



September 11, 2000

FMLA-111

Dear *Name**,

Thank you for your letter of May 27, 2000, addressed to Secretary of Labor Alexis M. Herman about the Family and Medical Leave Act of 1993 (FMLA). Your letter has been referred to the Wage and Hour Division of the U.S. Department of Labor for reply as this office administers and enforces the FMLA for all private, State and local government employees, and some Federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year—with continued group health insurance coverage during the leave—for specified family and medical reasons.

The referenced letter seeks guidance on whether a “Professional Employer Organization” (PEO) would be a covered employer under the FMLA based upon either the “integrated employer” test or the joint employment criteria as delineated in the Regulations at sections 29 CFR 825.104 and 825.106. As described in the letter, the PEO establishes a contractual relationship with clients by establishing and maintaining an employer relationship with the workers assigned to its client (leases worksite employees via a written contract with the client) and assumes substantial employer rights, responsibilities and risks. The PEO assumes responsibility for personnel management, health benefits, workers’ compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. In addition, the PEO has the right to hire, fire, assign, and direct and control the employees.

Under the FMLA, any employer in the private sector that is engaged in commerce or in an industry or activity affecting commerce is covered if 50 or more employees are employed in at least 20 or more calendar workweeks in the current or preceding calendar year. If the test of an integrated employer is met, all entities in question will be considered one employer, for purposes of counting employees as well as other purposes. If two entities are found to be joint employers, each would be responsible for its obligations under FMLA, provided it had the requisite number of employees.

The “integrated employer” test is not a new concept created solely for purposes of the FMLA. It is based upon established case law arising under Title VII of the Civil Rights Act of 1964 and the Labor Management Relations Act (LMRA). As FMLA’s legislative history states, the definition of “employer” parallels Title VII language defining a covered employer and is intended to receive the same interpretation. Under Title VII and other employment-related legislation, including the LMRA, when determining whether to treat separate entities as a single employer, individual determinations are highly fact-specific and are based on the following factors:

1. interrelation of operations, i.e., common offices, common record keeping, shared bank accounts and equipment;
2. common management, common directors and boards;
3. centralized control of labor relations and personnel, i.e., hire and fire employees; and,
4. common ownership and financial control.

A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. All four criteria need not be present in all cases, but the Equal Employment Opportunity Commission, which administers the Civil Rights Act, considers the first three criteria to be the most important, with centralized control of labor relations to be most critical of these three. Although the standards are somewhat different, it is our opinion that an employer who meets the “enterprise” test under the Fair Labor Standards Act (FLSA) will ordinarily meet the integrated employer test. For purposes of FLSA, the “enterprise” consists of the related activities performed (either through unified operations or common control) by any person or persons for a common business purpose. Thus, separate entities may be so integrated that they are considered to be one employer, whether commonly owned or not.

Under joint employment, separately owned and operated companies may each exercise sufficient control over the employee that they are considered joint employers. The standards established under the Fair



Labor Standards Act (FLSA) are used to determine joint employment under the FMLA. A joint employment relationship will be considered to exist in situations such as:

1. Where there is an arrangement between employers to share an employee's services or to interchange employees;
2. Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or
3. Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Similar to the determination process for integrated employers, the determination of whether a joint employment relationship exists is also not determined by the application of any single criterion; rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

Based on the information presented in the letter, it appears that the PEO is in a joint employment relationship with its client for these reasons:

1. The PEO is a separately owned and a distinct entity from the client as it is under contract with the client to lease employees for the purpose of handling "critical human resource responsibilities and employer risks for the client."
2. The PEO is acting directly in the interest of the client in assuming human resource responsibilities.
3. The PEO appears to also share control of the "leased" employee consistent with the client's responsibility for its product or service.

In joint employment relationships, the factors for determining the "primary" employer are authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. Based on the description of the PEO's responsibilities, it would appear that the PEO is the "primary" employer for those employees "leased" under contract with the client. As the "primary" employer, the PEO is responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same or equivalent job upon return from leave. The "secondary employer" (i.e., the client) is responsible for accepting the employee returning from FMLA leave in place of a replacement employee if the PEO chooses to place the employee with the client. In addition, the client as the "secondary" employer, whether a covered employer or not under the FMLA, is prohibited from interfering with a "leased" employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice that is unlawful under the Act.

Both employers must count employees who are jointly employed, whether or not maintained on the other employer's payroll, in determining employer coverage and employee eligibility. For example, if the client employer has 40 "leased" employees that are jointly employed with the PEO and, in addition, employs 15 "permanent" employees at the worksite, then the client is an FMLA-covered employer as it employs more than 50 employees. The client employer would only be responsible for granting FMLA leave to its 15 "permanent" employees, but not for the jointly employed "leased" employees as that responsibility belongs to the PEO as the "primary" employer. If the total number of employees, both jointly employed and "permanent," is less than 50 and the client employer does not have any other worksites, the client employer would not be a covered employer and would not have to grant FMLA leave to its "permanent" employees. Eligibility for the 40 "leased" employees would be determined by counting all of the "leased" employees assigned from or working at the PEO's site of employment (most likely the "placement" or "corporate" office). Excluded from this count would be any "permanent" employee of any client employer.



I hope this letter fully addresses your concerns. If you require further assistance, please do not hesitate to contact me.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*