Employee Counting – FMLA Style

Businesses and medical practices may be subject to the requirements of the Family and Medical Leave Act and may not be aware of it. The Act mandates unpaid leave for employees of businesses with 50 or more employees within 75 miles of a worksite.

As with most regulatory schemes, the devil is in the details. Counting noses from time to time will not suffice. The statute creating the FMLA appears to be relatively straight forward, but upon reading the regulations and the Department of Labor's Field Operations Handbook, it becomes clear that any ambiguities that exist will be used to determine that the law will apply.

The statute defines an "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar work weeks in the current or preceding calendar year." The language implies that the number of employees will be determined by counting the employees actually working on each day of a work week, and if you have 50 or more for all working days during 20 or more weeks, the Act will apply. Such an interpretation would be incorrect.

First, the definition of "employ" under the Act is not based upon the common law right to direct or control the worker. Rather, "employ" is defined by the Fair Labor Standards Act, where an employer includes those who "suffer or permit to work". The regulations state that, "Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act." 29 CFR sec. 825.105(a). Therefore, independent contractor arrangements may need to be reviewed in the counting process.

"Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week." 29 CFR 825.105(b). Please note that this regulation asserts that if an employee works one day during the week, the employee is deemed to have been employed for all days during the week. Moreover, the employee will be counted for having his or her name on the payroll roster, regardless of whether any compensation was paid or received. From past experience, names left on the payroll roster will be deemed to have a reasonable expectation of being actively employed in the future and will be counted by DOL officials.

"Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll." 29 CFR 825.105(c). Again, regardless of whether the employee works a whole day in the scope of a week, a part-time employee appearing on a payroll roster will be considered to have worked each day of that week for the purpose of calculating the number of employees a business may have.

“Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment.” 29 CFR 825.105(c). Consistent with the regulations, a person on a leave of absence is deemed to be an employee if his or her name is on the payroll roster and may be considered an employee even if the name is not on a payroll roster when there is a reasonable expectation the person will return to the workforce. Therefore, payroll rosters alone will not determine the number of employees for FMLA purposes.

A review of payroll data, independent contractor arrangements and other information is needed to properly ascertain the number of employees for FMLA purposes. Removing terminated employees, leased employees or others not actively performing work and not expected to return, can help limit the exposure associated with being a FMLA employer. Help in assessing situations is available from experienced counsel.