The Bermuda Triangle of FMLA Eligibility

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Why such a "basic" topic?

The tenants of FMLA eligibility are long established, however…

we have found ourselves on the phone with each other and others in the absence management industry debating FMLA eligibility issues over the past 24 months.

We've boiled down the conclusions and learnings from these debates to provide a holistic look at sticky issues related to FMLA eligibility.

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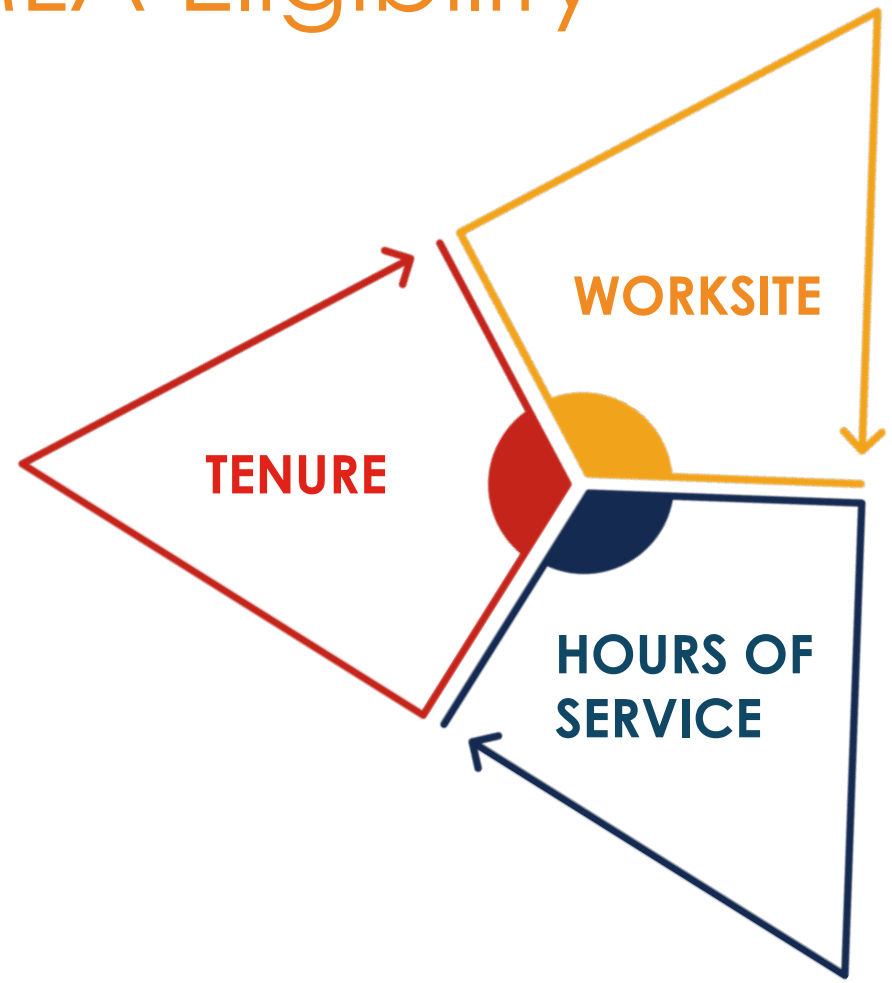
The Bermuda Triangle of FMLA Eligibility

- FMLA Eligibility
  1. Tenure
  2. Hours of Service
  3. Worksite
- Joint Employment
- "Waiving" eligibility:
  - The risks associated with deeming employees eligible
- Periods of Eligibility / Eligibility Window



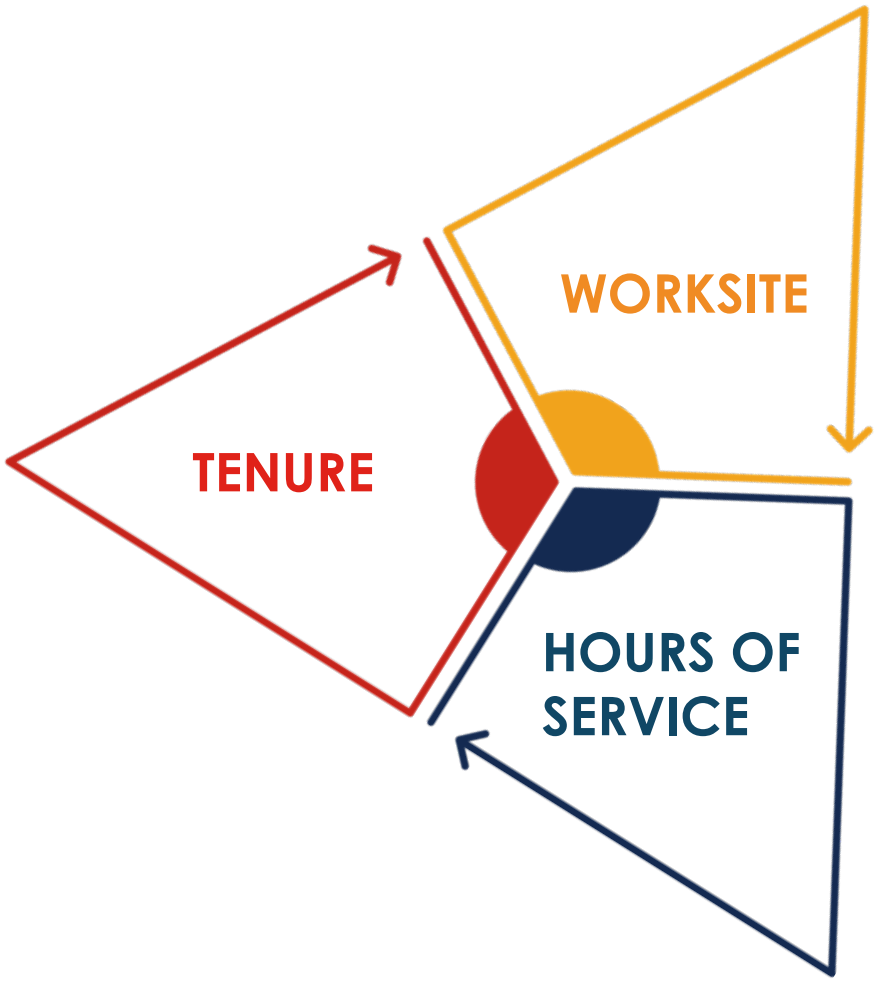
Employee Eligibility

As of ***start date*** of FMLA:

- Employed for at least 12 months, and
- Worked at least 1,250 hours in the immediately preceding12 months

As of ***request date*** of FMLA:

- Employed at a worksite where 50+ employees are employed within 75 miles



[29 C.F.R. § 825.110]

