

FMLA Confusion Persists Despite New DOL Advisory

By **Nicholas Schneider** (June 20, 2023)

Despite turning 30 years old this year, the Family and Medical Leave Act still puzzles employers.[1] Its complexity — encompassing many eligibility requirements, intricate provisions and evolving legal interpretations — creates treacherous waters for employers, human resources professionals and corporate counsel to navigate.

On May 30, aiming to clear confusion, the U.S. Department of Labor issued an advisory opinion on how to treat holidays falling during employees' FMLA leave. The opinion provides valuable DOL insights and highlights an FMLA ambiguity that employers should know of.



Nicholas Schneider

The FMLA gives eligible employees unpaid, job-protected leave — up to 12 weeks per 12 months, or 26 weeks to care for a covered service member — for qualifying medical and family reasons.[2] Employees' normal work schedules dictate their precise leave amount per leave week.[3]

For example, let's assume Mary works 40 hours per week as a paralegal. When she invokes FMLA benefits, Mary may take up to 40 hours per week of leave.

Employees may take FMLA leave all at once — i.e., 12 consecutive weeks off — or, when medically required, or by agreement, intermittently or on a reduced leave schedule.[4]

Returning to our hypothetical, Mary's mother is diagnosed with cancer. To help with her mother's chemotherapy, Mary takes two FMLA leave days off per week, Mondays and Tuesdays — i.e., 40% of her normal work week — which, on this fractional basis, counts against her FMLA leave entitlement.

For many employers, confusion abounds when holidays fall during employees' FMLA leave. Do holidays count toward FMLA leave usage? Does it matter if the employee otherwise had to work on the holiday? What about employees on reduced leave schedules? These are real-world scenarios that could affect any employee seeking FMLA coverage.

Whether holidays count as FMLA leave days depends on how employees use their leave. If a holiday falls in a week that an employee takes a whole week of FMLA leave, the employee is not credited for the holiday — i.e., the employee is charged a full week of FMLA leave.[5]

If, however, a holiday falls in a week that an employee does not take a whole week of FMLA leave, the employee is not charged for the holiday.[6] Our paralegal Mary, for example — who takes two FMLA leave days off per week, Mondays and Tuesdays — would be charged only 20% of an FMLA week during a week with a Monday holiday, e.g., Memorial Day. If Memorial Day week was Mary's first FMLA leave week, she would have 11.8 weeks of FMLA leave left.

But remember, the employee's normal work schedule dictates her leave entitlement.

So, for example, if our paralegal Mary normally worked only three days per week, Monday through Wednesday, and took FMLA leave Monday through Wednesday during Memorial Day

week, she would be charged a full FMLA leave week — i.e., she would not be credited the Monday holiday. Needless to say, calculating holidays per the FMLA is complicated.

On May 30, the DOL issued an advisory opinion on whether to count holidays during reduced-schedule FMLA leave usage based on an employee's normal or reduced-work schedule.

In its advisory opinion, the DOL instructed the anonymous employer that submitted the inquiry to use the employee's normal work schedule to determine how it should count holidays during reduced-schedule FMLA leave.

For example, the opinion provided that "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," which the opinion reasoned, "would be an interference with the employee's FMLA rights."^[7]

Despite the DOL assuring that "[it] do[es] not believe there is a conflict between the [holiday-calculation] provisions of the regulations," a practical disparity exists. Employees taking full FMLA weeks are treated differently than those taking partial FMLA weeks.

Thus, if Mary used FMLA leave to take the entire week of Memorial Day off, the holiday would be ignored, and she would be docked one FMLA leave week, leaving 11 FMLA leave weeks left.

If, however, she worked a reduced FMLA schedule of one day per week, i.e., Mondays only, the holiday would be ignored again, but she would be docked only 80% of an FMLA leave week, leaving 11.2 FMLA leave weeks left.

Practically, the effect is the same — a whole week off — but under the latter scenario, Mary saved herself 20% of an FMLA leave week. Employees taking the full week of FMLA leave and normally working a five-day week, understandably, may feel shortchanged, while FMLA-savvy employees may try to take advantage of a reduced-work schedule.

Although unaddressed in the DOL's May 30 advisory opinion, sound policy reasons may explain — even justify — this disparity. The inconsistency benefits employers by incentivizing employees to reduce work disruptions, e.g., working a reduced schedule instead of not at all, and mitigating potential staffing gaps.

It also benefits employees by empowering them with the flexibility to address their medical or family needs and preserving their leave entitlement by not counting holidays during their leave period.

The DOL's May 30 advisory opinion should serve as a welcome reminder to employers to familiarize themselves with the most current FMLA statutes and regulations — including those on calculating holidays — and review and update their FMLA leave policies, if necessary.

Employers should also establish and communicate — through employee manuals, handbooks and training — clear policies and guidelines for FMLA leave, including on holiday calculations.

Employers should encourage employees to raise concerns, ask questions and seek

clarification. And — perhaps most importantly — employers should maintain thorough and accurate records of employees' FMLA leave usage — to the hour even, e.g., 40-hour-per-week employees get 480 hours of FMLA leave.

Proper record-keeping lets employers track leave usage, calculate available leave and show compliance with FMLA requirements. Although DOL advisory opinions are not typically binding, they still carry persuasive weight with courts, and employers violating them do so at their own legal risk. And employers — not employees — bear the burden of ensuring that they provide their employees with the proper benefits.

In short, the FMLA remains a minefield for unwary employers, human resources professionals and corporate counsel. The DOL's May 30 advisory opinion helped to clarify some persistent confusion about holidays and FMLA leave — but only so far.

Due to each employee's FMLA leave situation being unique, employers should conduct a fact-specific analysis before determining how the FMLA applies,

Nicholas Schneider is an associate at Eckert Seamans Cherin & Mellott LLC.

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[1] 29 U.S.C. § 2601, et seq.

[2] 29 U.S.C. § 2612(a)(1), (3).

[3] 29 C.F.R. § 825.205(b)(1).

[4] 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.202(a).

[5] 29 C.F.R. § 825.200(h).

[6] Id.

[7] U.S. Dep't of Labor, Opinion Letter FMLA2023-2-A (May 30, 2023) (citing 29 U.S.C. § 2612(a)(1)).