

Sec. 31-51rr-2. Eligible employee (29 CFR § 825.110)

(a) An eligible employee is an employee of a covered employer who:

- (1) Has been employed by the employer for at least twelve (12) months, and
- (2) Has been employed for at least nine hundred fifty (950) hours of service during the twelve (12)-month period immediately preceding the commencement of the leave.

(b) The twelve (12) months an employee must have been employed by the employer need not be consecutive months, provided;

(1) Subject to the exceptions provided in subsection (b)(2) of this section, employment periods prior to a break in service of seven (7) years or more need not be counted in determining whether the employee has been employed by the employer for at least twelve (12) months.

(2) Employment periods preceding a break in service of more than seven (7) years shall be counted in determining whether the employee has been employed by the employer for at least twelve (12) months where:

(A) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.*, covered service obligation. The period of absence from work due to or necessitated by USERRA-covered service shall be also counted in determining whether the employee has been employed for at least twelve (12) months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(B) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service.

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave during which other benefits or compensation are provided by the employer, the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least twelve (12) months, fifty-two (52) weeks is deemed to be equal to twelve (12) months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than seven (7) years when determining whether an employee has met the twelve (12)-month employment requirement. However, if an employer chooses to recognize such prior employment, the employer shall do so uniformly, with respect to all employees with similar breaks in service.

(c)

(1) Except as provided in subsection (c)(2) of this section, whether an employee has worked the minimum nine hundred fifty (950) hours of service is determined according to the principles established under the FLSA for determining compensable hours of work. *See* 29 CFR part 785. The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work

due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous twelve (12)-month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule may be used for calculations.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*see bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541*), the employer has the burden of showing that the employee has not worked the requisite hours.

(4) The determination of whether an employee meets the hours of service requirement and has been employed by the employer for a total of at least twelve (12) months must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the twelve (12)-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA qualifying reason after the employee meets the eligibility requirement would be FMLA leave.

(Effective May 12, 2014)