

FMLA – BACK TO BASICS – ELIGIBILITY VS. ENTITLEMENT

Sep 27, 2021

This blog post will be part of a series on “FMLA – Back to Basics.” Watch for upcoming posts.

A common error in both FMLA policies and communications to employees seeking FMLA leave involves misuse of the word “eligibility” (or “eligible”) when in fact the intention is to refer to “entitlement” or vice versa. Using these words correctly will help ensure clarity as to whether an employee may or may not take FMLA-protected leave, and if not, the reason for this determination.

Eligibility

FMLA “eligibility” refers to whether an employee meets the *preliminary* requirements to even be considered for FMLA leave in the first place. In order to be “eligible” for FMLA leave, an employee must satisfy three requirements:

1. Have worked for the employer for at least 12 months as of the date the leave is to begin;
2. Have worked for the employer for at least 1,250 hours during the 12-month period immediately preceding the date the leave is to begin;
3. Work at a location where the employer has at least 50 employees within a 75 mile radius of the employee’s worksite.

The determination as to whether an employee meets the above-listed three eligibility requirements can be communicated to the employee through the U.S. Department of Labor’s combined Notice of Eligibility & Rights and Responsibilities (Form WH-381, revised June 2020). Section I of WH-381 is used to indicate whether the employee is eligible and, if not, an explanation of why not.

Key eligibility notes:

- The eligibility determination should be made within five business days of an employer being placed on notice that an employee may need FMLA leave (absent extenuating circumstances).
- If an employee does not satisfy *all three* eligibility requirements, then the employee is not eligible for FMLA leave and should be informed of this determination. If the employer nonetheless allows the non-eligible employee to take some other type of leave (such as leave

under an existing PTO, vacation, or sick leave policy), the type of leave granted should be specified and the leave should *not* be described or treated as FMLA leave.

- If an employee *is* eligible for FMLA leave (i.e., the employee meets all three of the requirements/criteria above), then the employee retains that eligibility for the duration of the applicable 12-month period with respect to the particular situation/condition for which the employee is requesting FMLA leave.

Entitlement

If the employee is eligible for FMLA leave, the next step is to determine whether the employee is *entitled* to – i.e., has a right under federal law to – take FMLA leave. The determination as to whether an employee is entitled to take FMLA leave hinges on: (a) whether the employee has a qualifying reason for leave; and (b) whether the employee has any leave time available to take, or has instead already exhausted his/her entitlement to 12 (or 26, for military caregiver) weeks of FMLA leave within the applicable 12-month period.

Whether the employee has a qualifying reason will require review of the certification and/or other documentation as requested from the employee / employee’s healthcare provider in Section II of the Notice of Eligibility & Rights Responsibilities (Form WH-381) referenced above. Whether the employee has any leave time available will require review of internal records identifying whether, when, and how much FMLA leave the employee has otherwise used during the applicable 12-month period as defined by the employer’s FMLA policy.

Once a determination has been made regarding entitlement, employers can use the DOL’s Designation Notice (Form WH-382, revised June 2020) to communicate this determination to the employee, i.e., inform the employee as to whether the employee’s request for FMLA leave has been approved. Employers should then carefully track an employee’s use of FMLA leave so that a determination can be made as to when the employee has exhausted the entitlement to 12 (or 26) weeks of FMLA leave.

Recommended Next Steps: Employers should review their FMLA policies and any forms used to communicate with employees regarding the FMLA to ensure that the terms “eligibility” and “entitlement” are being used correctly.

For any questions, please reach out to your Bryan Cave Leighton Paisner attorney contact.

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