

# Holiday Road! DOL Weighs in on Tracking FMLA Time Against Holidays

Article By:

Anne R. Yuengert

J. William Manuel

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Tracking intermittent FMLA time — it's every HR professional's favorite thing to do. Do you come up with a total number of hours per employee or just count portions of the workweek? What do you do if an employee takes intermittent leave during a holiday week? If you have been wrestling with this issue, the DOL just released [Opinion Letter FMLA2021-2-A: Whether Holidays Count Against an Employee's FMLA Leave Entitlement and Determination of the Amount of Leave](#).

## Intermittent FMLA Basics

If you have at least 50 employees, you know that the FMLA entitles eligible employees to take up to 12 workweeks of unpaid leave for qualifying reasons (or 26 workweeks to care for a covered servicemember) during a 12-month period. If the employee takes the leave all at once, it is easy to count. We all know, however, that employees may use FMLA leave intermittently — separate blocks of time, reduced schedule, or even an hour or so at a time. Counting that intermittent leave can get a little tricky.

An employee's workweek is the basis of the FMLA leave entitlement. When an employee takes less than a full workweek of FMLA leave, the amount of leave used is a proportion of the employee's actual workweek. [According to the regulations](#):

. . . 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.

So, figure out the employee's typical workweek and give them up to 12 weeks. Easy, right?

## Intermittent Leave and the Holiday Conundrum

If an employee takes a full week of leave during a holiday week, it counts as one week of leave. According to the regulations, the fact that the employee would not have had to work on the holiday

doesn't matter — it was a week of leave. It doesn't exactly work the same way when an employee takes intermittent leave during a holiday week.

Let's say your employee, Sue, usually works five days a week (40 hours) and takes one day of intermittent FMLA leave each week. In a five-day week, that means Sue is taking 20% of a week of leave. (Yes, that means she could do that for the entire year.)

In a holiday week, when Sue (and everyone else) gets a day off and are only scheduled for 32 hours, if Sue takes an FMLA day, is that still 20% of a week or is it 25% (because her workweek was only 4 days that week)? Should Sue's one day off cost more of her FMLA leave because of the holiday?

The DOL says no.

## Counting FMLA During Holiday Weeks

Not surprisingly, the DOL says an employee, like Sue, is entitled to 12 weeks of FMLA leave based on her workweek. In a shortened week, you still credit Sue with a 40 hour week to determine how much FMLA she took. So, the one day off is still 20% of her FMLA week.

One way around this is to count hours instead of weeks. Again, according to the regulations, "an employer may convert these fractions [of a workweek] to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours." If you want to convert to hourly equivalents, you take the number of hours in an employee's normal weekly work schedule and multiply it by 12. Using Sue as the example:

- If she typically works 40 hours a week, she can take up to 480 hours of FMLA leave.
- If she typically works 50 hours a week, she could take up to 600 hours.
- If she typically works 32 hours a week, she could take up to 384 hours.

You get the picture. If the employee is working fewer than 25 hours a week, she may not be FMLA eligible. Check to be sure she meets the 1,250 hours in the last 12 months requirement.

If you have an employee who works irregular weeks, this is a little trickier and you may want to simply count each week as it comes or come to an agreement with the employee about how many hours are available. Keep in mind that the DOL will expect you to make sure that the employee is not losing out on any available FMLA time. As always, when you find yourself with an FMLA puzzle, call your favorite employment lawyer.

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