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You've Just Bought the Company...Now Let's Get to Work! Oh, Wait...What About the FMLA?

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An acquisition of a new company into your corporate portfolio can be an exciting challenge. As a Human Resources manager, you have the daunting task of integrating the acquired company's personnel into the acquiring company's systems and practices. Your checklist of items to accomplish probably includes reviewing the acquired company's employee handbook to see what policies you want to keep and which ones you're going to toss, deciding whether you're going to re-do their I-9s, and reviewing their FLSA classifications to ensure that employees are properly classified as exempt and non-exempt. Thank goodness you don't have the additional headache of having to manage the acquired employees' FMLA leaves – after all, they aren't eligible for FMLA until they've worked for you for a year, right?

Actually, that may not be the case. If you acquire a company and hire all of the employees, then you are likely to be deemed a "successor in interest" under the FMLA. This means that you have to honor the employees' service with the acquired company for purposes of calculating their FMLA eligibility. Treat the employees of the acquired company as if they had worked for you the entire time they worked for the acquired company – their dates of hire with the prior company will serve as their dates of hire with you for purposes of calculating their FMLA eligibility. This was the finding of the federal district court in the Southern District of Alabama in considering whether an employee at a Burger King that was purchased two months prior to his need for FMLA leave was an "eligible employee" under the FMLA. The defendant in *Moore v. GPS Hospitality Partners IV, LLC*, 383 F.Supp.3d 1293 (S.D. Ala. 2019), purchased 190 Burger King restaurants in December 2016, retaining the employees of the prior owner, the equipment, and providing the same products and by the same means at the same locations. The court found that the defendant employer was a successor in interest under the FMLA, and that it therefore must count the plaintiff's periods of employment and hours of service with the predecessor in determining her eligibility for FMLA leave.

If an employee is out on FMLA leave at the time of the acquisition, the successor employer is required to honor the rest of the FMLA leave and then return the employee to work, so long as the employee's position still exists. That last part is key: the regulations make clear that "[a]n employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period." 29 C.F.R. § 825.216(a) (providing examples such as layoff or elimination of a shift that may justify denial of reinstatement); *see also O'Connor v. PCA Family Health Plan, Inc.*, 200 F.3d 1349,1354 (11th Cir. 2000) (holding reinstatement was not required where the plaintiff was subject to a legitimate reduction in force). Thus, an employer will not be found to have violated the FMLA by denying reinstatement if the employer "demonstrate[s] that it would have discharged the employee had he not been on FMLA leave." *Martin v. Brevard Cty. Pub. Schs.*, 543 F.3d 1261, 1267 (11th Cir. 2008). But courts look skeptically at employers who terminate employees who are on FMLA leave, so make sure if you're going to say that the position has been eliminated that it actually has. Don't try to get around this by eliminating the position, firing the employee on FMLA leave, and hiring someone else for the same position two weeks later.

Even without a transfer of assets, you may have obligations under the FMLA to recognize an employee's prior service. Let's say that instead of your company actually purchasing a company, your company wins a

government contract. Under federal government contracting rules, you are generally required to offer employment to the predecessor contractor's employees, and often, those employees will accept your offer, happy to continue working in the jobs they did before. You may be deemed a "successor in interest" of the prior contractor under the FMLA even though you have no legal relationship with that prior contractor. For example, a Virginia federal district court found that a government contractor providing private security at a GSA warehouse in Springfield, Virginia was a successor in interest to the contractor that had previously held the warehouse security contract for purposes of FMLA leave eligibility for the employees of those contractors. The plaintiff in *Osei v. Coastal Intern. Sec., Inc.*, 69 F.Supp.3d 566 (E.D. Va. 2014), provided security at the GSA facility for about four years under different employers until her new employer, Coastal, won the security contract. Within the first 12 months after Coastal took over the contract, the plaintiff sought to take FMLA leave. Coastal denied her request for leave and claimed she was ineligible because she had not worked for Coastal for the requisite 12 months. She sued, claiming that Coastal was a successor employer for purposes of the FMLA and had to honor her prior service with the prior contractor. The court agreed with the plaintiff, finding that she was an "eligible employee" under the FMLA. The court noted that Coastal hired substantially the same workforce as the previous contractor, including one of the plaintiff's supervisors. The equipment and physical features of the work site remained the same. The plaintiff's tasks and supervisory structure remained the same. Coastal had relied on certification previously obtained by the previous contractor with regard to the plaintiff's training. These factors, along with equitable factors related to the stated purpose of the FMLA, which is to grant long-term employees reasonable leave for medical reasons, led the court to conclude that Coastal was a successor in interest to the plaintiff's prior employer and that the plaintiff's prior service should be considered for purposes of determining her eligibility to take FMLA leave.

The *Osei* court relied on a Department of Labor (DOL) regulation, 29 CFR § 825.107, that identifies eight factors to determine whether an employer may be considered a "successor in interest" to its employees' former employer, even absent a formal acquisition. The factors to be considered include:

1. substantial continuity of the same business operations;
2. use of the same plant;
3. continuity of the work force;
4. similarity of jobs and working conditions;
5. similarity of supervisory personnel;
6. similarity in machinery, equipment, and production methods;
7. similarity of products or services; and
8. the ability of the predecessor to provide relief.

The regulation specifically states that a determination of whether or not a successor in interest exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality. In other words, if these factors, considered as a whole, point toward similarity and continuity, the later employer is likely to be deemed a successor for purposes of FMLA eligibility of the later employer's newly-hired employees.

Employers who succeed another employer – whether as a contractor or by asset transfer – should consider these factors when faced with a question about FMLA eligibility and determine whether an employee who has not met the 12-month requirement with their current employer may nevertheless be eligible when their prior service is tacked on.