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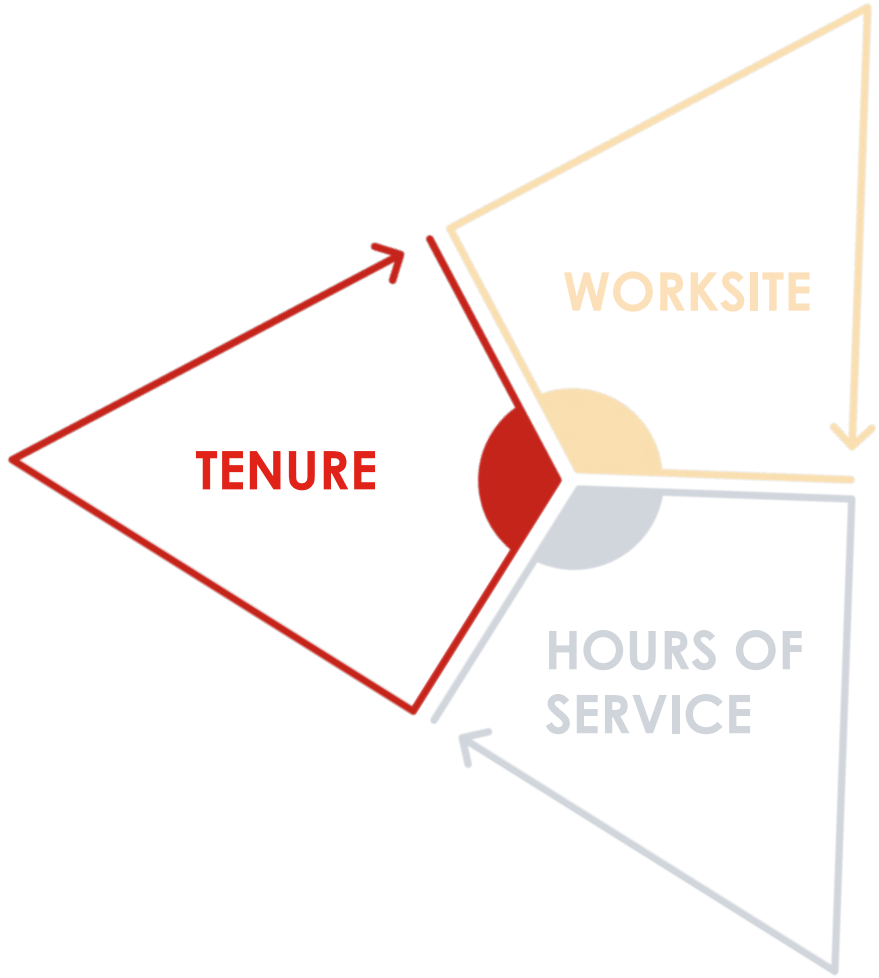
Tenure

Seems to be the simplest part of the test, however…

Challenges for tenure:

- Recordkeeping: Need not be continuous tenure
- USERRA: Leave taken while serving is counted towards tenure
- Temporary workers, joint employment, and successor in interest



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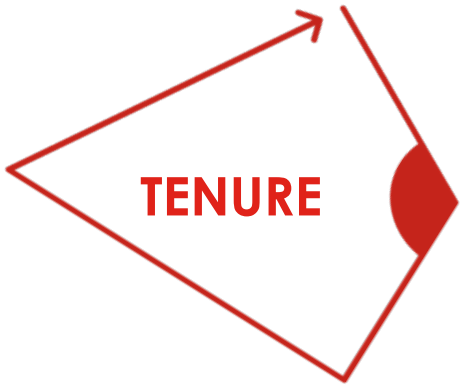
Tenure



- 12 months can be nonconsecutive
- If an employee is maintained on the payroll for any part of a week, including **any periods of paid or unpaid leave** during which other benefits or compensation are provided by the employer, the week counts as a week of employment
- 52 weeks is deemed to be equal to 12 months

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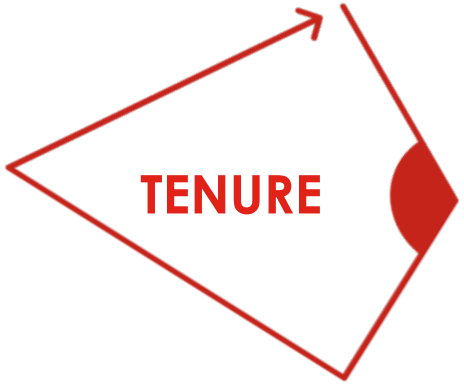
Tenure



- An employer may consider employment prior to a continuous **break in service** of more than seven years when determining whether an employee has met the 12–month employment requirement.
  - However, if an employer chooses to recognize such prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.

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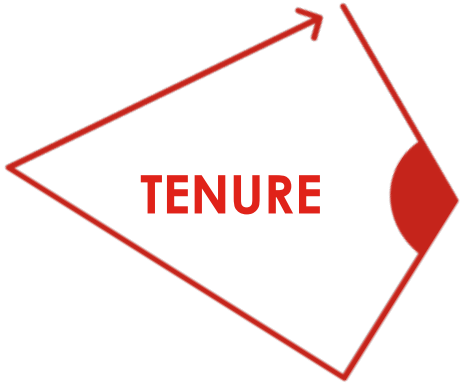
Tenure



- We will discuss USERRA, temporary employment, joint employment, and successor in interest after discussing hours of service so that we can consider the implications on eligibility holistically.

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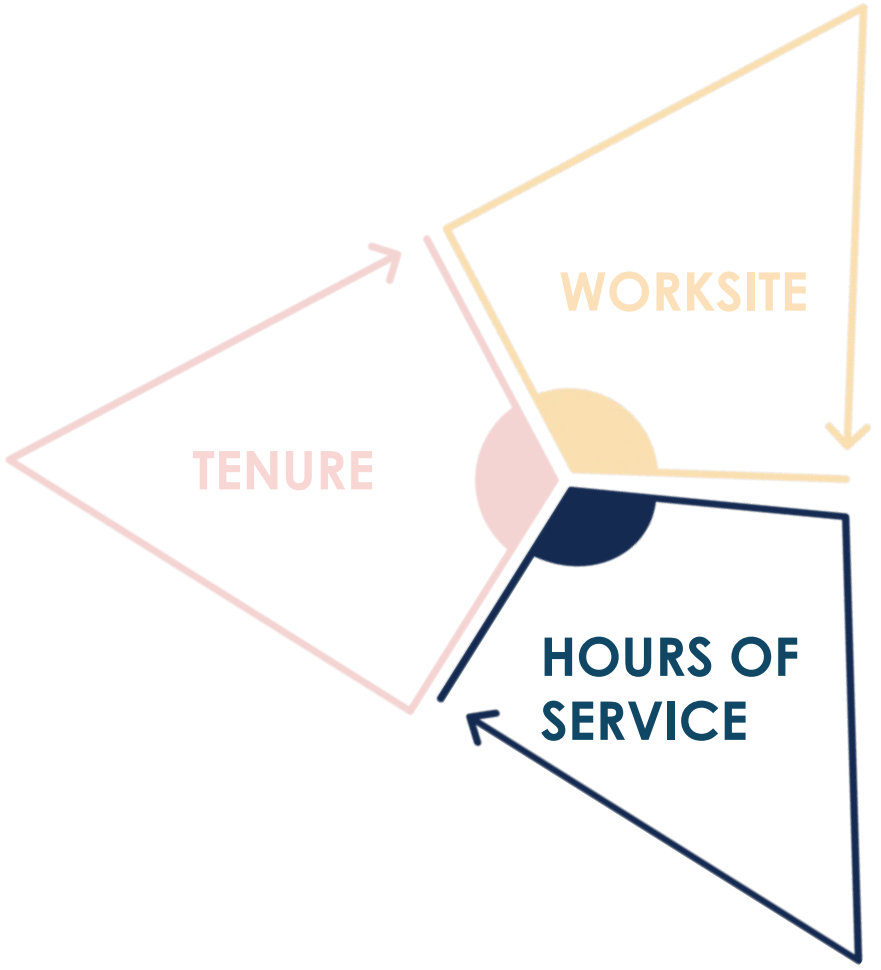
Hours of Service

