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## Coates' Canons Blog: Small Towns and the FMLA

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Does Anytown, N.C.—a town with fewer than 50 employees—owe to its employees the leave rights set out in the federal Family and Medical Leave Act (FMLA)? The answer is No, I think, but it takes a little explaining to get to that answer. And even though Anytown does not have to provide the rights, it still must post the FMLA notice as if it did.

First, let's think for just a moment about what the FMLA does. It requires employers to allow employees to take a considerable chunk of time off from work, up to 12 weeks, and to keep their jobs waiting for them when they return—job protected guaranteed leave. The leave must be necessary because of the employees' own serious illness, the illness of a family member who needs care, childbirth or adoption, or certain needs of family members on active military duty.

For the obligations to apply, an employer must be a “covered” employer. Small private sector employers are simply not covered. To be covered, a private employer must have at least 50 employees. **29 U.S.C. 2611(4)(A)(i)**. But the rule is different for governmental employers. The FMLA defines “employer” to include any “public agency” as defined in the Fair Labor Standards Act, and the Fair Labor Standards Act defines “public agency” to include states and political subdivision of states—such as counties and cities. **29 U.S.C. 2611(4)(A)(iii)**. All governmental employers are covered employers. So, a North Carolina town, no matter how many or how few employees it has, is a covered employer. Anytown is covered.

Nonetheless, Anytown, despite being a covered employer, has no “eligible employees” within the meaning of the act. An “eligible employee” is an employee who has met certain time conditions (that is, has worked at least 1,250 hours in the past year for the employer), but, the statute says, the term does not include someone “who is employed at a worksite at which [the] 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.” **29 U.S.C. 2611(2)(B)(ii)**. Since Anytown has fewer than 50 employees total, it clearly has fewer than 50 at any worksite and fewer than 50 within 75 miles of that worksite, so none of its employees are “eligible employees.”

This conclusion is bolstered by the language in **29 C.F.R. 825.108(d)**:

“(d) All public agencies are covered by the 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 worksite or within 75 miles.”

The consequence is a funny one: Anytown is a covered employer, but it has no covered employees. That means, as far as I can tell, that Anytown is responsible for meeting the information posting requirements of the FMLA [“Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act’s provisions and providing information concerning the procedures for filing complaints of violations of the Act.” **29 C.F.R. 825.300(a)(1)**] but not for providing to employees the leave rights of the act. [“Covered employers must post this general notice even if no employees are eligible for FMLA leave.” **29 C.F.R., 825.300(a)(2)**]

Go figure.

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