§ 825.104 Covered employer.

(a) An employer covered by FMLA is 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. Employers covered by FMLA also include any person acting, directly or
§ 825.105 Counting employees for determining coverage.

(a) The definition of “employ” for purposes of FMLA is taken from the Fair Labor Standards Act, §3(g), 29 U.S.C. 203(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term “employ” as defined in the Act includes “to suffer or permit to work.” The courts have indicated that, while “to permit” requires a more positive action than “to suffer,” both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on “isolated facts” or upon a single characteristic or “technical concepts,” but depends “upon the circumstances of the whole activity” including the underlying “economic reality.” In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who “follows the usual path of an employee” and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer’s payroll will be considered employed each working day.