

# HR QUESTION ? of the month



## *We dropped under 50 employees, does FMLA still apply?*

**Question:** Our company recently made some changes, and we no longer have more than 50 employees. How do we handle our prior FMLA obligations (50 or more employees)? Do we have to wait a certain time period before we no longer are required to provide FMLA leave?

**Response:** Yes, if an employer drops below the 50-employee threshold typically required for Family and Medical Leave Act (FMLA) coverage, indeed there is a certain time period that an employer must wait before it ceases being a covered employer for purposes of the Act. The employer will need to comply with its obligations under the FMLA as to any eligible employees, until such time as it is no longer a covered employer.

The FMLA covers all public sector employers, but only those in the private sector employer that are "engaged in commerce or in any industry or activity affecting commerce," and that employ "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." Thus, employers do not become covered by the FMLA the moment they reach the 50-employee threshold. Rather, they must wait 20 weeks at that employee count, to ensure that they have had 50 or more employees "for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" before coverage under the FMLA is triggered. By the same token, the moment an employer dips below the 50-employee headcount requirement, it does not suddenly lose coverage. Indeed if the employer had 50 or more employees in at least 20 weeks in the prior calendar year (and they do not need to be consecutive), the employer would stay covered by the FMLA for the remainder of the current year, even if it is never at or above the 50-employee threshold. Only when the employer can safely say that it has not had at least 50 employees for either 20 weeks in the present year or 20 weeks in the prior year will it cease to be considered a covered employer for FMLA purposes.

Here is an example. A company has 80 employees at the beginning of 2017 but on October 31, 2017, it lays off half of its workforce, leaving the employer with just 40 employees. Although it does not have 50 or more employees for the remainder of the year, it will stay covered by the Act for the rest of 2017 because it had 50 or more employees for at least 20 weeks earlier in the "current" calendar year. As well, although the employer has only 40 employees moving in to 2018, it will remain a covered employer for all of 2018 -- even if it never hires another employee -- because it had 50 employees for at least 20 workweeks in 2017, which at that point is the prior calendar year. In this example, it would not be until 2019 that the employer would cease to be a covered employer under the FMLA, assuming it does not increase its headcount, and it will have to comply with its FMLA obligations until then.

For more information, please see [http://www.ecfr.gov/cgi-bin/text-id?%20c=ecfr;sid=f60cac82476ea25c3294f2114da66cc6;rgn=div5;view=text;node=29%3A3.1.1.3.54;idno=29;cc=ecfr#se29.3.825\\_1104](http://www.ecfr.gov/cgi-bin/text-id?%20c=ecfr;sid=f60cac82476ea25c3294f2114da66cc6;rgn=div5;view=text;node=29%3A3.1.1.3.54;idno=29;cc=ecfr#se29.3.825_1104) as well as page 9 at <https://www.dol.gov/whd/fmla/employerguide.pdf>

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