- Whether the employee has worked the minimum of 1,250 hours of service is determined according to the principals established under the **Fair Labor Standards Act** for determining compensable hours of work.
- Hours of Service includes overtime hours but does not include time employees are paid but not working (e.g. vacation or leave of absence).



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Hours of Service

- **Part Time** workers
  - Employees who work an average of 24 hours per week will achieve 1,250 hours of service in a 52 week period
- **Exempt** employees
  - Employers do not have to keep a record of actual hours worked as long as eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months [29 C.F.R. §825.500]

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Hours of Service

- **Airline Flight Crew** exception:
  - whether an airline flight crew employee meets the hours of service requirement is determined by assessing the number of hours the employee has worked or been paid over the previous 12 months. An airline flight crew employee will meet the hours of service requirement during the previous 12-month period if he or she has ***worked or been paid for not less than 60 percent of the employee's applicable monthly guarantee and has worked or been paid for not less than 504 hours.*** [29 C.F.R. §825.801]

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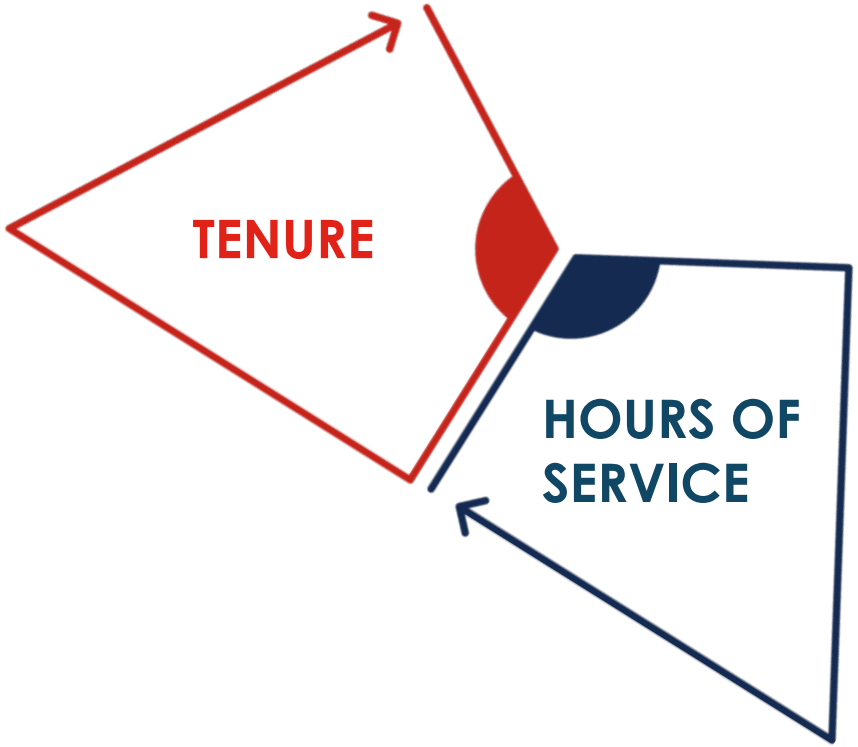
USERRA – Hours and Tenure

- Uniformed Services Employment and Reemployment Rights Act (USERRA):
- The period of absence from work due to USERRA-covered service must be counted for both tenure and hours of service
  - Hours: what the employee would have worked but for their USERRA-covered service [29 C.F.R. §825.110]



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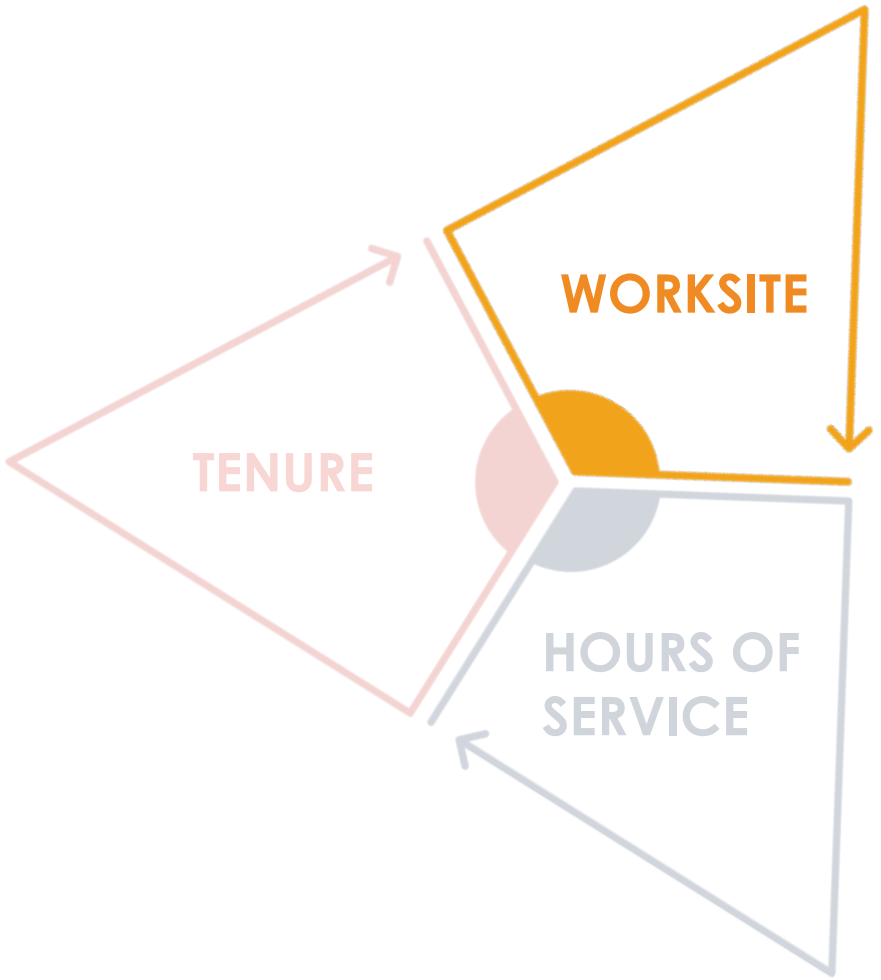
Worksite - the 50/75 rule

