

May 30, 2023

Dear **Name\***:

This letter responds to your request for an opinion concerning how to calculate the amount of leave used when an employee takes leave under the Family and Medical Leave Act (FMLA) during a week with a holiday. 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 request clarification regarding FMLA regulations at 29 C.F.R. § 825.200(h) and 29 C.F.R. § 825.205(b) to determine how to calculate an employee's FMLA leave entitlement when leave is taken during a week that includes a holiday. You note that 29 C.F.R. § 825.200(h) states that when an employee takes a full workweek of FMLA leave during a week that includes a holiday, the employee uses a full week of FMLA leave. You also identify 29 C.F.R. § 825.205(b), which explains how intermittent or reduced schedule leave is calculated for FMLA purposes. You ask for clarification on how to calculate the amount of FMLA leave used where an employee takes FMLA leave for less than a full week during a week that includes a holiday.

## **GENERAL LEGAL PRINCIPLES**

The FMLA entitles eligible employees of covered employers to take unpaid job-protected leave for qualifying family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees may take up to 12 workweeks of leave in a 12-month period for various qualifying reasons, and up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember. 29 U.S.C. § 2612(a)(1), (3). Under certain circumstances, an employee may use FMLA leave intermittently, that is, in separate blocks of time, or on a reduced leave schedule, by reducing the time worked in the day or week. *Id.* § 2612(b)(1); 29 C.F.R. § 825.202(a).

When an employee takes FMLA leave for less than one full workweek, the amount of FMLA leave used is determined as a proportion of the employee's actual workweek:

The actual workweek is the basis of the leave entitlement. Therefore, 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. Similarly, 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. . . . An employer

may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours.

29 C.F.R. § 825.205(b)(1).<sup>1</sup>

When a holiday falls during a week that an employee is taking a full workweek of FMLA leave, the entire week is counted as FMLA leave. 29 C.F.R. § 825.200(h). Thus, for example, an employee who works Monday through Friday and takes leave for a week that includes the Fourth of July on Thursday would use one week of leave and not 4/5 of a week. However, when a holiday falls during a week when an employee is taking less than a full workweek of FMLA leave, the holiday is not counted as FMLA leave unless the employee was scheduled and expected to work on the holiday and used FMLA leave for that day. *Id.* The Department has taken a consistent approach to the treatment of holidays since the first publication of its FMLA regulations in 1995. *See* 60 Fed. Reg. at 2200; *see also* Final Rule: The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67934, 67972-73 (Nov. 17, 2008).

## OPINION

In your letter, you ask for clarification on how to apply 29 C.F.R. § 825.200(h) and § 825.205(b)(1) when an employee takes FMLA leave during weeks in which there is a holiday. 29 C.F.R. § 825.200(h) explains that where an employee takes FMLA leave in increments of less than one week during a week that includes a holiday, the holiday generally does not count against the employee's FMLA leave entitlement. 29 C.F.R. § 825.205(b)(1) states that where an employee takes FMLA leave on an intermittent or reduced schedule, the employee's "actual workweek is the basis of leave entitlement." You ask whether the employee taking leave during a week that includes a holiday is using a fraction of the employee's usual workweek (a workweek without a holiday), or if the employee is using a fraction of a reduced workweek (the employee's usual workweek less one day due to a holiday).

We do not believe there is a conflict between these two provisions of the regulations. 29 C.F.R. § 825.205(b)(1) explains that when FMLA leave is used as a fraction of a workweek, the fraction is determined based on the actual week in which the leave was taken. This is consistent with the statutory requirement that the use of intermittent or reduced schedule leave "shall not result in a reduction in the total amount of leave to which the employee is entitled . . . beyond the amount of leave actually taken." 29 U.S.C. § 2612(b)(1). Meanwhile, 29 C.F.R. § 825.200(h) explains the impact on the amount of FMLA leave taken of a holiday falling during a full week of leave and clarifies that if the employee uses FMLA leave for all the workdays in the week, the holiday has no effect and a full week of FMLA leave is used. This is consistent with the statutory FMLA leave entitlement being based on workweeks of leave. 29 U.S.C. § 2612(a)(1).

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<sup>1</sup> Conversion of the FMLA entitlement to an hourly equivalent must be based on an employee's work schedule. Employees who normally work 40 hours per week are entitled to 480 hours of FMLA leave (40 hours x 12 weeks) per 12-month period. Employees who normally work 50 hours per week are entitled to 600 hours of FMLA leave (50 hours x 12 weeks) per 12-month period. *See, e.g.,* Final Rule: The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2203 (Jan. 6, 1995); WHD Opinion Letter FMLA2002-1, 2002 WL 34420905, at \*1 (May 9, 2002).

