

Insurance Resources



Calculate Intermittent FMLA Leave?

Question

We have an employee who will be starting dialysis and has requested to work from home. She works 40 hours a week. She would come in 2 days a week and work 4 hours before or after the dialysis on the remaining 3 days. She would be working 28 hours a week and using 12 hours a week for FMLA. She doesn't know when they will start or her schedule as of yet. She does know it will be 3 days a week and 3-4 hours a day. I know FMLA is for 12 weeks in a 12 month period, but I am not sure how the intermittent leave would work. How long would she actually have to be out?

Response

You are correct that leave under the FMLA can be taken intermittently or on a reduced schedule basis, but still no more than 12 weeks is provided in any 12 month period. As discussed below, when leave is taken intermittently or on a reduced schedule basis, the employer calculates the time off as FMLA by determining the increments of partial workweeks that were taken. Specifically the FMLA Regulations provide as follows:

"When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, 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. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (1/3) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 12 workweeks of leave, or 26 workweeks in the case of military caregiver leave, and the total number of hours contained in those workweeks is necessarily dependent on the specific hours the employee would have worked but for the use of leave." See the Electronic Code of Federal Regulations Section 825.205 which specifically addresses this issue.

It is not clear whether the subject employee is exempt or not. If non-exempt, there is no obligation to pay when time is not worked (absent a contract, policy or practice that supports doing so). If the employee is exempt, note that the FMLA permits an employer to prorate salary compensation commensurate with intermittent or reduced schedule FMLA leave, without destroying the salary basis required for exempt classification -- this is one of only a few limited instances where an employer can dock an exempt employee's salary compensation commensurate with hours worked. This is addressed at section 825.206 at the link above, and see also the paragraph titled "[Circumstances in Which the Employer May Make Deductions from Pay](#)" where the DOL expressly provides that "an employer is not required to pay the full salary ... for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act." We are not aware that state law differs on this issue in your jurisdiction. The employer should ensure, however, that any proration of compensation is consistent with employer policy and practice, and does not violate an applicable contract, if any. The employer also can allow or require substitution of accrued paid time off benefits for any period of unpaid FMLA leave, but again, only if company policy and practice support this. See Electronic Code of Federal Regulations Section 825.207 [Electronic Code of Federal Regulations section 825.207](#) which addresses the substitution of paid leave. Want to learn more? Click [here](#) to listen to our podcast on calculating intermittent FMLA leave.