regardless of whether the employee is maintained on one or both of the employers' payrolls."

The DOL, however, is setting forth a distinction in duties for those it deems "primary" versus "secondary" employers. Generally speaking, "primary" employers, such as a staffing company or temporary placement agency (those mainly responsible for control, pay, leave and benefits), are responsible for essentially all FMLA responsibilities for the jointly-employed employees. "Secondary" employers, on the other hand, are responsible for fewer but still important compliance items, including: (1) counting those workers for coverage and eligibility determinations; (2) not retaliating against the employee(s), discriminating against the employee(s) or interfering with their FMLA rights; and (3) keeping payroll data and identifying information.

Where multiple employers are covered by the FMLA as to one or more FMLA-eligible employees, the DOL provides the following chart to explain the responsibilities of the primary and secondary employers, respectively, toward the employee(s):

FMLA Responsibilities of Joint Employers	Primary Employer	Secondary Employer
Count jointly-employed employees for coverage and eligibility determinations (Fact Sheet #28)	Yes.	Yes.
For employee-eligibility determination, use its worksite for the eligibility test (50 employees within 75-miles of the worksite) (Fact Sheet #28)	Yes, unless the employee has physically worked at the secondary employer's facility for at least one year.	No, unless the employee has physically worked at the secondary employer's facility for at least one year.
Provide FMLA notices to the jointly-employed employee (Fact Sheet #28D)	Yes.	No; however the secondary employer must provide FMLA notices to its own employees
Provide FMLA leave to the jointly-employed employee (Fact Sheet #28F)	Yes.	No; however the secondary employer must provide FMLA leave to its own eligible employees.
Maintain benefits for the jointly-employed employee (Fact Sheet #28A)	Yes.	No; however the secondary employer must maintain benefits for its own employees who take FMLA leave.
Restore the jointly-employed employee to work (Fact Sheet #28A)	Yes.	No, unless the secondary employer is continuing to use the placement agency and the agency places the employee with that secondary employer.
Not retaliate, discriminate or interfere (Fact Sheet #28A) and (Fact Sheet #77B)	Yes.	Yes.
Keep Records	Yes, the primary employer keeps all required records.	Yes, the secondary employer keeps payroll data and identifying employee information.

This new guidance raises some red flags and new questions for employers, including:

- Are we now covered by the FMLA because we now have to include in our count workers employed by other companies?
- With which business partners are we now jointly covered by the FMLA?
- What data and information should we share among these covered business partners, and how frequently?
- How do our employee handbooks and/or other written policies address these issues?
- How may we protect ourselves from discrimination, retaliation or interference claims arising from the conduct of another employer over whom we seem

to have no control?

- How do our vendor/supplier/contractor agreements address these issues and related duties and responsibilities?

If you have any questions about the DOL's most recent FMLA fact sheet regarding a joint employer relationship, please contact Paul Wilhelm at (313) 309-4269 | pwilhelm@clarkhill.com, Nitya Lohitsa at (313) 965-8260 | nlohitsa@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.