U.S. Department of Labor Division Offers An Opinion Letter on the Interplay Between FMLA and Week Day Holidays

PUBLISHED ON
June 7, 2023

The Wage and Hour Division within the U.S. Department of Labor published an Opinion Letter adding Family and Medical Leave Act (FMLA) interpretation guidance last week. An Opinion Letter is an official written opinion by the Wage and Hour Division of how a particular law applies in specific circumstances presented by an employer, employee, or other entity requesting the opinion.

The Wage and Hour Division was faced with this request-how to lawfully calculate the amount of leave used when an employee takes FMLA leave during a week with a weekday holiday. By way of brief background, eligible employees may take up to 12 work weeks of FMLA leave in a 12-month period for various qualifying reasons. Under certain circumstances, an employee may use FMLA leave intermittently, in separate blocks of time, or on a reduced leave schedule, by reducing the time worked in the day or week.

Two present regulations give guidance.

- 29 C.F.R. 825.200(h) provides that "the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave" if the FMLA increment is a week in length. However, if the FMLA leave increment is 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.
- 29 C.F.R. 825.205(b) provides that when an employee is using intermittent leave, only the amount of leave actually taken should be counted as FMLA leave.

Quoting the Department of Labor's 2008 Notice of Proposed Rule Making when it revised 29 C.F.R. 825.200, the Opinion Letter stated that if an employee uses less than a full week of FMLA leave, and a holiday falls within the partial week, the hours that the employee does not work on the holiday cannot count as FMLA leave if the employee would not otherwise have been required to report for work on that day. Conversely, if an employee uses a full week of leave in a week with a holiday, then the hours the employee does not work on the holiday, count as FMLA.

The Opinion Letter used the following example:

- For an employee with a Monday through Friday 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.

For employers who track FMLA using fractions of workweeks, there should be no subtraction of the holiday from the

workweek when calculating partial leave. For example, 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 instead of 1/5. That is impermissible. That must be deemed to have used 1/5 of a workweek of FMLA, not 1/4.

The next instance to apply the guidance in the opinion letter is the Fourth of July, which falls on a Tuesday. If you have any questions regarding the Opinion Letter, FMLA, or employment-related inquiries at large, please contact Caleb P. Setlock or any member of the Barley Snyder Employment Practice Group.

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