- Must work at a worksite where 50 or more employees are employed within 75 miles
  - measured by surface miles, using surface transportation over public streets, roads, highways and waterways
- Who counts?
  - all employees whose physical worksite is within that area
  - employees who telework and report to or receive assignments from that worksite



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Worksite - Telework

Employee's personal residence is not a worksite

- Employees who work from home under "telework" or "flexi-place" arrangements, or other employees, such as salespersons who may leave to work from and return to their residence, the worksite is the office *to which they report or from which they receive assignments*.

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Worksite - Telework

Example: Vanessa is a surgical laser technician, working remotely out of her home in Texas.

- The corporate headquarters in Ohio takes in orders for surgical equipment. Those orders are then passed along to regional managers who assign them to specific technicians in the field.
- The technician takes the supplies from regionally-located facilities to the medical facilities where they're needed for a procedure. Following the procedure, the technician prepares a report and sends it directly to the Ohio headquarters.
- Vanessa reports to a regional manager in Texas who assigns her the orders coming out of headquarters, manages her attendance and performance. He reports to a remote worker in Illinois, who reports to someone in the Ohio headquarters.

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Worksite - Telework

Vanessa requests FMLA leave to care for her sick mother. What is her worksite for purposes of determining FMLA eligibility?

- Vanessa's home in TX
- Her manager's home in TX
- Her manager's manager's home in IL
- Company headquarters in OH

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Worksite - Telework

The court said there were really 2 options and the jury would decide *(the employer settled with the employee out of court)*:

- Where Vanessa reports - Her manager's home in Texas (less than 50 employees in a 75-mile radius)
- Where Vanessa receives her assignments - Ohio Headquarters (more than 50 employees in a 75-mile radius)

29 C.F.R. 825.111(a)(2) … An employee's personal residence is not a worksite … Rather, their worksite is the office **to which they report** and **from which assignments are made**.

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Worksite - Telework

Reporting worksite:

- Based on "location of the personnel who were primarily responsible for reviewing . . . reports and other information sent by the [employee], in order to record [tasks], assess employee performance, develop new sales strategies, and the like."
- Reports all went directly to headquarters, but supervisor assessed performance.

Assignment of work:

- Not merely from where the instructions are passed but rather, "where the people were who were ultimately responsible for creating and receiving the assignment information."
- Supervisor's role was more than a mere conduit, but facts suggest assignment actually driven by headquarters.

Landgrave v. Fortec Medical Inc., 581 F. Supp. 3d 804 (W.D. Tex. January 25, 2022)

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Worksite - Telework

How does the determination of FMLA worksite impact state leave law applicability?

- FMLA worksite has nothing to do with the state the worksite is in – it's strictly about the 50/75 rule
- State laws are typically based on where the employee is physically performing the work
- In this case, Vanessa works full time from her home in Texas - Texas state leave laws would apply

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Worksite - Telework

- "…FMLA shall not supersede any provision of any State or local law that provides greater family or medical leave rights. Employees in Tennessee would be entitled to the full 16 weeks of maternity leave provided under State law, provided of course they meet the requirements of that law."
- https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FMLA-37.pdf

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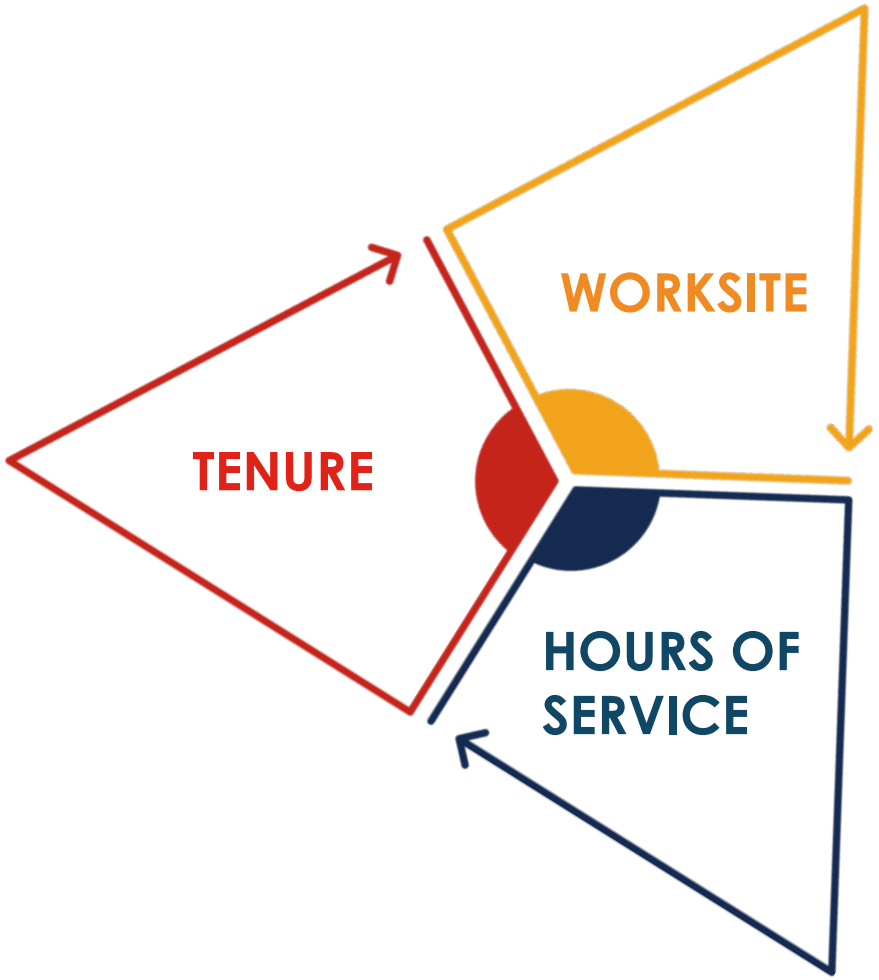
Joint Employment

Joint Employment impacts all three elements of eligibility

- Time worked in joint employment is counted toward tenure and hours of service
- Workers in joint employment are counted by both the primary and secondary employer for purposes of the 50/75 rule



Joint employment is uniquely defined for FMLA – different than FLSA or NLRB – employers must analyze independently

