

FMLA Protects Employee's Pre-eligibility Request for Leave

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If asked, most employers would say that an employee who has worked for the company for less than 12 months is not protected under the federal Family and Medical Leave Act (“FMLA”). According to a recent case in the United States Court of Appeals for the Eleventh Circuit that is not the correct answer.

By way of background, FMLA provides that “eligible” employees are entitled to leave for certain qualifying events. To be eligible, the employee must work for an employer with 50 or more employees (within a 75 mile radius), have worked for the employer for at least 12 months and have worked at least 1,250 hours in the 12-months preceding the request for leave. If eligible, an employee can take leave for certain family and health reasons, including the birth of a child.

In *Perada v. Brookdale Senior Living Communities, Inc.*, Perada had worked for her employer for less than 12 months when she requested leave for the birth of her child. It was undisputed that she would have been eligible for leave at the time she was to give birth. However, Perada was terminated by the company 11 months into her employment. Perada filed suit claiming that she was terminated because she requested leave. The district court dismissed her claim, finding that Perada was not entitled to the protections of FMLA because she was not eligible for leave at the time of her termination.

The Eleventh Circuit disagreed and ruled that an employee who requests leave is entitled to the protections of FMLA when the leave is requested if the employee would have been eligible for FMLA *at the commencement of the leave*. The Court looked to the FMLA regulations, such as the 30-day notice requirement, in finding that protecting pre-eligibility requests for leave was consistent with the basic concept of FMLA. To hold otherwise would create a loophole to allow an employer to terminate an employee before the employee could ever become eligible for leave. This would create a “trap” for new employees that are required to give advance notice of leave.

The Court was careful to limit its holding to protecting pre-eligibility requests for leave. This decision does not mean that FMLA leave rights are now available to those that are not eligible. However, it does mean that employers need to take care when terminating or disciplining an employee that has requested leave, even if the employee is not yet FMLA eligible.