

Employers Beware: Calculating FMLA Intermittent Leave Can Result in More (or Less) Than 480 Hours Per Year

Labor & Employment Law Update

By Laurie Meyer on March 3, 2023

Most employers with 50+ employees are aware that under the federal FMLA, eligible employees may, for qualifying reasons, take up to 12 weeks of unpaid leave during a 12-month period. Employers are also aware that employees can, under certain circumstances, take this leave on an “intermittent” or “reduced schedule” basis. For instance, an eligible employee might work four rather than eight hours per day for many weeks or months for FMLA-qualifying reasons. In those cases, an employer might believe that since 12 weeks multiplied by 40 hours per week equals 480 hours, the maximum amount of FMLA leave any employee can take in a 12-month period is 480 hours.

Sounds reasonable, right? This assumption **would** be reasonable **if** the employee normally worked 40 hours in a typical workweek. But what happens when the normal workweek for a particular employee is more or less than 40 hours? What if an employee regularly works more than five days per week or regularly works overtime? What if the employee normally works only 30 hours per week? Should the employer still assume that the maximum allotment is 480 hours per year?

No, says the Department of Labor. In guidance issued on February 9th, the Department reminded employers that the FMLA statutes use the “**workweek**” – not a defined number of hours or even the workday — as the basis for leave entitlement, and thus the employee’s normal or typical workweek is the controlling factor for calculating the total FMLA leave usage and determining when FMLA is exhausted. The FMLA regulations caution, however, that only the amount of leave **actually taken** may be counted toward the employee’s total leave entitlement.

Through the use of a number of examples, the applicable regulation recognizes the reality that not every employee’s normal “workweek” is the same, and therefore, FMLA usage calculations can differ:

- If an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth (1/5) of a week of FMLA leave.
- If a full-time employee who would otherwise work eight-hour days works four-hour days under a reduced leave schedule, the employee would use one-half (1/2) week of FMLA leave.
- Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, only works 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (1/3) of a week of FMLA leave for each week the employee works the reduced leave schedule.
- An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours.
- If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), **a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period** (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

What about the employee who ordinarily works a five-day week of 10 hours per day? Per the DOL's recent guidance, he or she has a normal "workweek" of 50 hours, and thus would be entitled to **600** hours of FMLA leave in a 12-month period. If that employee submits FMLA certification paperwork indicating that for an FMLA-qualifying reason, he or she cannot work more than eight hours per day, the employer should count 10 hours of FMLA leave each week against the total FMLA annual allotment of 600 hours.

Importantly, the DOL noted that employees may continue to use such intermittent, or reduced schedule, FMLA leave for an indefinite period of time as long as they continue to be eligible and have a qualifying reason for leave: "Thus, if the employee never exhausts their FMLA leave, they may work the reduced schedule indefinitely."

Employers should carefully review an employee's normal weekly work schedules when determining how to calculate the employee's FMLA leave entitlement—and employers should not assume that 480 hours is the end of the line for everyone.

Employers
Beware:
Calculating
FMLA
Intermittent
Leave Can
Result in
More (or
Less) Than
480 Hours
Per Year