The Department addressed this issue in 2008, when it issued a notice of proposed rulemaking (NPRM) with proposed changes to the FMLA regulations. The NPRM proposed adding text to 29 CFR § 825.200 to clarify how to determine the fraction of a workweek of FMLA leave an employee uses during a week with a holiday in which the employee both works and uses FMLA leave. NPRM: The Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7892 (Feb. 11, 2008). The Department provided the following explanation and example:

[I]f an employee needs less than a full week of FMLA leave, and a holiday falls within the partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee's FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day. If an employee needs a full week of leave in a week with a holiday, however, the hours the employee does not work on the holiday will count against the employee's FMLA entitlement. Accordingly, for an employee with a Monday through Friday work week schedule, in a week with a Friday holiday on which the employee would not normally be required to report, if the employee needs FMLA leave only for Wednesday through Friday, the employee would use only 2/5 of a week of FMLA leave because the employee is not required to report for work on the holiday. However, if the same employee needed FMLA leave for Monday through Friday of that week, the employee would use a full week of FMLA leave despite not being required to report to work on the Friday holiday.

*Id.* That proposal was adopted in the form of an additional sentence included in 29 C.F.R. § 825.200(h): "However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday." *See* 73 Fed. Reg. at 68087. The Department explained in the preamble to the final rule that the change "clarif[ies] how to count holidays in cases where an employee takes leave in increments of less than a full workweek [,]" and noted that "[t]his is a clarification and does not represent a change in the Department's enforcement position." *Id.* at 67972.

Further, in the preamble to the final rule, the Department addressed concerns raised by commenters that the treatment of holidays when an employee uses a full week of leave was inconsistent with the method of counting holidays when a partial week of FMLA leave is used. *See id.* The Department explained:

Holidays regularly occur during normal workweeks and should be counted when they fall within weekly blocks of leave. On the other hand, the Department believes that where leave is taken in less than a full workweek, the employee's FMLA leave entitlement should only be diminished by the amount of leave actually taken. The Department believes that maintaining the existing rule, together with the proposed clarification, is the most reasonable and practical approach.

*Id.* at 67973.

Applying the explanation and example given in the 2008 NPRM, it is clear that the actual workweek includes the day of the holiday. Subtracting the holiday from the workweek when

calculating the amount of FMLA leave used in a partial week of leave would impermissibly reduce the employee's leave entitlement, because the employee would have to use a larger amount of FMLA leave than needed. For example, for an employee who normally works a 5-day week and takes one day of FMLA leave, excluding the holiday from the week would result in the employee using 1/4 of a workweek of FMLA leave in a workweek that includes a holiday instead of 1/5 of a workweek of FMLA leave. Calculating the amount of leave used in this way would be an interference with the employee's FMLA rights. 29 C.F.R. § 825.220(b).

Finally, you note that the answer on how to calculate the employee's use of FMLA leave during a week with a holiday also impacts how an employee's leave is calculated using the "rolling backward" calculation of leave used. Under the rolling backward method, each time an employee takes FMLA leave, the remaining leave is the balance of the 12 weeks not used during the immediately preceding 12 months. *See* 29 C.F.R. § 825.200(b)(4), (c). The principles described in this letter apply when the rolling backward method is utilized. To use the above example, in a scenario where an employee takes one day of FMLA leave in a week with a holiday, leave would be used—and then 12 months later, replenished on a rolling basis—in increments of 1/5th of a workweek. For more information about tracking an employee's leave balance when taking intermittent FMLA leave during the "rolling" 12-month leave period, *see* WHD Opinion Letter FMLA2005-3-A, 2005 WL 3401781 (Nov. 17, 2005).

In sum, under the FMLA, the employee's normal workweek is the basis of the employee's leave entitlement. If a holiday occurs during an employee's workweek, and the employee works for part of the week and uses FMLA leave for part of the week, the holiday does not reduce the amount of the employee's FMLA leave entitlement unless the employee was required to report for work on the holiday. Therefore, if the employee was not expected or scheduled to work on the holiday, the fraction of the workweek of leave used would be the amount of FMLA leave taken (which would not include the holiday) divided by the total workweek (which would include the holiday).

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.

We trust that this letter is responsive to your inquiry.

Sincerely,

Jessica Looman  
Principal Deputy Administrator

**\*Note: The actual name (s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**