**FMLA Joint Employment (Temporary Agency Staff)**

Human Resources staff and managers should be aware that joint employment with another employer (for example, a temporary agency) can result in a hiring employer having early liability for providing FMLA leave.

This DOL Fact Sheet is a helpful resource for more information: <https://www.dol.gov/agencies/whd/fact-sheets/28n-fmla-joint-employment>

**Q: We regularly utilize temporary employees, some of whom we hire permanently. Does the time they work as a temp (through an agency) count toward the 12-month and 1,250 hour eligibility requirements?**

Yes. An employee is eligible to take FMLA leave when, among other things, he/she has worked for the employer for 12 months (which, of course, need not be consecutive) and worked 1,250 hours in the previous 12-month period.  According to the Department of Labor, the time worked as a temporary employee does indeed count toward the 12-month service and 1,250 hour requirement.

In one short sentence in the FMLA regulations, the DOL sums up its position:

***Joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a secondary employer.***

**Q. What main factors are considered in determining whether an employer is a primary or secondary employer?**

The three main factors to consider are:

* Which employer has the authority to hire, fire, place or assign work to the employee;
* Which employer decides how, when and the amount the employee is paid; and
* Which employer provides the employee's leave or other employment benefits.

**Q. What are the FMLA responsibilities of the secondary employer?**

* Count all jointly employed employees for determining FMLA coverage and eligibility;
* Refrain from retaliating or discriminating against an employee or interfering with FMLA rights;
* and “flag” former temporary staff in your system and try to capture past hours from temporary staff (and/or original date of placement at your organization) either at the time of hire or upon a request for leave.

**Note:** FMLA leave responsibilities for jointly employed employees generally fall on the primary employer. (Upon hire, this is your responsibility.)

**Q. Do any responsibilities switch from the primary to the secondary employer under certain circumstances for FMLA?**

The primary employer's worksite should be used for determining employee eligibility (i.e., whether the jointly employed employee works at a worksite with at least 50 employees in 75 miles), ***unless the employee has physically worked at the secondary employer's worksite for at least one year.***

**The secondary employer is responsible for restoring an employee returning from FMLA leave** if it continues to use the same placement agency and the agency places the employee with the secondary employer.

**Note:** Review state laws for state-specific provisions.

Written by a Catapult Advisor.