

Employment Practices Liability

January 8, 2020

DOL Issues Opinion Letter – Aggregation of Health District With County Employees Not Necessary For Purposes of FMLA Where County Demonstrated They Are Separate and Distinct

By Robin Kallor, Partner, Rose Kallor, LLP

The Department of Labor recently considered the question of whether the employees of a health district in a particular county in Ohio must be aggregated for purposes of determining eligibility under the FMLA for the health district employees, and determined that the health district was a separate and distinct employer and, thus, did not need to aggregate its employees with county employees in order to meet the 50 employee threshold under the FMLA.

The FMLA affords up to 12 weeks of unpaid leave to eligible public employees who must, among other requirements, work for a covered employer at a location where the employer has 50 or more employees within 75 miles. The FMLA incorporates the Fair Labor Standards Act's (FLSA) definition of "public agency." Public agencies are covered employers under the FMLA and may include the government of a state or a political subdivision of a state, such as counties, cities, and towns, as well as the agencies of a state or a political subdivision of a state. A State or a political subdivision of a state constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility under the FMLA. For example, a State is a single employer, a county is a single employer, and a city or town is a single employer.

Whether two agencies of the same State or local government constitute the same public agency can be determined only on a case-by-case basis. The following factors that must be considered are: (1) whether they are treated separately for statistical purposes in the Census of Governments issued by the U.S. Census Bureau; (2) whether the two agencies have separate payroll systems; (3) whether they have different retirement systems; (4) whether they have separate budgets and funding authorities; (5) whether each has the authority to sue and be sued in its own name; (6) whether they have separate hiring and other employment practices; (7) whether one employer controls the appointment of officers of the other agency; and (8) how state law treats the relationship between the two agencies.

In considering this issue, the DOL initially analyzed Ohio law to determine how these health districts are treated. Under Ohio law, health districts can sue or be sued, free to enter into contracts on its own behalf and may hold/dispose of land or personal property for its use and benefit. Health districts has its own governing board; County does not appoint or approve appointments (although the County official sits on the health district's advisory council that appoints two members. The health district operates its own budget and not funded by the County, rather, it is funded by taxes, levies, contracts, grants and fees that are "separate from the county." The health district determines the pay and benefits offered to its employees and the County has no part in the hiring, firing, supervision of health district employees. The health district employees participate in the State retirement system, which provides retirement benefits for public employees throughout the state, including County employees. The health district pays the

employer portion of retirement contributions on behalf of its employees through its own budget. The health district pays the County to process payroll.

The DOL concluded that these two entities were health distinct entities by analyzing the factors enumerated above. First, Ohio law treats a health district as a political subdivision that is separate from any county or other local government agency or body. Moreover, under state law, a health district can sue and be sued in its own name, enter into contracts on its own behalf, and may acquire, hold, possess, and dispose of real and personal property, which are factors that indicate its independence from other public entities. Additionally, the health district its own budget and does not rely on any funds from the County. In addition, the County has no part in the hiring, firing, or supervision of the health district's employees, and the board of directors of the health district is largely independent from the County. Further, health district employees do not participate in the retirement system administered by the County, although both health district and County employees may participate in a statewide retirement system. Finally, although the County auditor processes the health district's payroll, the health district pays the auditor for this service. As the Taken together, these factors demonstrate that the health district and County are separate entities for purposes of the FMLA. While in this case, the U.S. Census Bureau classified the health district as a subordinate agency of the County, the DOL concluded that they were separate, nonetheless, as this was just "one factor" under their regulations. An analysis of the factors dictated a finding that the two entities were separate for purposes of calculating FMLA eligibility.

This case is instructive, but it does not stand for the proposition that all health districts or other similar districts or authorities are separate from the municipality or state agency are separate for purposes of the FMLA. An analysis of the factors must be done in order to ensure compliance under the law.

Robin Kallor is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including the selection process, discrimination and harassment related issues and frequently conducts neutral workplace investigations. If you have questions about this legal update, please contact us at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Jacqueline Smith, CIRMA Communications Associate at jsmith@ccm-ct.org.

For more information about CIRMA's Employment Practices Liability Helpline Program, please contact your CIRMA Risk Management Consultant.