

HOW TO CALCULATE FMLA LEAVE

By Karen Sutherland

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. 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 beginning 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.

This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at ksutherland@omwlaw.com