

X. Joint Employment

A. Statutory Background

The FMLA covers an employer in the private sector engaged in commerce or in an industry or activity affecting commerce if it employs 50 or more employees for each working day in 20 or more calendar workweeks in the current or preceding calendar year. *See* 29 U.S.C. § 2611(4). An employee of an FMLA-covered employer is “eligible” for the benefits of the FMLA if the employee has worked for the employer for at least 12 months, for at least 1,250 hours of service during the preceding 12-month period, and is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. 29 U.S.C. § 2611(2).

Despite the plain wording of these definitions a number of questions have arisen as to their meaning, such as how to treat employees with no fixed worksite, employees who are jointly employed by two or more employers, employees of temporary help companies, and others. The Department included the topics of employer coverage and employee eligibility in its RFI. In particular, the RFI noted that the Court of Appeals in *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004), partially invalidated 29 C.F.R. § 825.111(a)(3), which states that when an employee is jointly employed by two or more employers, the employee’s worksite is the primary employer’s office from which the employee has been assigned or to which the employee reports.

B. Department of Labor Regulations

Section 825.104(c) of the regulations addresses who is the employer where more than one entity is involved, such as in an “integrated employer” situation. It provides that the “determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality.” 29 C.F.R. § 825.104(c)(2). Factors considered in determining whether two or more entities are an integrated employer include

the degree of common management, interrelation between operations, centralized control of labor relations, and common ownership/financial control.

The Department stated in the preamble to the final rule that the “integrated employer” test is not a new concept, but rather it is based on established case law arising under Title VII of the Civil Rights Act of 1964 and the Labor Management Relations Act.

Section 825.106 of the regulations implements how the Department views employer coverage and employee eligibility in the case of joint employment. It provides that where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. For example, where the employee performs work which simultaneously benefits two or more employers, and there is an arrangement between employers to share an employee’s services or to interchange employees, a joint employment relationship generally will be considered to exist. *Id.* § 825.106(a). The regulations further provide:

(b) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a secondary employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the “primary” employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

Id. § 825.106(b)-(c). Under section 825.106(d), employees jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility. Thus, for example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. Although job restoration is the primary responsibility of the primary employer, the secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, and thus may not interfere with an employee's attempt to exercise rights under the Act, or discharge or discriminate against an employee for opposing a practice that is unlawful under FMLA. See 29 C.F.R. § 825.106(e).

With regard to the term "worksite," the legislative history states that it is to be construed in the same manner as the term "single site of employment" under the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101(a)(3)(B), and the regulations under that Act (20 C.F.R. Part 639). See S. Rep. No. 103-3, at 23 (1993), H.R. Rep. No. 103-8(I), at 35 (1993). Accordingly, the FMLA regulations define the term "worksite" in those cases in which the employee does not have a fixed place of employment by using language that is very similar to the WARN Act definition in 20 C.F.R. § 639.3(i)(6). Section 825.111 provides as follows:

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in

New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their "worksite."

29 C.F.R. § 825.111(a)(2).

When applying the employee eligibility test (*i.e.*, the 50 employees/75 miles test) to employees of temporary help offices and others who are jointly employed by two or more employers, however, the regulation provides that "the employee's worksite is the primary employer's office from which the employee is assigned or reports." 29 C.F.R. § 825.111(a)(3).

C. Wage and Hour Opinion Letter

In Wage and Hour Opinion Letter FMLA-111 (Sept. 11, 2000), the Department considered the application of the FMLA regulations' "integrated employer" test and "joint employment" tests in sections 825.104 and 825.106 to a "Professional Employer Organization" (PEO). The PEO in question had established a contractual relationship with its clients under which it established and maintained an employer relationship with the workers assigned to the clients (who were leased worksite employees provided via the contract with the client) and assumed substantial employer rights, responsibilities and risks. Specifically, the PEO assumed responsibility for personnel management, health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. Moreover, the PEO had the right to hire, fire, assign, and direct and control the employees.

