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This Bulletin was prepared by John Duke of Foley Hoag LLP's Labor & Employment Law Department. If you would like additional information on this topic, please contact Mr. Duke (jduke@foleyhoag.com or 617-832-3083), or contact your attorney at Foley Hoag LLP. For "Alerts and Updates" on other topics, please visit our website at <http://www.foleyhoag.com>.

First Circuit Holds that an Employee's Previous Period of Employment Counts Towards FMLA Leave Eligibility, Despite a Five-Year Gap

The Family and Medical Leave Act ("FMLA") requires covered employers to grant eligible employees up to 12 weeks of unpaid leave per year under certain circumstances, including when the employee is unable to work because of a serious health condition. One of the eligibility requirements is that an employee must work for the employer "for at least 12 months." In *Rucker v. Lee Holding Co.*, the Court of Appeals for the First Circuit held that an employee could count an earlier period of employment, despite a five-year gap, towards the 12-month eligibility period.

In that case, the plaintiff Kenneth Rucker worked for Lee Holding Company as a car salesman for approximately five years before he voluntarily quit. About five years later, Lee Holding rehired him. After working for seven months, Rucker began taking intermittent medical leave for a back injury. He was then fired for excessive absenteeism. Rucker sued, claiming that his termination violated the FMLA. The district court dismissed Rucker's claim on the grounds that he was not an "eligible employee" under the FMLA since he had not been employed for 12 consecutive months prior to his medical leave.

The First Circuit reversed the dismissal, holding that Rucker could combine his earlier employment with his more recent employment to satisfy the 12-month eligibility period. In reaching that conclusion, the court relied upon a Department of Labor ("DOL") regulation, and the DOL's interpretation of that regulation as permitting an employee to combine separate periods of employment. Although the DOL urged the First Circuit to establish a rule that five years was the outer limit for a break in employment, the court refused to adopt such a limit.

The First Circuit's decision in *Rucker* complicates an employer's determination of whether an employee is eligible for FMLA leave. An employer unwittingly might violate the FMLA if it fails to account for a prior period of employment, particularly if the employer no longer maintains records reflecting that prior employment. Although both the First Circuit and the DOL recognized that there were strong policy reasons for putting some limit on the length of the break between periods of employment, for now, at least, there appears to be no established limit.

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