Legal Update Article

# What Retailers Can Take Away From Labor Department Opinion Letter on FMLA Leave and Holidays

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The Wage and Hour Division of the Department of Labor (DOL) has advised in an opinion letter on calculating Family and Medical Leave Act (FMLA) leave when employees take off part of a week during which a holiday falls that holidays are not counted toward leave, unless an employee takes the entire week off or the employee was scheduled to work on the holiday.

The discussion in the opinion letter revolves around two FMLA regulations:

*29 C.F.R. § 825.205(b)(1):* This explains how to calculate FMLA leave when an employee takes leave for less than a week at a time. In that case, the amount of FMLA leave used is determined as a proportion of the employee's *actual workweek.* For example, if an employee's *actual workweek* is 40 hours and the employee takes off 20 hours that week, the employee has used a half week of FMLA leave.

*29 C.F.R. § 825.200(h):* This states that when an employee takes a full workweek of FMLA leave during a week with a holiday in it, the employee has used up a full week of FMLA leave. But employees do not always take off a full week. Employees taking FMLA leave might take intermittent full days off or simply reduce their hours on certain days.

### 2008 Regulation

Before 2008, the regulations were silent on calculating leave when an employee takes less than a full week of FMLA leave during a week containing a holiday. In an effort to provide clarity, in 2008, the DOL issued a notice of proposed rulemaking. Critics responded that a holiday should count against FMLA leave if the holiday is between two days taken as FMLA leave or the employee proves their health necessitated leave on a holiday during any week with a holiday. Others claimed that holidays should never count against FMLA leave, not even when a full week is taken.

In its final rule, the DOL added the following language to Section 825.200(h): "[I]f an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday."

### Actual Workweek

When an employee takes FMLA leave for less than one full workweek, the amount of FMLA leave used is determined as a *proportion of the employee's actual workweek.* To create that fraction, employers need a precise understanding of what constitutes the *actual workweek,* especially when there is a holiday in the week. This was the topic of the DOL's opinion letter: Whether the *actual workweek* is the usual workweek (a workweek without a holiday) or a reduced one (the usual workweek minus the holiday) discussed in Section 825.205(b)(1).

The DOL adopts the former interpretation, that employers must include the holiday in the

*actual workweek* proportion. In other words, a holiday on a workweek that an employee has not taken off entirely cannot be counted toward used FMLA leave. An interpretation that excludes a holiday from the *actual workweek* in a leave calculation would impermissibly reduce the employee's leave entitlement, the DOL explained, as the employee would have to use more FMLA leave than days the employee actually took. For example, if an employee takes two non-holidays off in what would otherwise be a five-day workweek (were it not for the holiday), an interpretation that excludes a holiday from the *actual workweek* would require an employee to use a half week of FMLA leave, even though the employee did not actually take off half of the week.

There is an exception: the employee was scheduled and expected to work on a holiday. In that case, the calculation employers must make is simple. If an employee takes leave two days out of the employee's five-day workweek, including a holiday that the employee was scheduled to work on, the employee has taken two-fifths of a week of FMLA leave. On the other hand, if the employee is not scheduled to work on the holiday but takes the same exact days off, the employee has taken one-fifth of a week of FMLA leave.

## Implications for Retailers

Nothing in the opinion letter or the statute suggests that the result changes when a retailer ceases to operate on a holiday. As if the employee were not scheduled to work, the holiday does not count.

While some retailers close on holidays, others open their doors wider. For example, on the retail holiday Black Friday, which in recent years has merged into Thanksgiving. For many retailers, Thanksgiving night requires more hands. If an employee has been using FMLA leave on Thursdays, employers should be careful of purposely scheduling that employee on Thanksgiving. Just because the employer schedules the employee to work that day does not necessarily mean the employee will have to use their FMLA leave — the employee must be "scheduled *and expected* to work during the holiday." An employee who consistently takes off Thursdays for a qualifying reason under the FMLA might have been scheduled to work on Thanksgiving, but the employee may not have been *expected* to work.

Please contact a Jackson Lewis attorney with any questions.