



May 9, 2002

FMLA2002-1

Dear **Name***

Thank you for your letter addressed to Joe Kennedy, then Acting Assistant Secretary of the Employment Standards Administration, concerning how leave entitlement under the Family and Medical Leave Act of 1993 (FMLA) is determined for employees who normally work part-time or variable hours. Your letter has been referred to the Wage and Hour Division of the Employment Standards Administration for reply as the Division administers and enforces FMLA for all private, State and local government employees, and some Federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 workweeks of unpaid, job-protected leave each year -- with continued group health insurance coverage during the leave -- for specified family and medical reasons.

Under the FMLA, the workweek is the basis for an employee's leave entitlement (See FMLA, Section 102(a)(1).) The entitlement is not phrased in terms of a particular number of days or hours of leave, but rather as 12 workweeks of leave. Thus if there is a holiday in a week when an employee is on leave for the full week, the employee is still charged with a week of leave. (See Section 825.200(f) of Regulations, 29 CFR Part 825.) Similarly, if an employee normally works a 50-hour workweek, the employee's statutory entitlement is not capped at 480 hours. (See 60 Fed. Reg. 2180 (Jan. 6, 1995) (preamble to 825.205.)) Thus, the focus is always on the workweek, and the employee's "normal" workweek (hours/days per week) prior to the start of FMLA leave is the controlling factor for determining how much leave an employee is entitled to use. Only the amount of leave actually taken may be counted against the employee's 12-week entitlement of FMLA leave. (See section 825.205 of Regulations, 29 CFR Part 825.)

Whether FMLA leave is taken for qualifying family reasons or medical reasons, or taken continuously or intermittently, the rules for calculating the amount of leave available to the employee and to be used during the leave period are exactly the same. For example, an employee, who works 40 hours per week (five (5) days, eight (8) hours each day), needs one (1) day a week of intermittent FMLA leave for six (6) months to undergo treatment for a serious health condition. The employer calculates the employee's leave entitlement based on the employee's full-time schedule and determines that the employee will take one-fifth (1/5), or 20 percent, of a workweek of FMLA leave each week during the leave period. Assuming the employee had 12 workweeks of FMLA leave at the commencement of leave and took no additional FMLA leave during the leave period, at the conclusion of the leave period, the employee took five and one-fifth (5-1/5) workweeks, or 26 workdays, of FMLA leave with a remaining balance of six and four-fifths (6-4/5) workweeks, or 34 workdays. While the computations work out the same whether you use a fraction of the workweek or individual hours, as you will see when reviewing your first example, it is much easier to compute using the fraction of the workweek method when an employee is on leave for consecutive full days, and is not using leave on an intermittent or reduced schedule basis for a few hours at a time.

Prior to determining the amount of FMLA leave an employee is entitled to take, and the amount of FMLA leave an employer may count against that entitlement, the employee's established 7-day workweek and the 12-month leave period selected by the employer in which the 12 weeks of leave entitlement occurs must be known. Since this information was not provided in your request, for the purposes of this response, we will assume that the employee's workweek in all examples is Sunday through Saturday. We will also assume that the employer has selected the calendar year as the 12-month leave period. (See section 825.200 of Regulations, 29 CFR Part 825.)

You present an example of an employee who had a normal workweek schedule of 34 hours, Monday through Friday, prior to taking FMLA leave due to a serious health condition from February 8 through March 7. During this leave period, the employee used a total of four and one-fifth (4-1/5) workweeks (i.e., 21 workdays) of FMLA leave.



A break-out of the amount of leave taken during the leave period is the following: four-fifths (4/5) of a workweek from February 8 through 11 (Tuesday through Friday); three (3) full workweeks from February 14 (Monday) through March 3 (Friday), and; two-fifths (2/5) of a workweek from March 6 (Monday) through March 7 (Tuesday). The error in your computation was that you determined the number of hours of leave available for this period based upon the average 30-hour workweek that the employee worked later in the year, and your formula includes weekends rather than looking at the fraction of the Monday through Friday workweek the employee missed.

Three months later (June 8), this same employee needed FMLA leave to care for an immediate family member who was seriously ill. The employee's normal workweek schedule prior to the start of the second leave period had changed to 30 hours a week, Monday through Friday. In this situation, the new workweek schedule would be used for calculating the amount of FMLA leave available to the employee if the employer made a permanent or long-term change in the employee's workweek schedule for non-FMLA reasons prior to the employee's request for FMLA leave. (See section 825.205(c) of Regulations 29 CFR Part 825.) The amount of leave available to the employee for the second FMLA leave period would be seven and four-fifths (7-4/5) workweeks. The employee could remain on FMLA leave continuously from June 8 through August 1, or 39 workdays. Because this employee did not use intermittent or reduced schedule leave, there is no need to compute the leave available or the leave used in hours.

In calculating the amount of FMLA leave available to an employee whose schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period should be used. (See section 825.205(d) of Regulations 29 CFR Part 825.) In your second example, an employee works an alternating workweek schedule of three days (Monday through Wednesday), 12 hours per day, or 36 hours one week, and four days (Monday through Thursday), 12 hours per day, or 48 hours the following week. The employee requested and was granted FMLA leave for his serious health condition on April 7 (Friday) and returned to work on May 1 (Monday). Since April 7 fell on a Friday, the employee could not be charged with FMLA leave on that day as the employee had already worked his scheduled hours for that week. The employee's start of FMLA leave in this example should be April 10 (Monday). The amount of FMLA leave used by the employee is exactly three (3) workweeks of FMLA leave. Four months later when the employee needed FMLA leave for the same condition, the employee would have nine (9) workweeks of FMLA leave remaining to use. Again, because the employee used full workweeks of leave, there is no need in this case to compute the leave in hours.

You also present a third example, whereby the employee works an alternating workweek schedule similar to the second example except the employee works ten-hour days instead of 12-hour days. Despite the change in hours, if the leave circumstances were exactly the same as those described in the second example, the employee would have used three (3) workweeks of FMLA leave for the first absence and would have nine (9) workweeks of leave available to use for the second leave period.

We trust that this letter is responsive to your concerns. If you should require further information, please do not hesitate to contact us.

Sincerely,

Rosemary E. Sumner
Office of Enforcement Policy
Family and Medical Leave Act Team

*Note: * Name(s) withheld to preserve privacy, in accordance with 5 U.S.C. 552(b)(7).*