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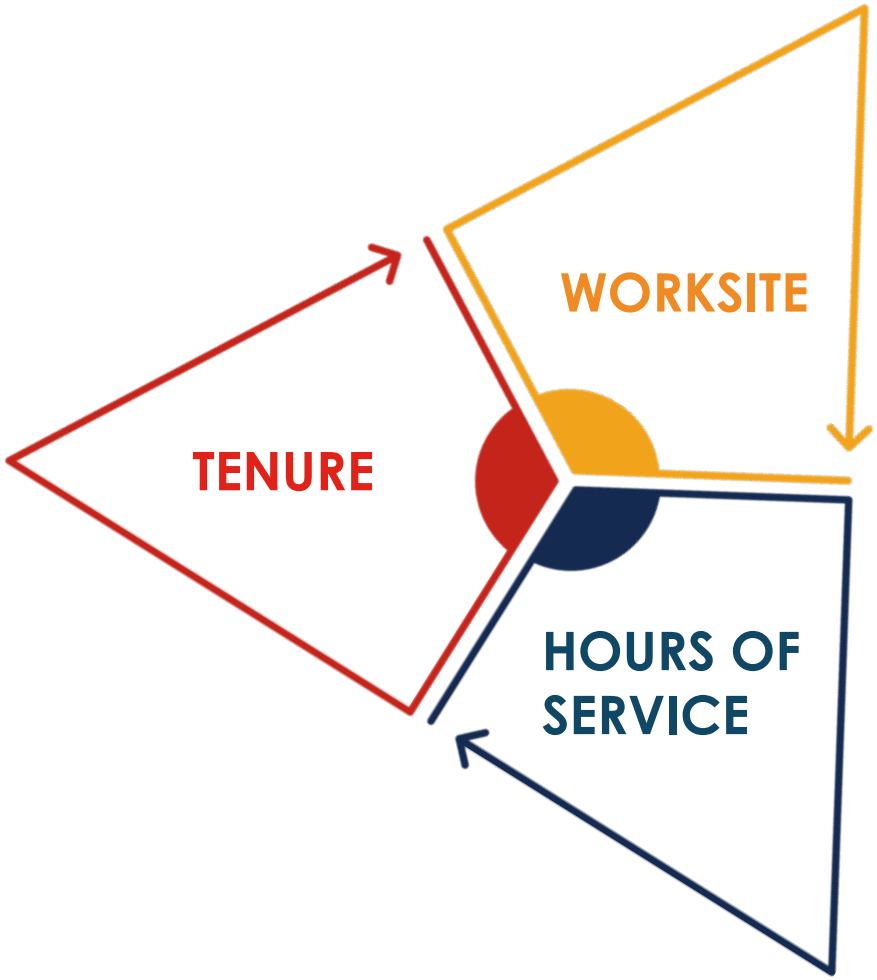
Joint Employment

- 29 C.F.R. §825.106(a) Where two or more businesses ***exercise some control over the work or working conditions of the employee***, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally 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.



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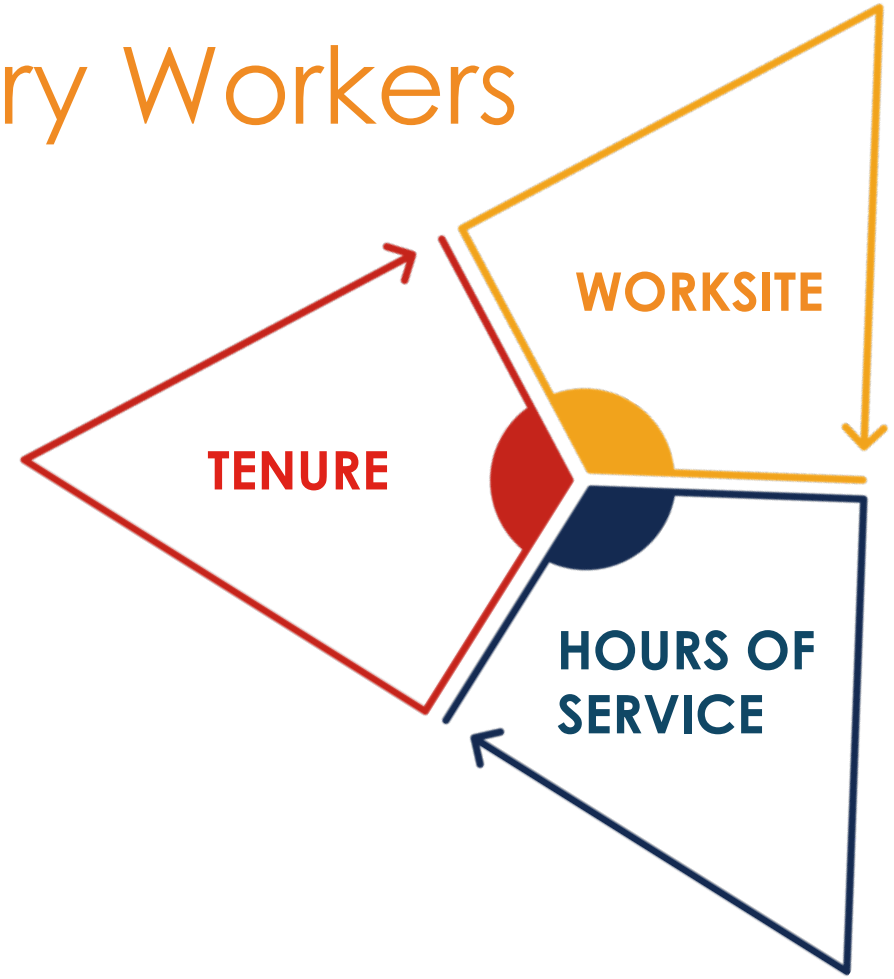
Joint Employment – Temporary Workers

The Department of Labor is clear that a joint employment relationship ordinarily exists, for purposes of the FMLA, where a temporary agency supplies employees to a client employer. [29 C.F.R. §825.106(b)(1)]

- Time worked as a temporary worker prior to becoming permanent must be counted toward tenure and hours of service once they become an employee
- Temporary workers must be counted when determining worksite size