Based on the facts described in the incoming letter, the Opinion Letter found that “it appears” the PEO is in a joint employment relationship with its clients for these reasons:

1. The PEO is a separately owned and a distinct entity from the client as it is under contract with the client to lease employees for the purpose of handling “critical human resource responsibilities and employer risks for the client.”
2. The PEO is acting directly in the interest of the client in assuming human resource responsibilities.
3. The PEO appears to also share control of the “leased” employee consistent with the client’s responsibility for its product or service.

Based on the specified responsibilities, the Opinion Letter stated that “it would appear that” the PEO is the “primary” employer for those employees “leased” under contract with the client. Thus, the PEO would be responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same or equivalent job upon return from leave. The “secondary employer” (*i.e.*, the client) would be responsible for accepting the employee returning from FMLA leave in place of a replacement employee if the PEO chooses to place the employee with the client. The Opinion Letter concluded that the client, as the “secondary” employer, whether a covered employer or not under the FMLA, is prohibited from interfering with a “leased” employee’s attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice that is unlawful under the Act.

D. Harbert v. Healthcare Services Group, Inc.

Section 825.111(a)(3) of the regulations provides that for an employee jointly employed by two or more employers, the “worksite” is the location of the primary employer’s office from which the employee is assigned or reports. In *Harbert v. Healthcare Services Group, Inc.*, 391 F.3d 1140, the Court of Appeals held that section 825.111(a)(3), as applied to the situation of an employee with a long-term fixed worksite at a facility of the secondary employer, was arbitrary and capricious because it: (1) contravened the plain meaning of the term “worksite” as the place where an employee actually works (as opposed to the location of the long-term care placement agency from which Harbert was assigned); (2) contradicted Congressional intent that if any employer, large or small, has no significant pool of employees nearby (within 75 miles) to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee; and (3) created an arbitrary distinction between sole and joint employers.

With respect to the term “worksite,” the court stated that Congress did not define the term in the FMLA, and it concluded that the common understanding of the term “worksite” is the site where the employee works. With respect to the employee eligibility requirement of 50 employees within 75 miles, the court noted that Congress recognized that even potentially large employers may have difficulty finding temporary replacements for employees who work at geographically scattered locations. Congress thus determined that if any employer (large or small) has no significant pool of employees in close geographic proximity to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee. Therefore, the court concluded that:

An employer’s ability to replace a particular employee during his or her period of leave will depend on where

that employee must perform his or her work. In general, therefore, the congressional purpose underlying the 50/75 provision is not effected if the “worksite” of an employee who has a regular place of work is defined as any site other than that place.

391 F.3d at 1150.

In comparing how the regulations apply the term “worksite” to joint employers and sole employers, the court stated:

The challenged regulation also creates an arbitrary distinction between sole employers and joint employers. For example, if the employer is a company that operates a chain of convenience stores, the “worksite” of an employee hired to work at one of those convenience stores is that particular convenience store. *See* 58 Fed. Reg. 31794, 31798 (1993). If, on the other hand, the employer is a placement company that hires certain specialized employees to work at convenience stores owned by another entity (and therefore is considered a joint employer), the “worksite” of that same employee hired to work at that same convenience store is the office of the placement company.

391 F.3d at 1150.

Importantly, the court did not invalidate the regulation with respect to employees who work out of their homes: “We do not intend this statement to cast doubt on the portion of the agency’s regulation defining the ‘worksite’ of employees whose regular workplace is his or her home. *See* 29 C.F.R. § 825.111(a)(2).” 391 F.3d at 1150 n.1. Nor did the court invalidate the regulatory definition in section 825.111(a)(3) with respect to employees of temporary help companies: “An employee of a temporary help agency does not have a permanent, fixed worksite. It is therefore appropriate that the joint employment provision defines the ‘worksite’ of a temporary employee as the temporary help office, rather than the various changing locations at which the

temporary employee performs his or her work.” 391 F.3d at 1153.

