



FMLA2023-1-A

February 9, 2023

Dear **Name\***:

This letter responds to your request for an opinion concerning whether the Family and Medical Leave Act (FMLA) entitles an employee to limit their workday to eight hours a day for an indefinite period of time because of a chronic serious health condition, where that employee normally works in excess of eight hours a day. You suggest that it may be preferable to treat this restriction as a reasonable accommodation under the Americans with Disabilities Act (ADA). You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

For the reasons set forth below, an eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement.

## **BACKGROUND**

You inquire whether an employee may use FMLA leave to limit their work schedule for an indefinite period of time if the employee has a chronic serious health condition and a health care provider certifies that the employee has a medical need to limit their schedule. You express concern that multiple employees have presented medical certifications for taking FMLA leave from work after completing an eight-hour workday, making it difficult to satisfy the 24-hour coverage needs of your department. You state that in this workplace, it is standard for employees to work and be scheduled for a workday that lasts longer than eight hours.<sup>1</sup> For employees who work more than eight hours a day, you write, such schedule limitations might be “better suited” for reasonable accommodation under the ADA than for FMLA leave.

## **GENERAL LEGAL PRINCIPLES**

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<sup>1</sup> For purposes of responding to this letter, we assume that the employees who are the subject of this letter are normally required to work more than eight hours per day, and that working overtime is not optional or voluntary.

The FMLA entitles eligible employees of covered employers to take unpaid job-protected leave for qualifying family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Among other qualifying reasons for leave, an eligible employee may take up to 12 workweeks of leave in a 12-month period “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D). The employer is responsible in all circumstances for designating leave as FMLA-qualifying without delay and giving the employee notice of the designation.<sup>2</sup> 29 C.F.R. § 825.300(d)(1).

A “serious health condition” is “an illness, injury, impairment, or physical or mental condition” that involves inpatient care or continuing treatment by a health care provider. 29 U.S.C. § 2611(11). FMLA implementing regulations specify that a serious health condition involving “continuing treatment” includes chronic conditions. 29 C.F.R. § 825.115(c). Generally, a chronic serious health condition is one which requires visits to a health care provider at least twice a year and continues over an extended period. *Id.* When an employee requests leave for a serious health condition, an employer may require a medical certification to be completed by a health care provider. 29 U.S.C. § 2613(a). The certification allows the employer to obtain information related to the FMLA leave request, including the likely duration, and verify that an employee has a serious health condition. *See* 29 U.S.C. § 2613(b); 29 C.F.R. §§ 825.305–.306.

The statute uses “workweek” as the basis for leave entitlement. 29 U.S.C. 2612(a)(1). An employee may take FMLA leave in periods of weeks, days, hours, and smaller increments, if the employer uses smaller increments for other forms of leave. 29 C.F.R. § 825.205(a). An employer may convert fractions of a workweek of leave to their hourly equivalent as long as the conversion fairly reflects the employee’s total normally scheduled hours. 29 C.F.R. § 825.205(b)(1).

Employers must permit employees to take intermittent or reduced schedule FMLA leave when it is medically necessary due to the employee’s serious health condition. 29 U.S.C. § 2612(b). Employees using intermittent or reduced schedule leave may use FMLA leave in the smallest increment of time the employer allows for the use of other forms of leave “provided that [the increment] is not greater than one hour and provided further that an employee’s FMLA leave entitlement may not be reduced by more than the amount of leave actually taken.” 29 C.F.R. § 825.205(a). Employees may use intermittent or reduced schedule FMLA leave when they are unable to work required overtime hours due to an FMLA-qualifying reason. 29 C.F.R. § 825.205(c).

Employers are prohibited from interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right. 29 U.S.C. § 2615(a)(1). When an employee returns from FMLA leave, they must be restored to the same job that the employee held when the leave

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<sup>2</sup> *See* WHD Opinion Letter FMLA2019-1-A, 2019 WL 1514982, at \*2 (Mar. 14, 2019) (“Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave.”); WHD Opinion Letter FMLA2019-3-A, 2019 WL 4324268, at \*3 (Sept. 10, 2019) (“This is the case, for instance, even if the employer is obligated to provide job protections and other benefits equal to or greater than those required by the FMLA pursuant to a CBA or state civil service rules.”).

began, or to an equivalent job. 29 U.S.C. § 2614(a)(1). An equivalent job means a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location). 29 U.S.C. § 2614(a)(1); 29 C.F.R. §§ 825.214–215.

“The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.” 29 C.F.R. § 825.702(a) (quoting S. Rep. No. 103-3, at 38 (1993)). Consequently, the FMLA may apply in addition to other federal laws, state or local laws, an employer’s policies, or a collective bargaining agreement. An employer must provide leave under whichever authority provides the employee with greater rights and protections, including federal and state antidiscrimination laws. 29 U.S.C. § 2651; 29 C.F.R. §§ 825.700–702.

For example, the ADA prohibits employers from discriminating against a qualified individual on the basis of disability in regard to the terms and conditions of employment. 42 U.S.C. § 12112(a). If an employee is a qualified individual with a disability within the meaning of the ADA, the ADA requires their employer to make reasonable accommodations, barring undue hardship. *Id.* at § 12112(b)(5). “Disability” under the ADA and “serious health condition” under the FMLA are different concepts and must be analyzed separately. However, leave provided as an accommodation under the ADA may also be FMLA-protected leave. The FMLA regulations make clear that, in such cases, the employee maintains their rights under both the FMLA and the ADA. 29 C.F.R. § 825.702(b).

Leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. 29 C.F.R. § 825.702(a). For example, the FMLA leave requirements and the ADA reasonable accommodation requirements may differ with respect to the continuation of an employee’s group health insurance coverage. *Id.* § 825.702(b). “A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits . . . [h]owever, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period.” 29 C.F.R. § 825.702(c)(1). The ADA might require that an employer offer an employee a reasonable accommodation, while the FMLA would entitle an employee to return to work at the same or a virtually identical position as held prior to the FMLA leave period. *See* 29 C.F.R. § 825.702(d)(1). WHD recognizes that employers are obligated to comply with multiple statutes that serve differing purposes. *See* Final Rule: The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67934, 68040 (Nov. 17, 2008); Notice of Proposed Rulemaking: The Family and Medical Leave Act of 1993, 73 Fed. Reg. 7876, 7924-25 (Feb. 11, 2008) (discussing intersection between the FMLA and ADA). We hope this letter provides guidance that is helpful for achieving compliance.

## **OPINION**

An employee may continue to use FMLA leave for an indefinite period of time as long as they continue to be eligible and have a qualifying reason for leave. In this case, if an employee would normally be required to work more than eight hours a day but is unable to do so because of an FMLA-qualifying reason, the employee may use FMLA leave for the remainder of each shift,

and the hours which the employee would have otherwise been required to work are counted against the employee's FMLA leave entitlement.<sup>3</sup> The employee may continue to use FMLA leave until the employee has exhausted their entitlement to FMLA leave. Thus, if the employee never exhausts their FMLA leave, they may work the reduced schedule indefinitely. *See, e.g.*, WHD Opinion Letter FMLA-29, 1994 WL 1016737, at \*1 (Feb. 7, 1994) ("If the employee never uses as much as 12 workweeks of FMLA leave in a 12-month period, the employee would never exhaust his or her statutory entitlement to take FMLA leave."); WHD Opinion Letter FMLA-67, 1995 WL 1036738, at \*2 (July 21, 1995); *see also* *Santiago v. Dep't of Transp.*, 50 F. Supp. 3d 136, 146–49 (D. Conn. 2014) (holding that plaintiff could use FMLA leave indefinitely to cover all required overtime, citing, *inter alia*, Final Rule: The Family and Medical Leave Act of 1993, 60 Fed. Reg. 2180, 2202 (Jan. 6, 1995)). An employee who exhausts their FMLA leave entitlement by working a reduced schedule would be entitled under the FMLA to reinstatement to the same or an equivalent position, with equivalent pay and benefits, to what the employee held when the leave was initiated, but, in the situation you describe, they would no longer be entitled under the FMLA to work less than the normal schedule of more than eight hours a day. 29 C.F.R. § 825.702(c)(4).

You suggest that an employee's need to limit their workday to an 8-hour day may be "better suited" as a reasonable accommodation under the ADA. However, as explained above, the requirements and protections of the FMLA are separate and distinct from those of the ADA, and an employee may be entitled to invoke the protections of both laws simultaneously. Nothing in the ADA modifies or limits the protections of the FMLA; nor does the FMLA modify or limit the protections of the ADA. *See* 29 U.S.C. § 2651(a), 42 U.S.C. § 12201(b); *see also* 29 C.F.R. § 825.702(a). In the case of an employee who needs leave for a serious health condition under the FMLA and is also a qualified individual with a disability under the ADA, requirements from both laws must be observed and applied in a manner that assures the most beneficial rights and protection to the employee.<sup>4</sup> Thus, an employee who has exhausted their FMLA leave and is no longer entitled under the FMLA to work a reduced schedule may have additional rights under the ADA or other laws. WHD does not interpret or provide any advice concerning the requirements of the ADA.

In addition, in your letter, you write that where an employee uses FMLA leave, the leave is deducted from the employee's "480 hours of allowable FMLA time" in the 12-month period. It is important to reiterate that the FMLA provides that an employee is entitled to 12 *workweeks* of leave per year. 29 U.S.C. § 2612(a)(1). Therefore, if an employee is regularly scheduled to work more than 40 hours per week, they are entitled to more than 480 hours of FMLA leave per 12-month period. WHD Opinion Letter FMLA2002-1, 2002 WL 34420905, at \*1 (May 9, 2002); 73 Fed. Reg. at 67978. For example, an employee who ordinarily works 50 hours per week would be entitled to 600 hours of FMLA leave in a 12-month period. *See* 29 C.F.R. 825.205(b)(1) ("An employee does not accrue FMLA-protected leave at any particular hourly rate.").

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<sup>3</sup> In contrast, voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement. 29 C.F.R. § 825.205(c).

<sup>4</sup> While such an employee is not required to accept a reasonable accommodation in lieu of taking FMLA leave, the FMLA does not prevent the employee from accepting, voluntarily and without coercion, the reasonable accommodation. WHD Field Operations Handbook 39j07.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Jessica Looman".

Jessica Looman  
Principal Deputy Administrator

**\*Note: The actual name (s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**