

FMLA Insights

Guidance & Solutions for Employers

FMLA FAQ: How Many Intermittent FMLA Leave Hours is an FLSA-Exempt Employee Entitled To?

By Jeff Nowak on September 19, 2011

$$2 + 2 = \underline{\underline{5}}$$

Q. We employ an FLSA-exempt employee who has been certified for intermittent FMLA leave for migraine headaches. He averages two to three intermittent absences per month. Normally, I would calculate the employee's total FMLA allotment as 480 FMLA hours (12 weeks x 40 hrs/wk), but he claims he should be entitled to 600 FMLA hours because he averages 50 hours worked per week. Is he correct? Help!?!

A. One of the (many) headaches of managing intermittent FMLA leave is keeping track of leave in increments smaller than one work week. For non-exempt employees, employers often calculate leave entitlement as 480 hours per FMLA year (i.e., 12 weeks x 40 hrs/wk). However, the [FMLA regulations](#) urge caution when making these calculations.

When dealing with a reduced schedule *or* intermittent leave under the FMLA, an employer first should calculate how many **hours** of leave an employee is entitled to. You make this calculation according to the employee's regular workweek. For example, an employee who regularly works a five-day work week and eight hours a day, is entitled to 480 hours of leave: 12 weeks x 40 hrs/wk. Similarly, an employee who works a four-day week and eight hours each day is entitled to 384 hours of leave: 12 weeks x 32 hrs/wk.

Fluctuating work week: If an employee's schedule varies from week to week that an employer cannot determine with any certainty how many hours the employee would otherwise have worked, the employer should average of the hours scheduled over the 12 months prior to the beginning of the leave period (including the hours for which the employee took any type of leave) to calculate the employee's leave entitlement.

However, for an FLSA-exempt employee, employers typically have not recorded any work hours for the employee. Thus, determining the actual intermittent FMLA allotment is particularly difficult, since it is not unusual for exempt employees to work more than 40 hours in a work week. In these instances, the burden is on the employer to disprove the employee's record of the number of hours he or she worked.

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How can an employer meet this burden? For starters, we strongly recommend that employers utilize a standard leave of absence form that employees complete in conjunction with any absence. On the

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form, employers should require their exempt employees to specify the number of hours they have worked over the preceding 12-month period.

If you have concerns about the hours represented by the employee, discuss this with your employee. Perhaps you can cite to attendance patterns or time records to show that their calculation is not accurate. At a minimum, it encourages an open dialogue at the beginning of the FMLA leave so that it minimizes any surprises (or claims of unfair treatment) further down the line.

One additional note: If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA leave and before the notice of need for FMLA leave), the employer can use the hours worked under the *new* schedule to make the leave entitlement calculation.

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