

Ask the attorney: Intermittent FMLA, compliance and hours reduction

We asked our expert lawyer to answers a few HR professionals' employment law questions.

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How would this baby-bonding time situation be covered?

Q: "A client (over 50 employees) hired an employee in March 2018. His live-in girlfriend had a baby in July 2018. He has requested intermittent FMLA starting in February 2019. He wants to take every Thursday and Friday off as FMLA to care for his daughter so his girlfriend can go to school. Does this qualify as FMLA? I understand that intermittent FMLA may not be taken for the care of a newborn. Would New York's Paid Family Leave be applicable?" – Kenneth, New York

A: Well, assuming that the girlfriend's baby is also his baby (he may be the birth parent or stand in loco parentis to the child), he does have the right to take FMLA leave to bond with the baby within the first 12 months after her birth. However, if he started in March of 2018, he won't be eligible to take leave until he passes his anniversary date in March 2019 (assuming he meets all other requirements). And, baby-bonding leave is unlike other types of family and medical leave in that an employer does not have to grant intermittent leave to bond with a newly born or adopted child, although this employer certainly may elect to permit this, once he become eligible for FMLA.

Why would his employer wish to do this? Well, one reason is that the employee seems eligible to take the leave pursuant to the New York Paid Family Leave law. The Paid Family Leave Law also provides up to 10 weeks (in 2019 – the law is scaling up and will provide 12 weeks' of benefits by 2021) of paid leave benefits to parents who seek time away from work to bond with a child born, adopted, or fostered within the prior 12 months. Employees become eligible after 26 weeks of work, so it sounds like this employee has qualified to begin taking leave now. And, the New York Paid Family Leave law (which is funded by employee payroll deductions) is unique in that it allows workers to take intermittent leave in increments of as little as a day. So, he could take as many as 60 days of leave, paid at 55% of his average wage rate, within the period before his child's first birthday.

Must we allow an employee to reduce her own schedule?

Q: "We have a full-time employee who wants to reduce her schedule for personal reasons. Do we have to accommodate her? She is hourly." – Anonymous, Pennsylvania

A: Probably not, depending on what is meant by "personal reasons." If her reasons are related to her own disability, for example, granting her request for a reduced schedule might be a reasonable accommodation. If she needs time away to care for a close family member, she might be entitled to a reduced schedule under the

Family and Medical Leave Act (and, some states other than Pennsylvania provide similar benefits to caregivers as a matter of state law).

If she truly wishes to modify her schedule for personal reasons, you are under no obligation to grant her request, but – in an era of low unemployment – you may wish to agree to her request, at least on a trial basis, in order to retain a good employee.

How exactly is distance measured when figuring out the FMLA compliance threshold?

Q: “I know if we have 50 employees working within 75 miles, we must comply with the FMLA. But we have a facility that’s within about 65 miles as the crow flies, yet much longer by road due to the mountains here. I don’t want to make a mistake here, so is there a specific way distance is measured when it comes to FMLA compliance?” – Christopher, Colorado

A: The FMLA regulations do address this concern directly, and it looks like you’re going to have to measure the exact distance by road. According to the regulations, “the 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed.

Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g., airline miles).” 29 C.F.R. 825.111(b). So, in order to gauge whether you are covered, measure the drive using the shortest route to determine if you are within the 75-mile radius requirement.