E. RFI Comments and Recommendations

The RFI requested specific information, in light of the court’s decision in *Harbert*, on the definition in section 825.111 for determining employer coverage under the statutory requirement that FMLA-covered employers must employ 50 employees within 75 miles. The Department also sought comment on any issues that may arise when an employee is jointly employed by two or more employers or when the employee works from home. Below are some of these comments.

1. “Worksite” for Employees Jointly Employed by Two or More Employers

The AFL-CIO in its comments urged the Department not to revise 29 C.F.R. § 825.111 (a)(3) to reflect the court’s decision in *Harbert* that held this section to be invalid when applied to a jointly-employed employee with a long-term fixed worksite at a facility of the secondary employer. *See* Doc. R329A, at 18, 21. The AFL-CIO pointed to the legislative history that the term “worksite” is to be construed in the same manner as the term “single site of employment” under the WARN Act and the regulations under that Act.

Specifically, the AFL-CIO agreed with the dissent in *Harbert* that the Secretary’s interpretation of “single site of employment” under the WARN Act regulations as applying equally to employees with and without a fixed worksite is a “permissible and reasonable interpretation”:

[Interpreting the WARN Act regulation so that it] only applies to employees without a regularly fixed site of employment would seem to contravene the express language of the provision which mentions other categories, including employees who “travel from point to point, who are *outstationed*, or whose primary duties involve work

outside any of the employer’s regular employment sites.”

Doc. R329A, at 20 (citations omitted).

Finally, the AFL-CIO agreed with the dissent that the application of the rule does not result in arbitrary differences between sole and joint employers under the FMLA. *See id.* at 20. Instead, it results in a rational distinction, rooted in the very purpose of the 50 employees within 75 miles rule, where the placement agency locates and hires the worker for the client agency:

Basing FMLA eligibility on primary employers prevents confusion and provides certainty, because a temporary placement employee’s coverage could vary daily were he placed in different [locations of the client employer] on a rotating basis. Further, contrary to the court’s assertion, the ability of a . . . [client employer] and a placement agency to find abundant nearby replacements probably is not identical, after all, the placement agency specializes in hiring and placing employees within the area.

Doc. R329A, at 20–21 (citation omitted).

The National Partnership for Women & Families similarly commented that it believes the current regulations are sound and do not require change. Specifically, the National Partnership stated that the preamble to the FMLA regulations makes clear that the Department gave much consideration to the question of how best to determine an employee’s worksite. It noted that the Department’s definition of the employee’s “worksite” is in accord with the FMLA’s legislative history, namely, that the term was to be construed the same as the term “single site of employment” under the WARN Act regulations. The National Partnership commented that the purpose of designating the primary office as the worksite is to ensure that the employer with the primary responsibility for the employee’s assignment is the one held accountable for compliance with these regulations. *See* Doc. 10204A, at 6. The

National Partnership stated that the same principles articulated in the regulations with regard to “no fixed worksite” situations also should apply to this factual scenario. “In cases where employees have long-term assignments, we believe the purposes of the FMLA are best served by using the primary employer from which the employee is assigned as the worksite for determining FMLA coverage.” *Id.*

Similarly, the Public Service Company of New Mexico commented that it has employees who perform work in a remote area or at home, and that it always interprets the most favorable option for the employee for FMLA eligibility. “There is no known benefit to our company if we deny FMLA to certain workers simply due to their remote location.” Doc. 10074A, at 3.

On the other hand, the National Council of Chain Restaurants commented that 29 C.F.R. §§ 825.104 and 825.106 are overly vague and expansive in their definitions of joint and integrated employment. Doc. 10157A, at 3. The National Council stated that these regulations were creating a potential liability for many restaurant franchisees and other small business owners who should not be considered employers under the Act. *Id.*

Oftentimes, individuals will have an ownership interest in one or more restaurants or stores. The FMLA regulations create a potential risk that a joint employment situation or a single integrated enterprise will be found even when the franchisee has few, if any, individuals who work at or for more than one of the restaurants or stores.

Id. at 4.