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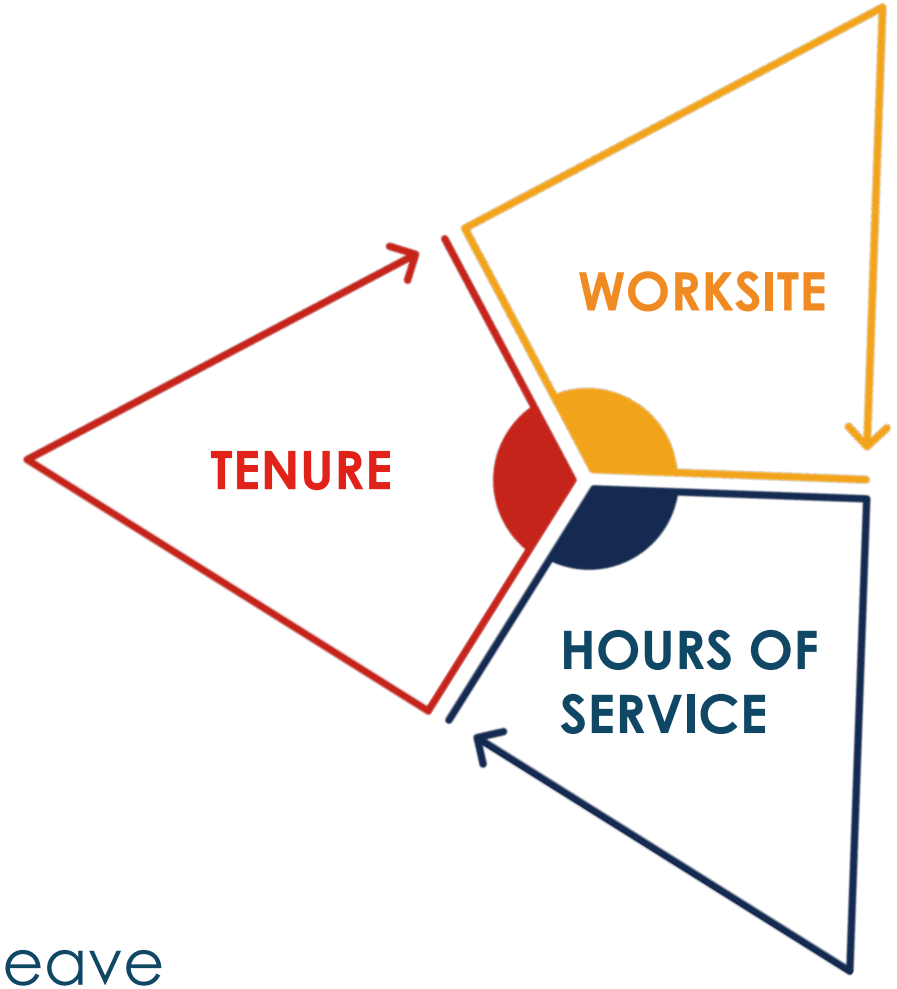
Joint Employment

Primary employer responsible for :

- providing required notices,
- providing FMLA leave,
- maintenance of health benefits, and
- job restoration



Secondary employer responsible for:

- accepting the employee returning from FMLA leave
- maintaining certain records including, but not limited to, rate of pay, daily and weekly hours worked, total compensation (see § 825.500(e))

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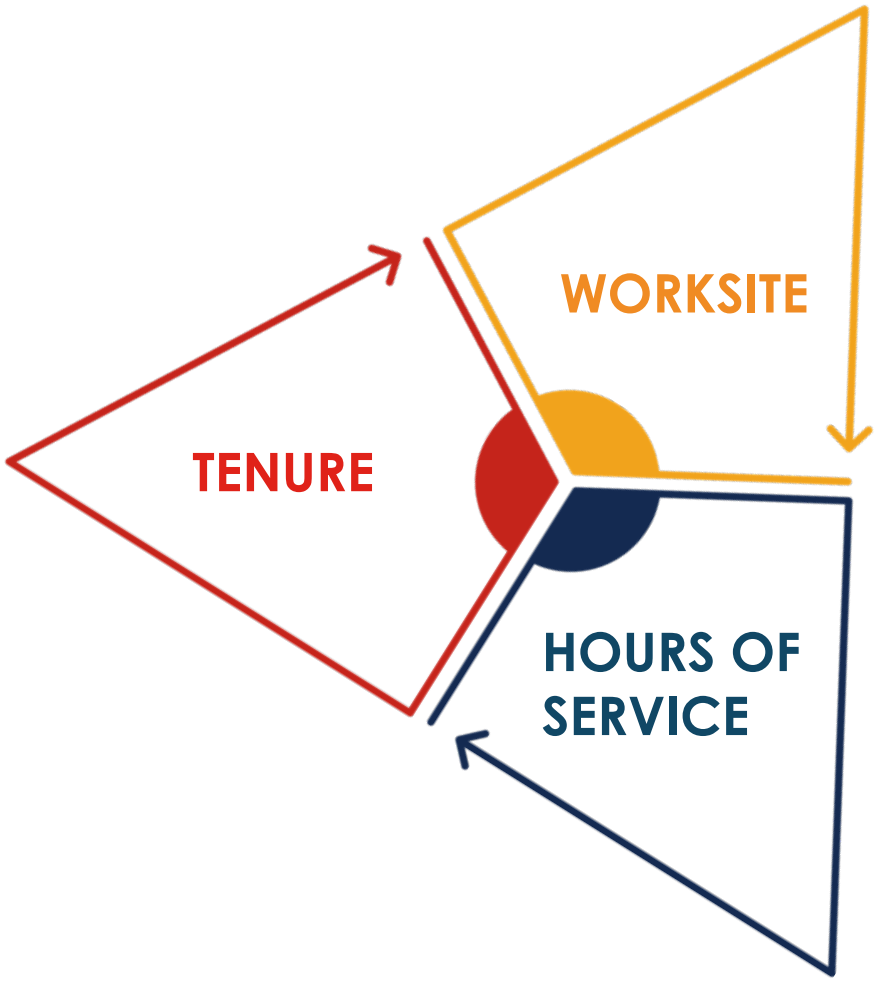
Joint Employment

Both employers:

- count employee/worker for purposes of employer coverage and employee eligibility
- subject to provisions regarding interference and retaliation, and
- Keep records (primary keeps all required records and secondary keeps payroll data and identifying employee information).



