

## **The U.S. Department Of Labor States That Employees May Use FMLA Leave To Reduce Work Hours Indefinitely**

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On February 9, 2023, the U.S. Department of Labor, Wage and Hour Division (“DOL”) released an opinion letter in response to an inquiry from an employer concerned about their employee’s use of leave under the Family and Medical Leave Act (“FMLA”) for a chronic serious medical condition. The employer at issue requires 24-hour coverage and the scheduled shifts are longer than 8-hours. The employer sought guidance from the DOL as to whether it was “better suited” to treat the employee’s need for a reduced schedule as an accommodation under the Americans with Disabilities Act (“ADA”) rather than the FMLA. The DOL stated that while there is some overlap between the ADA and FMLA, the requirements and protections of the laws are distinct and employees may invoke the protections of both laws, simultaneously. Simply put, neither the ADA nor the FMLA modify the other.

The FMLA entitles employees to 12 workweeks of unpaid leave in a 12-month period for a qualifying reason such as a “serious health condition that makes the employee unable to perform the function of their job.” 29 U.S.C. § 2612(a)(1)(D). For employees seeking to use leave intermittently, employers must determine the hour equivalent for the 12-weeks of leave based on its scheduling system. For example, employees who regularly work 40-hours per week are entitled to 480 hours of leave, but employees who regularly work 50 hours per week are entitled to 500 hours of leave.

Accordingly, an employee can use their approved FMLA leave to reduce their work hours each day, or each week, until the leave is exhausted. The use of intermittent leave must be for the covered reason under the FMLA and could result in an indefinite schedule reduction. However, if an employee does manage to exhaust their leave by working a reduced schedule, then they would be required to resume working their normal schedule. It is important for employers to keep an accurate account of the intermittent hours used by employees.

The DOL reminds employers that employees benefit from whichever law provides greater rights and protections. In this regard, the leave provided to employees under FMLA may also be considered a reasonable accommodation under the ADA. It is important to contact labor counsel for assistance with determining the applicability of the ADA in these circumstances as each case is unique and requires a separate analysis.

Employers are encouraged to contact labor counsel for additional guidance.