

QUIRKY FMLA COUNTING RULES: LEAVE PRIOR TO ELIGIBILITY

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Continuing our discussion of “quirky” counting rules under the Family and Medical Leave Act (“FMLA”), today we address these questions: May leave granted to an employee who is not eligible for FMLA leave be designated as FMLA leave? And may that leave be counted against the 12-week FMLA leave entitlement.

The short answer (to both) is: No.

This question typically arises because an employer is trying to be generous. For example, the employee is a newer employee and needs leave, but has not yet worked for the employer for 12 months or 1,250 hours. Or perhaps the employer has various office locations and wants to allow employees in smaller offices (which do not meet the 50 employees in 75 miles eligibility rule) to take FMLA leave just like employees in larger offices are able to do.

But while an employer is certainly permitted to provide an employee with leave when not otherwise required by the FMLA, the regulations are clear that such leave **is not** FMLA leave and **may not** be counted against an employee’s 12-week FMLA entitlement.

So, for example, if an employee is permitted to begin a leave prior to reaching the 12 months of employment threshold, such leave cannot be designated as FMLA leave at any time. Instead, if and when the employee reaches the 12 months of employment threshold, only leave that occurs *after* the eligibility requirement is met can be counted against the employee’s FMLA entitlement.

Employers who generously grant “FMLA-like leave” to all employees regardless of whether such employees meet the eligibility requirements need to recognize that when an employee becomes eligible, he or she can demand a full 12 weeks of FMLA leave. Alternatives for handling pre-FMLA eligibility leave requests include establishing a non-FMLA leave policy, providing leave as an accommodation under the ADA (after conducting an appropriate analysis under the ADA to determine whether such leave is appropriate), or handling special situations on a case-by-case basis.

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