



FMLA2020-1-A

Jack Pepper
Athens City-County Health Department
278 W. Union Street
Athens, OH 45701

January 7, 2020

Dear Mr. Pepper:

This letter responds to your request for an opinion concerning whether a combined general health district must count the employees of the County in which the health district is located for the purpose of determining Family and Medical Leave Act (FMLA) eligibility for its employees. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You inquire on behalf of a health district established under Ohio state law that provides health services to residents of a county and city in Ohio.

You note that Ohio law categorizes the health districts as “political subdivisions of the state . . . separate from any county, township, or other local government.” 2008 Op. Ohio Att’y Gen. 08-017 at 3; *see also* 2018 Op. Ohio Att’y Gen. 2018-013, at 10. Pursuant to state law, the health district may sue or be sued; is free to enter into contracts on its own behalf; may acquire, hold, possess, and dispose of real and personal property; and may take and hold in trust for its use and benefit any grant or devise of land and any domain or bequest of money or other personal property. *See* Ohio Revised Code § 3709.36.

The health district you represent has its own five-member governing board. You represent that the County does not appoint or approve appointments to the health district’s board of directors, although a County official sits on the “district advisory council” that appoints two members. You state that the health district you represent operates its own budget, and notably is not funded by the County; rather, it is funded variously by taxes, levies, contracts, grants, and fees that are “separate from the County.”

The health district determines the pay and benefits offered to health district employees, and the County has no part in the hiring, firing, or supervision of health district employees. Health district employees participate in the Ohio Public Employee Retirement System, which provides retirement benefits for public employees throughout the state, including County employees. The health district pays the employer portion of retirement contributions on behalf of its employees through its own budget. The health district pays the County to process its payroll.

GENERAL LEGAL PRINCIPLES

The FMLA affords up to 12 weeks of unpaid leave to eligible public employees who must, among other requirements, work for a covered employer at a location where the employer has 50 or more employees within 75 miles. *See* 29 U.S.C. § 2611(2)(B)(ii). The Sixth Circuit has explained that “[t]here is nothing illogical in concluding . . . that Congress intended to restrict FMLA benefits to public employees who work for public employers with a not-insubstantial workforce.” *Tilley v. Kalamazoo Cnty. Rd. Comm’n*, 777 F.3d 303, 311 (6th Cir. 2015). Indeed, “[t]he FMLA’s threshold numerical requirements represent Congress’s careful balance of the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling reasons.” *Pirant v. U.S. Postal Serv.*, No. 03 C 9383, 2006 WL 3590072, at * 8 (N.D. Ill. Dec. 7, 2006), *aff’d* 542 F.3d 202 (7th Cir. 2008) (citing *Hukil v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999) (*abrogated on other grounds by Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006))).

The FMLA incorporates the Fair Labor Standards Act’s (FLSA) definition of “public agency.”¹ Public agencies are covered employers under the FMLA and may include the government of a state or a political subdivision of a state, such as counties, cities, and towns, as well as the agencies of a state or a political subdivision of a state. *See* 29 C.F.R. § 825.108(a). A State or a political subdivision of a state constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility under the FMLA. *See* 29 C.F.R. § 825.108(c)(1). For example, a State is a single employer, a county is a single employer, and a city or town is a single employer. *Id.*

“Whether two agencies of the same State or local government constitute the same public agency can be determined only on a case-by-case basis.” 29 C.F.R. § 825.108(c)(1). “One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the” U.S. Census Bureau. *See* 29 C.F.R. § 825.108(c)(1).² However, other factors to consider include: (1) whether the two agencies have separate payroll systems; (2) whether they have different retirement systems; (3) whether they have separate budgets and funding authorities; (4) whether each has the authority to sue and be sued in its own name; (5) whether they have separate hiring and other employment practices; (6) whether one employer controls the appointment of officers of the other agency; and (7) how state law treats the relationship between the two agencies. *See, e.g.*, WHD Opinion Letters FLSA2006-21NA, 2006 WL 4512963 (Oct. 5, 2006); FLSA2006-28, 2006 WL 8266398 (Aug. 7, 2006); and FLSA2002-3, 2002 WL 32255313 (June 7, 2002).