The law firm of Pilchak Cohen & Tice commented that, under the current regulations, employees at the same size establishment are treated differently because one works for a traditional sole employer and the other works for a staffing firm:

For example, where a small retail store chain may have many employees nationwide, each store could employ

fewer than 50 employees. Those employees clearly would not be eligible for FMLA in the traditional employment context. Yet, under the current regulation, if that same retail chain utilized contract employees from an entity which employed more than 50 employees from its home office and that is where the contract employees received their assignments from or reported to, those contract employees could have FMLA rights at the retail chain. This creates an arbitrary distinction between sole and joint employers. . . . Under 29 C.F.R. § 825.106(e), an employer could contract for an engineer, Employee A, for a six-month project, and then find out after the employee has only been there for two weeks, that Employee A will need 12 weeks off due to the upcoming birth of his child. Upon Employee A's departure, the employer would then have to spend the time and expense training Employee B only to [be] forced to return Employee A to the position, even though it had already spent time training two individuals. The employer would then have to spend additional time and expense bringing Employee A "up to speed" on the project and complete the training initially started.

Doc. 10155A, at 7.

Pilchak Cohen & Tice stated that the regulation would be more palatable if, to qualify for FMLA job restoration with the client company, the contract employee had to have at least 12 months of service at that location. *Id.*

As discussed below, the law firm of Fisher & Phillips commented that an Outsourcing Vender (elsewhere called a Professional Employer Organization, or PEO) should not be treated as a joint employer. In contrast with an employer who uses a PEO, however, Fisher & Phillips stated that a small employer who uses employees from a temporary agency may still have to comply with the FMLA:

In this context, aggregation of the number of employees of both the temporary agency and the worksite

employer may make sense in some cases because the temporary agency can help the smaller employer adapt to an employee's leave of absence by reassigning another temporary worker. Moreover, this regulation is consistent with Congress' intent that the application of the FMLA not unduly burden smaller employers who are unable to reassign employees to cover for absent workers.

Doc. FL57, at 6.

The law firm of Smith & Downey commented that placement agencies (as opposed to PEOs, as discussed below) face a different problem than other employers, in that they may not succeed in obtaining the client company's agreement to reinstate an employee who is returning from FMLA leave. Smith & Downey stated that in many cases although the placement agency dutifully fulfills its FMLA obligations, the entity with whom the employee was placed refuses to reinstate the employee returning from FMLA leave. Doc. FL106, at 1. "This scenario typically places the placement agency in an impossible position, particularly in those cases where the only placements provided by the placement agency are with the single entity in question." *Id.* at 2.

Smith & Downey commented that the client company may not be able to keep a position available for the temporary employee who is on FMLA leave because the position is mission-critical to the company's success, and it proposed that the Department issue regulations that provide for an exception to the usual joint employment rules in those cases in which the employee is placed in a position that is mission-critical to the client employer. *Id.*

The National Coalition to Protect Family Leave commented that the court in *Harbert* was correct in distinguishing between a jointly employed employee who is assigned to a fixed worksite and a jointly employed employee who has no fixed worksite and changes worksites regularly. "As for the former,

the worksite for purposes of determining whether they are eligible employees . . . would be the fixed worksite of the secondary employer. As for the latter, the worksite would continue as stated in the regulation[.]” Doc. 10172A, at 13.

Finally, Access Data Consulting Corporation stated that the best way to resolve identifying the employer is for the Department to clarify that “the person’s employer is the entity from which their paycheck is written.” Doc. 10029A, at 2. This commenter stated that in the case of an employee who is employed by a long-term care placement agency and is assigned to work at the home of a client, the employer of record is the placement agency, not the client, because the paycheck is derived, or written from, the placement agency. “This is not a situation where the employee has two employers; the employee has one – the placement agency, and that company’s demographics should be used to determine FMLA eligibility.” *Id.*

2. Professional Employer Organizations (PEOs)

A number of commenters, including the AFL-CIO, Jackson Lewis, Wilson Sonsini Goodrich & Rosati, Fulbright & Jaworski, Littler Mendelson, Fisher & Phillips, and TriNet, commented that the regulations incorrectly consider Professional Employer Organizations or PEOs (sometimes called HR Outsourcing Vendors) to be joint employers with their client companies.