Source: https://www.dol.gov/agencies/whd/fact-sheets/28n-fmla-joint-employment

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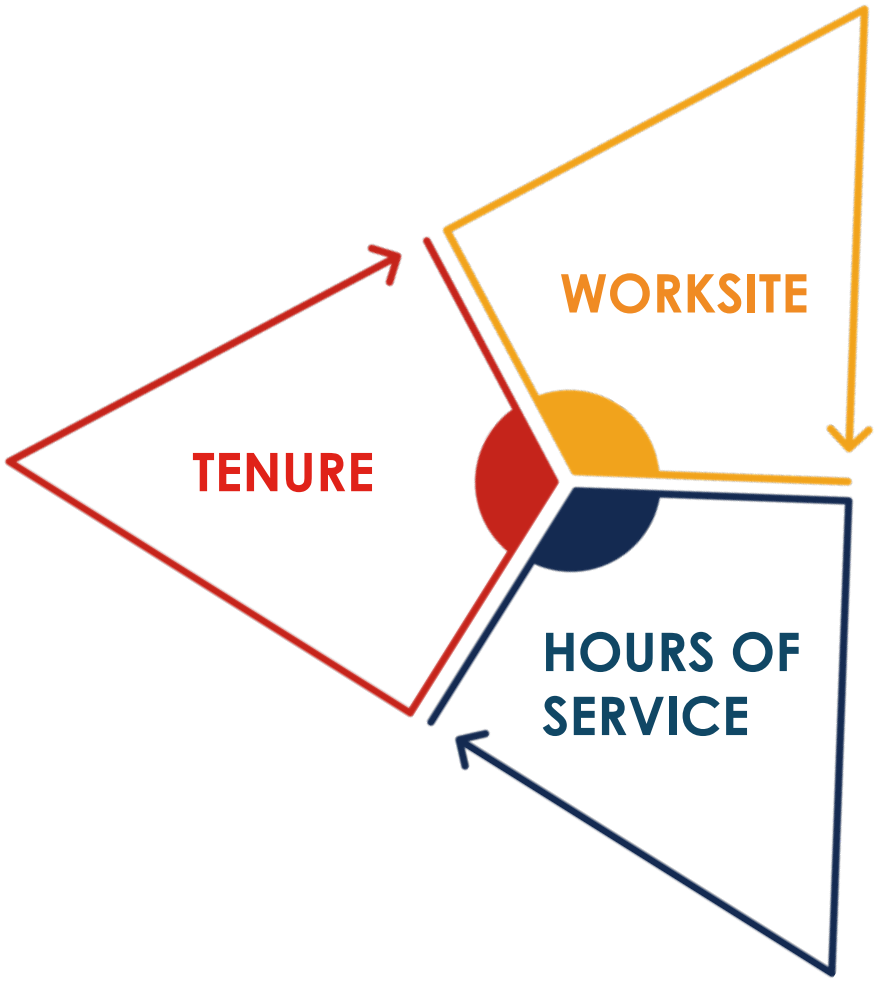
Successor in Interest

An employer who buys or otherwise comes into control of another employer

- must grant leave for employees who provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor
- must count periods of employment and hours of service with the predecessor for purposes of determining employee eligibility for FMLA leave



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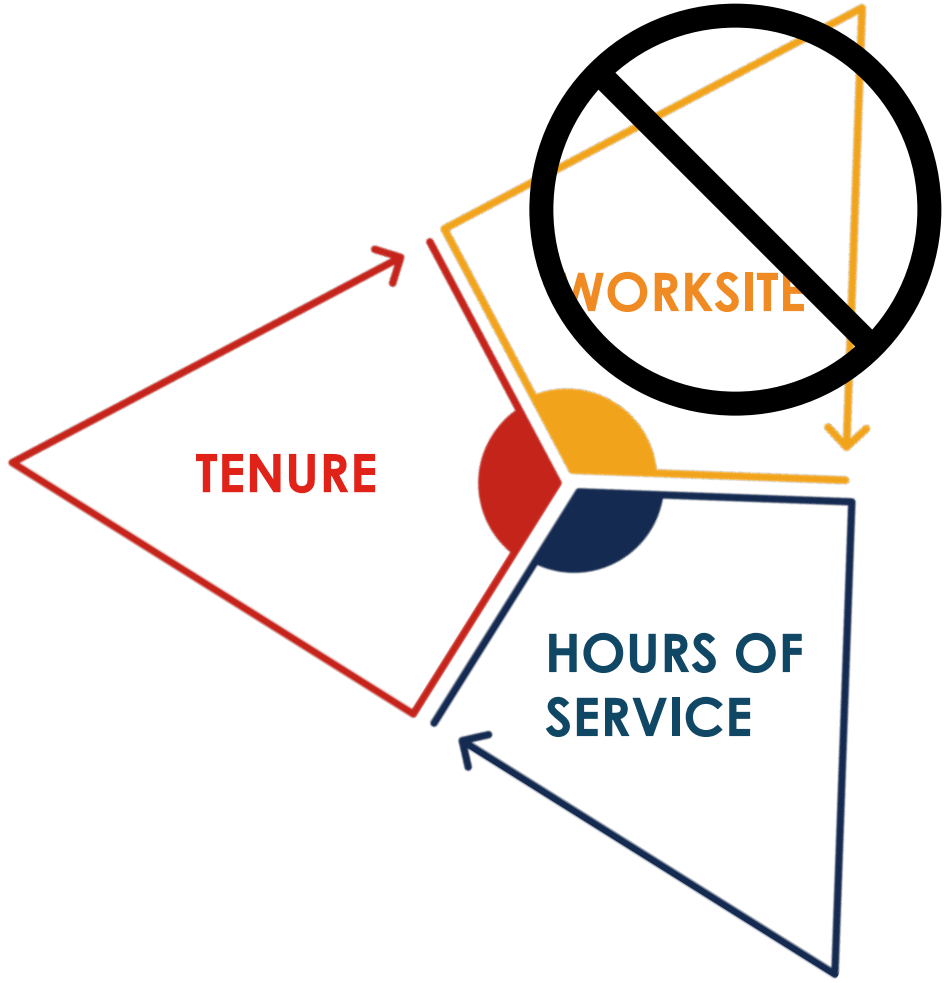
"Waiving" Eligibility

Can I just be more generous?

- Employers may be tempted to "waive" eligibility and provide employees FMLA leave regardless of hours, tenure, or worksite
- Most common: employers "waive" or ignore the worksite requirement
- Waiving FMLA eligibility requirements creates risk for the employer



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"Waiving" Eligibility

From the DOL Employer Guide:

- ***If the employee does not meet the eligibility requirements, an employer may not designate the leave as FMLA even if the leave would otherwise qualify for FMLA protection.*** If the employee is not eligible for FMLA leave, the employer may grant the employee leave under the employer's policy. Once the employee becomes eligible and the leave is FMLA-qualifying, any of the remaining leave period taken for an FMLA-qualifying reason becomes FMLA-protected leave.
- DOL has been clear – once an employee is eligible and on leave for a qualifying reason, their full 12-week entitlement is available to them

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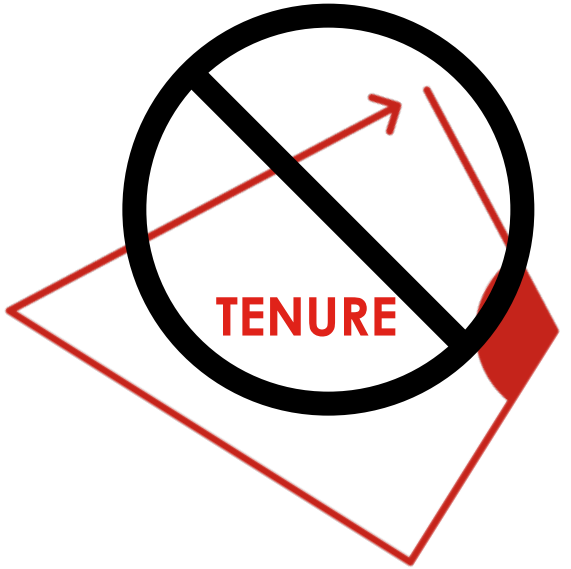
"Waiving" Eligibility



Tenure example:

- Abby was hired January 1, 2023. She becomes pregnant and delivers December 1, 2023. She has more than 1,250 hours of service and works at a location that has more than 50 employees.
- On January 1, 2024 (while on leave), she becomes immediately eligible for FMLA and can take up to 12 workweeks of FMLA-protected leave.
  - Leave taken prior to becoming eligibility does ***not*** count against the employee's 12-week FMLA entitlement
  - If an employer "waives" eligibility, they could incorrectly advise the employee that only 8 weeks of leave are available as of January 1.