¹ *See* 29 U.S.C. § 2611(4)(A)(iii) (incorporating 29 U.S.C. § 203(x)); *see also* 73 Fed. Reg. 67,939 (Nov. 17, 2008).

² A prior version of the FMLA regulation stated that the Census of Governments was “determinative” when questions arose about whether an entity was part of or separate from another public agency. 73 Fed. Reg. 67,939. On Nov. 17, 2008, the Department of Labor revised the regulation “to be consistent with the FLSA regulation, pursuant to which the Census is just one factor.” *Id.* The revised FMLA regulation, like the FLSA regulation, allows employment-related factors to play a greater role. *Id.*

OPINION

Based on the facts described in your letter and the supplemental information you provided in your subsequent correspondence and conversation with WHD staff regarding your particular health district, under the various factors considered by WHD on a case-by-case basis, the health district and the County do not appear to be the same or single public agency employer such that the health district must count County employees working within a 75-mile radius to determine whether a health district employee is eligible for FMLA leave.

Significantly, Ohio law treats a health district as a political subdivision that is separate from any county or other local government agency or body. *See Bd. of Health of St. Bernard v. City of St. Bernard*, 19 Ohio St. 2d 49, 53 (1969) (“[A] city health district is a state agency rather than a branch of city government.”). The Ohio Attorney General has issued opinions consistent with Ohio case law finding that health districts are entities separate from the cities, townships, or counties in which they are located. *See, e.g.*, 2008 Op. Ohio Att’y Gen. 08-017 at 3; 2018 Op. Ohio Att’y Gen. 2018-013, at 10. Moreover, under state law, a health district can sue and be sued in its own name, enter into contracts on its own behalf, and may acquire, hold, possess, and dispose of real and personal property, which are factors that indicate its independence from other public entities. The health district you represent manages its own budget and does not rely on any funds from the County. In addition, the County has no part in the hiring, firing, or supervision of the health district’s employees, and the board of directors of the health district is largely independent from the County.³ Further, health district employees do not participate in the retirement system administered by the County, although both health district and County employees may participate in a statewide retirement system. Finally, although the County auditor processes the health district’s payroll, the health district pays the auditor for this service. Taken together, these factors demonstrate that the health district and County are separate entities for purposes of the FMLA.

It is true that the U.S. Census Bureau classifies the health district as a subordinate agency of the County.⁴ But that is just “one factor” under our regulations. 29 C.F.R. § 825.108(c)(1). Based on the facts presented here, the vast majority of factors, including the longstanding interpretation of Ohio state law by the courts and the state attorney general, support the conclusion that the County and health district are separate entities of the Ohio government.

For these reasons, the health district and the County do not appear to be a single public agency employer for the purpose of determining FMLA eligibility.

³ *See Onuoha v. Greene Cty. Bd. of Comm’rs*, No. 3:15-CV-047, 2015 WL 7820633, at *5 (S.D. Ohio Nov. 12, 2015), *report and recommendation adopted*, No. 3:15-CV-47, 2015 WL 7871352 (S.D. Ohio Dec. 3, 2015) (“The State of Ohio and the United States government undoubtedly exercise control over the Health District through legislation, through direct or indirect grants in aid with conditions, and so forth. Having some degree of influence over a lower level of government does not mean that the higher level of government is the employer of all the employees of the lower level of government . . .”).

⁴ *See* U.S. Census Bureau, Individual State Descriptions: 2017 Census of Governments, at 229 (Ohio) Apr. 2019, available at <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” *Id.*

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in blue ink that reads "Cheryl M. Stanton". The signature is fluid and cursive, with a long horizontal stroke at the end.

Cheryl M. Stanton
Administrator