The comments submitted by the law firm of Jackson Lewis explained the typical differences between a temporary staffing agency and a PEO: A temporary staffing agency is a labor supplier that supplies employees to a client employer. A PEO is a service provider that provides services to existing employees of a company. Doc. R362A, at 3. Jackson Lewis commented that the determination of whether an employee is a “key” employee for purposes of considering entitlement to leave, for example, is made by the client employer and not by the PEO. It further stated that, unlike a temporary staffing

agency, a PEO does not have the ability to place an employee returning from FMLA leave with a different client employer. *Id.* at 4.

Jackson Lewis commented that, like the employees of temporary staffing agencies, the client employer should include the employees serviced by a PEO for purposes of the 50 employee threshold, but should not include the corporate employees of the PEO or the employees of other clients of the PEO. *See* Doc. R362A, at 3, 5. “In the PEO context, the ‘worksite’ is the client’s workplace. Just as in *Harbert*, aggregating unrelated companies that utilize the services of the same PEO is contrary to the purpose and intent of the statute and improperly creates coverage of employees that were not intended to be covered by the FMLA.” *Id.* at 5.

The AFL-CIO commented that PEOs engage in a practice known as “payrolling,” in which the client employers transfer the payroll and related responsibilities for some or all of their employees to the PEO, and that typically, the PEO also makes payments on behalf of the client employer into state workers’ compensation and unemployment insurance funds, but the PEO does not provide placement services. In contrast with a temporary staffing agency, this commenter stated, PEOs do not match people to jobs. *See* Doc. R329A, at 16.

Thus, PEOs do not fit the model of the primary employer who should bear the FMLA’s job restoration responsibilities in a joint employment situation, because there is no evidence to suggest that hiring and related functions fall to them, as opposed to the client employer. . . . Client employers should not be able to shed FMLA responsibilities when they have contractual relationships with entities such as PEOs that are not able to fulfill the FMLA’s job restoration responsibilities, despite how attractive it may be for the client to shift, and the PEO to “accept,” those responsibilities. For all of these reasons, we urge the Department to reconsider its joint

employment rules as they apply to PEOs and similar organizations.

Id. at 17–18.

The law firm of Wilson Sonsini Goodrich & Rosati commented that 29 C.F.R. § 825.106(d) has led to a broader coverage of the Act than was intended by Congress. *See* Doc. R122A, at 4. Many small or start-up companies use PEOs to administer their payroll and benefits or provide other human resources assistance and this may constitute a “joint employer” relationship. “As a result, an employer that has only 15 employees (which is the cause of the need to outsource human resources functions) and would not otherwise be covered by the FMLA must count the employees of the PEO in addition to their own employees, which results in FMLA coverage for the employer.” *Id.*

The law firm of Littler Mendelson stated that a “PEO arrangement” refers to a circumstance in which a customer contracts with another company to administer payroll and benefits, and perform other similar functions. Doc. 10271A, at 2. “Employee leasing arrangements”—like those involving temporary services firms and other staffing companies—refer to arrangements in which the staffing firm places its own employees at a customer’s place of business to perform services for the recipient’s enterprise. The PEO assumes certain administrative functions such as payroll and benefits coverage and administration (including workers’ compensation insurance and health insurance). The PEO typically has no direct responsibility for “hiring, training, supervision, evaluation, discipline or discharge, among other critical employer functions.” *Id.* Littler Mendelson argued that an employer–employee relationship between the PEO and these employees does not exist, based on the economic realities of the relationship and the fact that the employee is not dependent on the putative employer for his economic livelihood. “Because a PEO does not control its client’s employees, does not hire, fire or supervise them, determine their rates of pay or

benefit from the work that the employees perform, the PEO cannot be considered an employer under the FLSA or the FMLA.” *Id.* at 3.

