PULLMAN &COMLEY LLC
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Labor and Employment Law Alert

This alert is published by our Labor and Employment practice. Please feel free to contact any of our attorneys for more information.

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Connecticut Court Rules that DOL Must Count Out-of-State Workers to Determine if Employer Has Requisite 75 or More Employees Under Connecticut's FMLA

In a decision sure to send chills to employers with small branch offices in Connecticut, a Superior Court judge recently ruled that an employer's out-of-state employees must be counted in determining if an employer is subject to the state's Family Medical Leave Act (FMLA) rules.

For example, employers with 75 or more employees nationwide that have just one employee in Connecticut may now be subject to Connecticut's FMLA rules for that Connecticut employee.

Although this decision is likely to be appealed, if allowed to stand it has huge implications for employers with small branch offices in Connecticut that, in the past, were not viewed as being covered under the state FMLA. It also has implications for employers based in Connecticut with fewer than 75 employees here but that have out-of-state workers.

The context

Under federal FMLA law, an employer is subject to the FMLA when it employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. However, only certain types of employees are covered: The employee must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

In Connecticut, things are a little more complicated because Connecticut has its own version of FMLA that overlaps at times with the federal law. Under CTFMLA (Conn. Gen. Stat. §31-51kk(4)), an employer "means a person engaged in any activity, enterprise or business who employs seventy-five or more employees." The language of the Connecticut law, however, does not include the "within 75 miles of the worksite" language found in federal law.

Nonetheless, the Connecticut Department of Labor has long taken the position that only *Connecticut* employees should be used in the calculation of determining whether a company is an "employer" under CTFMLA. Part of that arises from the fact that it seems natural to conclude the Connecticut only has jurisdiction over the part of the employer that is actually in Connecticut.

But the Superior Court's decision in *Velez v. Mayfield* throws that analysis up in the air.

In *Velez*, the Court overturned the Labor Department Commissioner's decision approving of a hearing officer's ruling. In doing so, the Court concludes that the DOL has made an "error of law." It does so by concluding that the legislative history and the language of the statute itself require that all employees of an employer must be included, not simply those that work in Connecticut:

> In light of the purpose behind the 75-person exemption, the court cannot interpret the term 'employee' as restricted to Connecticut employees so as to prohibit multi-state linking of employees. Such an interpretation would not only ignore the purpose of protecting Connecticut's small employers but also skew the exemption in favor of entities that employ few Connecticut residents but have large numbers of personnel in other states.

Here's an example of how this decision might work in practice: Suppose an employer has two employees in each of the 50 states. Although the employer has 100 employees, none of those employees would be eligible for FMLA because of the worksite rules in the FMLA. However, those two Connecticut employees would now be eligible for Connecticut's FMLA because under Velez, the employer would be deemed to employ over 75 employees.

For now, the decision is simply one Superior Court decision and it is unclear what the Connecticut Department of Labor's stance will be going forward, pending a possible appeal. Out-of-state companies with smaller Connecticut offices should certainly consult legal counsel, however, to determine the possible impact that decision may have on the business and the approach that the employer wants to take in this time of uncertainty.

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