

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 93-F-15

Date Issued: September 23, 1993
Requested by: Mr. Wade G. Enget
Mountrail County State's Attorney

- QUESTION PRESENTED -

Whether county social service employees who are subject to the state merit system must be included in the number of employees of a county for purposes of applying the Family and Medical Leave Act of 1993.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that county social service employees must be included in the number of county employees for determining whether a county is subject to the Family and Medical Leave Act of 1993.

- ANALYSIS -

The Family and Medical Leave Act of 1993 applies only to certain employers. An employer subject to this Act is defined as:

- (4) Employer-
- (A) IN GENERAL.--The term "employer"--
 - (i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;
 - (ii) includes--
 - (I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
 - (II) any successor in interest of an employer; and

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(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)).

(B) PUBLIC AGENCY.--For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

Pub. L. No. 103-3, ? 101(4), 107 Stat. 6,8 (1993). The Fair Labor Standards Act of 1938 defines "public agency" to include states and their political subdivisions. 29 U.S.C. ? 203(x) (1988). North Dakota counties are political subdivisions of the state. Hart v. Bye, 76 N.W.2d 139, 144 (N.D.1956). A North Dakota county which employs 50 or more employees is, therefore, subject to the Act.

To determine whether an employer has 50 or more employees for purposes of the Family and Medical Leave Act of 1993, the number of people who are defined as employees under the Act must be determined. The term "employee" is given the same meaning under the Act as that found in subsection (e) of section 3 of the Fair Labor Standards Act. Pub. L. No. 103-3, ? 101(3) 107 Stat. 6, 8 (1993). The relevant portions of the Fair Labor Standards Act provide:

- (e) (1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.
(2) In the case of an individual employed by a public agency, such term means--

* * * *

- (C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--
(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and
(ii) who--
(I) holds a public elective office of that State, political subdivision, or agency,

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(II) is selected by the holder of such an office to be a member of his personal staff,
(III) is appointed by such officeholder to serve on a policymaking level,
(IV) is an immediate advisor to such an officeholder with respect to the constitutional or legal powers of his office, or
(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

* * *

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political

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subdivision, or agency has a mutual aid agreement.

29 U.S.C. ? 203(e) (1988). Any county employee meeting the above definition must be counted when determining whether a county has 50 or more employees and therefore subject to the Family and Medical Leave Act of 1993.

Since a North Dakota county is a political subdivision of the state and since any individual employed by a political subdivision is an employee within the meaning of the Fair Labor Standards Act except as specifically excluded by 29 U.S.C. ? 203(e), any individual employed by a county not so excluded must be counted toward the 50 employee threshold of the Family and Medical Leave Act. In determining exceptions to the definition of an employee contained in 29 U.S.C. ? 203(e) a two-fold inquiry is involved. First, it must be determined whether any such individual is not subject to applicable civil service laws. Second, it must be determined whether any such individual is an elected official, is a member of an elected official's personal, policy-making, or legal staff, or is a non-library legislative branch employee.

County social service employees are subject to the state merit system. 1981 Op. N.D. Att'y Gen. 431. Because they are subject to the state civil service rules, they arguably do not meet the first prong of the test. However, even if a determination were made that the first prong of the inquiry was met because the state rather than a county civil service system was applicable to these county employees, they still would not be exempted from the definition of employee under 29 U.S.C. ?203(e) because they do not fall within the categories listed under the second part of the inquiry. County social service employees are not elected officials or members of elected officials' personal, policy-making, or legal staff, nor are they legislative branch employees. Consequently, it is my opinion that county social service employees must be included in the number of county employees for determining whether a county is subject to the Family and Medical Leave Act of 1993.

- EFFECT -

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This opinion is issued pursuant to N.D.C.C. ? 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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ATTORNEY GENERAL

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