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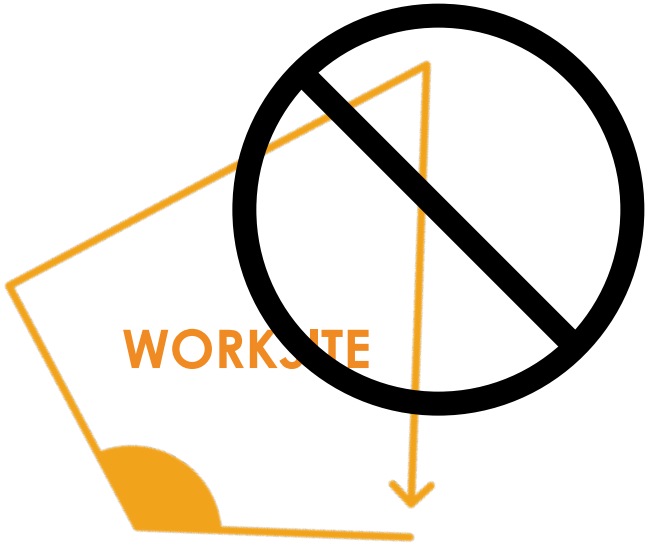
“Waiving” Eligibility



Worksite example:

- Abby works at a small field office with 25 employees. She has worked for her company for 10 years as a full-time employee.
- In June 2023, Abby takes 12 weeks of leave to have a baby.
- In November 2023, Abby relocates to the company’s headquarters to be closer to family.
- In January 2024, Abby needs leave to care for her mother.
- How much FMLA leave does she have available?

  12 weeks!

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Deeming Employees Eligible

Considerations:

- If employee is advised they are eligible for FMLA when they are not, the protections of the FMLA may still apply even though the time does not count.
  - "... an employer who without intent to deceive makes a definite but erroneous representation to his employee that she is an "eligible employee" and entitled to leave under FMLA, and has reason to believe that the employee will rely upon it, may be estopped to assert a defense of non-coverage, if the employee reasonably relies on that representation and takes action thereon to her detriment." Minard v. ITC Deltacom Communications, Inc., 447 F.3d 352, 359 (C.A.5 (La.), 2006)

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Period of Eligibility / Eligibility Window

All FMLA absences for the same qualifying reason are considered a single leave and eligibility for that reason does not change during the applicable 12-month period.

- Determined as of the first instance of leave for each qualifying reason
- Eligibility for the same reason does not change during the applicable 12-month period
- When an employee requests leave, check to see if they are within an existing 12-month period of eligibility. If so, do NOT re-evaluate eligibility.

Period of Eligibility / Eligibility Window

Determined as of ***the first instance of leave*** for each qualifying reason

- First day of actual leave that is approved/ designated as FMLA
- If employee is on non-FMLA leave then becomes eligible, 12-month period begins with first day of FMLA (not first day of leave)
- 12-month period may be adjusted (e.g. employee retroactively reports an absence on an approved leave)

Period of Eligibility / Eligibility Window

"Redetermination" date depends on the employer's chosen leave year method

- "Where an employer has selected either the calendar year, fixed year, or the 12-month period measured forward, it is our position that an employee's eligibility, once satisfied, for intermittent FMLA leave for a particular condition would last through the entire current 12-month period as designated by the employer for FMLA leave purposes." https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FMLA-112.pdf

Period of Eligibility / Eligibility Window

Example:

- Employee needs 12 weeks of leave for knee replacement beginning 5/6/2024 but doesn't become eligible until 6/3/2024
  - 12-month period is 6/3/2024 – 6/2/2025
- Same approach if first portion of leave is denied for other reasons
  - Time exhausted (but replenishes during leave)
  - Employer notice requirements not satisfied
  - Not medically supported

Period of Eligibility / Eligibility Window

Subsequent leave request

- Is it for the same leave reason? If so and within the original 12-month period, employee remains eligible.
- If new/different leave reason, new eligibility evaluation and if eligible/approved, a separate 12-month period of eligibility

Period of Eligibility / Eligibility Window

- "…if an employee with MS who was eligible to take intermittent FMLA leave in April and May needed leave again when the episodes of incapacity recurred in July and again in October, the employee would be entitled to FMLA leave without having to re-qualify under the 1,250- hour eligibility test so long as the absences occurred within the same 12-month period and the employee had not exhausted the 12-week leave entitlement for this or any other FMLA-qualifying reason."
- https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FMLA-112.pdf

Period of Eligibility / Eligibility Window

Example:

- Susan files leave for migraines with the first absence on January 5, 2024.
- She meets all eligibility requirements – her eligibility window for her migraines is Jan. 5, 2024 -Jan. 4, 2025
- In March, Susan reduces her regular hours to 20 hours/week
- In November, Susan learns she needs knee-replacement and files for leave to begin December 5, 2024.
- Can the employer evaluate Susan's hours of service to determine her eligibility?

Employer Responsibilities

- Send timely (within 5 business days) Eligibility/Rights and Responsibilities Notices:
  - If ineligible, employer must provide the reason why (ex. insufficient tenure)
  - Both notices must be sent regardless of eligibility
  - Include a blank certification form specific to the requested leave reason
- Once medical certification/documentation is received, send timely (within 5 business days)Designation Notice
- Ongoing notices as applicable (exhaustion of leave, updated Designation Notice if employee requests leave balance)
- Template notices and blank certification forms are available on the DOL website

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Best Practices

- Have recordkeeping for temporary/joint employees
- Have a method for ensuring all hours and tenure are included when determining eligibility
- Don't waive eligibility – create a corporate leave policy if you want to be more generous
- Track employee's 12-month eligibility period and reevaluate eligibility when permitted
- Develop consistent documented administration practices
- Train front-line managers
- Know your state-leave laws

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Resources

DOL Employer Guide to the FMLA:

- https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf

Joint employment:

- https://www.dol.gov/agencies/whd/fact-sheets/28n-fmla-joint-employment
- https://www.dol.gov/whd/opinion/FMLA/2004_04_05_1A_FMLA.pdf

Eligibility

- Eligibility window - https://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-112.pdf
- Temp time - https://www.dol.gov/WHD/opinion/fmla/prior2002/FMLA-37.pdf

Template notices and Certification forms

- https://www.dol.gov/agencies/whd/fmla/forms

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