

Do Your Policies Explain How You Calculate FMLA Leave?

By Karen Sutherland

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Legal Background

The Family Medical Leave Act (“FMLA”) applies to public employers regardless of their size and to private employers who have 50 or more employees within 75 miles. If you are not sure if your organization is covered by the FMLA, let us know and we can probably determine whether it is covered within a couple of minutes. In a nutshell, the FMLA requires employers to hold an employee’s job open under most circumstances while the employee is absent if he or she or a family member has a serious health condition. The FMLA gives most employees who have been employed for at least 1250 hours in the past 12 months up to 12 weeks of leave in a 12-month period. At first blush, that sounds simple enough. However, there are exceptions and details that make applying the FMLA fairly complicated. The detail that this chapter focuses on is the calculation of the 12-month period.

How many ways are there to count to 12? According to the regulations implementing the FMLA, there are four, and if the employer does not pick one in advance and let the employees know which one the employer picked, then the employees can pick the one that is most advantageous to them, which could result in the employee taking up to 24 consecutive weeks off.

The four methods of calculating the 12-month period are as follows:

1. The calendar year;
2. Any fixed 12-month period, such as a fiscal year or one required by state law;
3. The 12-month period measured forward from when an employee first takes FMLA leave;
or
4. A “rolling” 12-month period measured backward from the date and employee uses FMLA leave.

There are pluses and minuses to each method of calculation. The first two methods have the plus of being easy to administer because the date is the same for everyone, but can result in the employee being gone for more than 12 weeks in a row, depending on when the leave begins. For example, under the first method of calculating leave, if an employee began work on October 1, 2001 and developed a need to take full-time FMLA leave beginning October 14, 2002, then the employee could be allowed to take off the rest of 2002 and the first 12 weeks of 2003. The employee then would not be entitled to any additional FMLA leave until January 2004.

The use of a 12-month look-forward period means that the employee who began work on October 1, 2001 and needed to take full-time FMLA leave beginning October 14, 2002 would be able to take 12 weeks during the 12-month period that began on October 14, 2002. The employee would not be out on FMLA leave for more than 12 weeks at a time, but that the employer needs to be sure to carefully track the start date of the 12-month period because it will be different for each employee. Also, calculating the 12-month period may be confusing when an employee takes FMLA leave more than once (but not consecutively) during the same 12-month period.

The use of a 12-month look-back period means that the 12-month period begins running from the date the employee last used FMLA leave. (In other words, how much FMLA leave has the employee already used in the last 12 months, counting backwards from the date that leave is sought to be taken?) This method of calculation also means that the employee will not be on full-time FMLA leave for more than 12 consecutive weeks, but it, too, can become confusing to calculate because the applicable date will be different for each employee.

No method is perfect, but if the employer fails to select a method in advance and let the employees know what it is, then each employee will have the right to pick the method of calculation that serves that employee's needs the best.

Practical Guidelines

- Adopt a written policy regarding the FMLA that states when the 12-month period begins.
- Keep accurate records of the dates that an employee takes FMLA leave. This is especially important if there may be some confusion later on, such as when there is a delay between the beginning of the FMLA leave and its designation as FMLA leave, or where the leave is taken intermittently and there is a possibility for confusion as to which absences were covered and which absences were not covered. Likewise, if you have an employee who is taking FMLA leave in part-day increments, track which portions of each day (by number of hours) are taken as FMLA leave so that you will know when the employee's leave has been exhausted.
- Explain how intermittent leave and partial-day leave works to employees before they go on leave so that there will be no misunderstandings.
- If you have a part-time employee who works enough hours to be FMLA-eligible, then the amount of FMLA leave available will be proportionate to the employee's schedule.
- Keep in mind that you can make an employee's other forms of paid leave run concurrently with FMLA leave, but you need to let the employees know this in advance to avoid disputes later on. For example, an employee's sick leave can count towards the 12 weeks of FMLA leave if it is your policy to do so and if you give the employee notice that the leave counts as both sick leave and FMLA leave.
- You cannot automatically terminate an employee for being gone longer than the 12-week period set forth in the FMLA. If the employee has a disability, additional leave beyond 12 weeks may be a reasonable accommodation of that disability. This will need to be

determined on a case-by-case basis, taking into account the nature of the disability and its effect on the employee, other possible accommodations, the hardship to the employer, the expected date of the employee's return, etc.

- There are very few situations where you can retroactively label leave as FMLA leave, so be sure to give your employees notice that you consider their leave to be taken under the FMLA as soon as possible.
- You can make the determination that leave is being taken under the FMLA if the FMLA's criteria are met even if the employee does not want the leave to be counted towards his or her FMLA leave entitlement. This situation could arise if an employee wants to take a leave for unspecified reasons (or use sick leave) and then, after exhausting all other forms of leave, wants to begin using FMLA leave.
- Remember that FMLA leave is a legal right, and that you should not discourage employees from using it or retaliate against them for having used it. For example, do not tell an employee that it would be better for the employee to hire someone else to take care of a spouse or child with a serious medical condition instead of taking care of that person himself or herself.
- Use the enclosed DOL forms to obtain information about the medical condition to determine if the condition is covered by the FMLA (Form WH-380) and to respond to an employee's request for leave (Form WH-381).
- The FMLA has extensive agency rules and regulations covering its usage. If you have any questions about the FMLA, contact the Department of Labor (DOL) or an attorney with experience in this area of the law for assistance.
- The information set forth in this notebook is a broad and general overview of a complex topic, and it is not legal advice. If you wish to retain Ogden Murphy Wallace, P.L.L.C. to assist you with an employment law issue, please do not hesitate to contact us and we will see what we can do.

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