

QUIRKY FMLA COUNTING RULES: OVERTIME

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Of all the administrative challenges posed by the Family and Medical Leave Act (“FMLA”), the most difficult may be ensuring that you are correctly determining FMLA hours available and taken for each employee. Figuring out how to apply the general FMLA counting rules is hard enough, but add in some of the “quirky” FMLA counting rules, and the situation can be downright maddening.

One such quirk relates to overtime hours. You are probably aware that overtime hours are considered “hours worked” for purposes of the eligibility requirement relating to 1,250 hours worked. That is, overtime hours are counted on an hour-for-hour basis when determining whether the employee has worked at least 1,250 hours during the 12 month period immediately preceding the commencement of the leave.

And you may also be aware that, for qualifying situations, FMLA can be used to protect leave during what would otherwise be overtime hours (potentially including a general “no overtime” request).

But do you know whether and how to count such missed overtime hours against an employee’s 12-week FMLA leave entitlement? And whether overtime hours must be factored into the amount of FMLA leave entitlement in the first place?

The FMLA regulations speak to these issues. Specifically:

- If the overtime that the employee missed was **voluntary** overtime, then the missed time **may not** be counted against the employee’s FMLA leave entitlement.
- If the employee would **normally be required** to work the overtime, then the missed hours **may** be counted against the employee’s FMLA entitlement. Such leave is considered, and should be designated as, intermittent FMLA leave.

For purposes of determining whether overtime is voluntary, the DOL has stated that the appropriate focus is whether the employee would have been required to work the overtime hours but for the taking of FMLA leave.

Importantly, required overtime hours **must be factored into the FMLA entitlement calculation** for eligible employees. In other words, employees who are normally required to work overtime are

entitled to more than 480 hours (12 weeks x 40 hours per week) of FMLA leave in the applicable 12-month period. For example, if an employee would normally be required to work 48 hours in a given week, and the employee only works 40 hours due to a serious health condition, then the employee has used eight hours of leave out of 48, or 1/6 of a week of FMLA leave.

Coming soon.... Quirky FMLA Counting Rules: Light Duty

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