

**LETTER OPINION
2001-L-03**

February 13, 2001

Mr. Donald R. Becker
Emmons County State's Attorney
PO Box 658
Linton, ND 58552-0658

Dear Mr. Becker:

Thank you for your letter asking whether the Family and Medical Leave Act, 29 U.S.C.A. § 2601 et seq. (FMLA), applies to counties employing fewer than 50 persons.

The FMLA generally grants eligible employees 12 work weeks of leave in a 12-month period for certain serious health conditions of an employee or employee's family. 29 U.S.C.A. § 2612. The FMLA defines "eligible employee" as:

(2) Eligible employee

(A) In general

The term "eligible employee" means an employee who has been employed--

(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and

(ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

(B) Exclusions

The term "eligible employee" does not include--

(i) any Federal officer or employee covered under subchapter V of chapter 63 of Title 5; or

(ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50.

(C) Determination

For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply.

29 U.S.C. § 2611(2).

Further, the Act defines "employer" covered by the Act as:

(4) Employer

(A) In general

The term "employer"--

(i) means 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 workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the General Accounting Office and the Library of Congress.

(B) Public agency

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

29 U.S.C. § 2611(4). The United States Department of Labor (USDOL) is specifically directed to prescribe rules necessary to carry out the Act. 29 U.S.C.A. §2654. The USDOL rules appear in 29 C.F.R. Part 825. In 29 C.F.R. § 825.104(a), “covered” employers are defined as:

(a) An employer covered by FMLA is 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 workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (See Sec. 825.600.)

The relationship between a “covered” employer and “eligible” employees is described in 29 C.F.R. § 825.108(d) as:

(d) All public agencies are covered by FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (e.g., state) employ 50 employees at the work site or within 75 miles.

Interpreting the FMLA and the USDOL promulgated administrative rules leads to the conclusion that all “public agencies” defined in 29 U.S.C.A. § 203(x) are “covered” by the FMLA. A North Dakota county is “covered” by the FMLA. 1993 N.D. Op. Att’y Gen. F-15.¹

¹ This 1993 opinion resolved a question on whether county social service board employees should be included in the number of employees to determine if a county is subject to the FMLA. Although not explicit in the terms of 29 U.S.C. § 2611(4), the USDOL, in its controlling rules, has determined the fifty employee threshold does not apply to “public

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However, even though a county is covered by the FMLA, if it employs less than 50 persons at a work site or within 75 miles thereof, then no employee of that county is an “eligible employee” able to qualify for leave under the Act.

Sincerely,

Wayne Stenehjem
Attorney General

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agencies.” Therefore, to the extent 1993 N.D. Op. Att’y Gen. F-15 implies that the fifty employee threshold does apply to determine “coverage” by the FMLA it is overruled.