# FMLA – Not Just A Large Employer Concern

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While employers with 50 or more employees spend a considerable amount of time developing policies and training managers on the requirements of FMLA leave, often employers with less than 50 employees never give medical leave polices a second thought. A recent federal appellate case highlights that a smaller employer's failure to accurately communicate Family and Medical Leave Act (FMLA) rights could lead to unintended coverage for the employee. In *Tiley v. Kalamazoo Cty. Rd. Comm'n*, 777 F.3d 303 (6th Cir. 2015), an employer with less than 50 employees was found to be subject to the requirements of the FMLA because it erroneously told an employee he was eligible for protected leave.

An employee is eligible for FMLA leave if they meet three basic criteria: (1) they have been employed by a covered employer for 12 months; (2) they have worked for 1,250 hours during the 12-month period before their requested leave begins; and (3) they work at a location where their employer employs 50 or more employees within a 75-mile radius of that location. If an employee does not satisfy all three criteria, they are not entitled to leave or any protections under the FMLA. But what happens when an employer tells an ineligible employee they are eligible for leave, or when an employer's FMLA policy does not accurately define eligibility requirements?

In *Tiley*, the employer's FMLA policy defined an eligible employee as "any full-time employee who has worked for the Road Commission and accumulated 1,250 work hours in the previous 12-months." The policy made absolutely no reference to the requirement that 50 employees work within 75 miles. The employee filed a claim under the FMLA after he was terminated for missing work due to a serious health condition. The employer claimed that he was not an eligible employee under the FMLA since he did not work at a location where his employer employs 50 or more employees within a 75 mile radius.

The District Court granted summary judgment for the employer on the basis that Tiley was not eligible for FMLA leave, but the 6th Circuit Court of Appeals reversed the decision. The Appellate Court explained that because the employer left out the 50 or more employee prong of the eligibility provision a "reasonable person in the employee's position could fairly have believed that he was protected by the FMLA." The Court allowed Tiley's FMLA claims to be presented to the jury even though he was not eligible for protected leave under the law.

The legal principle applied is "equitable estoppel" and it prevents a party from asserting a legal claim or defense that is inconsistent with his or her prior action or conduct. In the FMLA context, equitable estoppel prevents an employer from defending a FMLA case by arguing that the employee is not entitled to leave when the employer previously misrepresented to the employee that they were. The employer's misrepresentation may be in the form of a poorly worded FMLA policy, as in *Tiley*, but it can also come in the form of an email.

In another federal case of interest, an employer found itself embroiled in FMLA litigation because it sent a communication merely suggesting coverage under the FMLA. *Dawkins v. Fulton County Government*, No. 12-11951, 2013 WL 5422977 (11th Cir. 2013). In *Dawkins*, the employee sent her supervisor an email titled "FMLA" requesting emergency leave to assist in caring for her terminally ill uncle. Her supervisor replied to the email "approved" but did not clarify whether leave was approved or FMLA leave was approved. When the employee was later denied a promotion, she filed a claim for FMLA retaliation. The employer argued there was no FMLA retaliation because the employee was not eligible for FMLA leave to care for her sick uncle. The employee argued her FMLA retaliation claim was meritorious, despite being outside the statute's protection, because the employer was equitably estopped from denying her eligibility based on her supervisor's "approved" email. The Eleventh Circuit ultimately affirmed the summary judgment decision in favor of the employer because the employee did not detrimentally rely on the misrepresentation that she was covered by FMLA. However, the entire case likely could have been avoided had the employer accurately responded to the employee's request for FMLA leave.

While not all federal appellate courts have weighed in on the application of equitable estoppel in FMLA cases, the doctrine is being argued at the district court level in every circuit. Employers should be aware of the potential for such claims and take steps to avoid them. The following examples illustrate scenarios where eligibility for FMLA leave may be misrepresented.

- **Company miscalculates number of employees in approving FMLA request.** Counting employees sounds like an easy proposition, but it can be difficult when dealing with temporary or seasonal employees. It is important to understand who qualifies as an "employee" under the FMLA.
- **Company miscalculates total number of hours worked in the previous 12-month period.** An accurate time-keeping system is crucial for many reasons, including the calculation of FMLA eligibility.
- **Company with more than 50 employees that also has a distant satellite location.** An employee is eligible for leave if they work at a location where their employer employs 50 or more employees within a 75-mile radius of that location. An employee in a small satellite office may not be eligible even if the employer has over 50 employees.
- **Employer with less than 50 employees offers discretionary leave.** It is not uncommon for employers with less than 50 employees to provide employees with a leave of absence to deal with their own serious health condition. However, it must be clear to the employee that the employer is not covered by the FMLA and the employee is not receiving FMLA leave.

Employers covered by the FMLA should closely review their FMLA policies and procedures to ensure that they clearly state who qualifies as an eligible employee. Smaller employers should make sure any employee who requests leave understands they are not an eligible employee and are not entitled to FMLA leave. Finally, and most importantly, all members of management who field leave requests should be trained on the company's policies and procedures to make sure leave requests are responded to appropriately.

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