Littler Mendelson commented that PEOs typically provide their services to small businesses and add value by administering their payroll process and providing access and administration of employee benefits that would be cost prohibitive if the small businesses tried to contract for these benefits on their own. “It makes no sense to make an otherwise non-covered employer subject to the FMLA, in contravention of Congress’ intent [in creating a small business threshold], simply because it contracts with a PEO for payroll services and other administrative benefits.” *Id.* at 6.

The law firm of Fisher & Phillips commented on the same kinds of differences discussed above between a PEO and a temporary employment agency, staffing agency or traditional leasing company.

Specifically, if an employer contracts with an HR Outsourcing Vendor, should the number of individuals employed by the HR Outsourcing Vendor [PEO] be aggregated with the number of individuals employed by the employer in question? In addition, should the number of Individuals employed by the HR Outsourcing Vendor’s other clients (within a 75-mile radius) be aggregated with the number of individuals employed by the employer in question. The answer to both of these questions is “no.” Unfortunately, under the current regulations, this answer is not clear.

Consequently, the ambiguity from the two controlling regulations on the issue (Sections 825.111 and 835.106(d)) has forced some employers to turn to the Judicial system for relief. Thus, in the interest of Judicial economy, ensuring compliance with the FMLA where warranted, and effectuating Congress’ intent to protect small employers from the burdens of the FMLA, we respectfully request the DOL to revise and clarify not only Section

825.111, but also Section 826.106(b)-(e) concerning joint employment, as these sections relate to . . . [PEOs]. In addition, or alternatively, we urge the DOL to implement new regulations that expressly detail the requirements for an entity to be subject to the requirements of the FMLA. . . . Extending Section 835.106(d) to encompass relationships between . . . [PEOs] and their clients produces absurd results that were not intended by Congress and do not adhere to the intent of the FMLA.

Doc. FL57, at 2-3.

TriNet commented that in the case of a PEO, the employee is hired first by the client company and the PEO enters the picture when the client company signs up with the PEO and the existing workforce begins to receive PEO services. “The timing is exactly opposite with a temporary staffing agency that first has an employee in its pool of talent and then second assigns that employee to a particular company to work.” Doc. FL109, at 3.

The law firm of Fulbright & Jaworski commented that PEO responsibilities vary by organization and contract, but that most are not involved in the day-to-day operations of their client’s business and do not exercise the right to hire, fire, supervise or manage daily activities of employees. In some cases, the PEO and the client are not in the same city. Doc. FL62, at 1. The firm commented on the need for the Department to clarify that opinion letter FMLA-111 (Sept. 11, 2000) is about an atypical PEO who actually exercised control over client’s employees. “This comment letter requests a Department regulation [as follows] clarifying that the most common type of PEOs – PEOs that do not exercise control of employees – are not covered employers under the FMLA.” *Id.* at 2.

Professional Employer Organizations that contract to perform administrative functions, including payroll, benefits, regulatory paperwork, and updating employment policies, are not joint or integrated employers with their

clients under the provisions of 29 C.F.R. §§ 825.104 and 825.106, provided they do not exercise control over the day-to-day activities of the client’s employees or engage in the hiring or firing of the client’s employees.

Id. at 6.

3. Employees Who Work at Home

The RFI also sought comment on what constitutes the worksite for an employee who works from home. As discussed above, the Access Data Consulting Corporation commented that the employer should be determined “by the entity from which their paycheck is written.” Doc. 10029A, at 2. This commenter stated that the same principle should apply to workers who work from home. *Id.*

The National Coalition to Protect Family Leave commented that 29 C.F.R. § 825.111(a)(2) already addresses the issue of identifying the worksite for employees who work at home by expressly stating that an employee’s home is not an appropriate worksite. In such cases, the location the employee reports to or that furnishes the employee with assignments is the worksite for FMLA purposes. “The Coalition concurs with this analysis . . . [and] asks DOL to clarify the situation where an employee is jointly employed and works out of his home instead of changing locations regularly or at a secondary employer’s premises. In such circumstances, the Coalition recommends that the employee’s worksite be the primary employer’s office from which the employee is assigned or reports.” Doc. 10172A, at 13.