

**DEFINITION OF A “DAY”**  
**DOL Topic: C<sup>1</sup>**

**PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION (“RFI”) ABOUT THE DEFINITION OF A “DAY.”<sup>2</sup>**

**PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.**

**PART ONE**

The DOL requested information regarding the definition of a “day.” Currently, the regulations state that the requirements for a “serious health condition” may include “a period of incapacity of more than three consecutive days.”<sup>3</sup>

With regard to the definition of a “day”, the DOL asked for comments on two topics:

- The Treatment of Scheduled Holidays
- The Definition of “More Than Three Consecutive Calendar Days”

**ISSUE: Treatment of Scheduled Holidays**

- **The RFI asked: Should scheduled holidays that occur during an employee’s full-week absence count against an employee’s 12 weeks of FMLA leave?** Under 29 C.F.R. § 825.200(f), the entire week is counted as FMLA leave if a holiday occurs within a week taken as FMLA leave.

<sup>1</sup> This topic is not discussed in depth in the Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), available at <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>.

<sup>2</sup> The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the “Digest of Comments Submitted in Response to the Department of Labor’s Request for Information on the Family and Medical Leave Act,” available at <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

<sup>3</sup> 29 C.F.R. § 825.114(a)(2)(i).

### ISSUE: Definition of “More Than Three Consecutive Calendar Days”

- **The RFI asked: Should “more than three consecutive calendar days” for a serious health condition in 29 C.F.R. § 825.114(a)(2)(i) be defined as four days or three days and part of the fourth day?** Demonstrating that a consensus has not been reached yet, the RFI cited the following conflicting cases:
  - **Russell v. North Broward Hosp.**, 346 F.3d 1335 (11th Cir. 2003). The court held that the test for continuing treatment for a serious health condition could be met by an employee whose serious health conditions lasted three full days and part of a fourth day.
  - **Murray v. Red Kap Indus., Inc.**, 124 F.3d 696 (5th Cir. 1997). The court held that an employee who alleges a serious health condition involving continuing treatment by a health care provider must show a period of incapacity for at least four consecutive days.
  - **Henderson v. Central Progressive Bank**, No. 01-2963, 2002 WL 31086086 (E.D. La. Sept. 17, 2002). The court held that a serious health condition requires a period of incapacity that lasts at least four consecutive days.
  - **Seidle v. Provident Mut. Life Ins. Co.**, 871 F. Supp. 238 (E.D. Pa. 1994). The court held that the employee’s child did not have a serious health condition because his incapacity only required him to be absent for three days. The court read the regulation to require four or more days of absence.
  - **Bond v. Abbott Labs.**, 7 F. Supp. 2d 967 (N.D. Ohio 1998). The court held that an employee must show a period of incapacity of at least four consecutive days.

### EMPLOYER-SIDE COMMENTS

Each bold-faced heading below sets forth a particular subject of commentary from employers or employer organizations, and is followed by explanatory text describing the comment in more detail.

- **Treatment of Scheduled Holidays** – Employers report that 29 C.F.R. § 825.200(f) should not be changed. Scheduled holidays should continue to count against an employee’s FMLA entitlement if the employee is absent from work for the entirety of the week during which the holiday falls.

## EMPLOYER-SIDE COMMENTS

- **Definition of “More Than Three Consecutive Calendar Days”** – Employers state that “more than three consecutive calendar days” means four consecutive days and partial days should not count toward the total number of days required to meet the definition of “more than three.”
  - Employers’ Suggested Changes – (1) Define “more than three consecutive days” as requiring absence for four consecutive days. (2) A majority of the comments suggest increasing the number of days, both consecutive and work days, required for a period of incapacity.<sup>4</sup> (3) Define “more than” to explicitly require full and complete days.

## EMPLOYEE-SIDE COMMENTS

Each bold-faced heading below sets forth a particular subject of commentary from employee organizations, and is followed by explanatory text describing the comments about this subject in more detail.

- **Treatment of Scheduled Holidays** – Employee advocates state that counting employees’ absence on holidays against employees’ FMLA leave entitlement is inconsistent with how holidays are treated in other leave situations. Employees also note the inconsistency in counting holidays toward total leave allotments, when employees who are on intermittent leave during a day that they are not scheduled to work do not have that non-work day counted against their overall allotments.
  - Employees’ Suggested Changes: Modify 29 C.F.R. § 825.200(f) to preclude employers from counting holidays as part of employees’ FMLA leave. Only the leave that an employee actually takes should count towards an employee’s 12-week entitlement. Thus, if an employee is out on FMLA leave during a scheduled holiday, the employee should be able to use holiday leave instead of losing a day of FMLA leave.
- **Definition of “More Than Three Consecutive Calendar Days”**
  - Employee advocates state that there is no basis for reading “more than three consecutive calendar days” to require four full days of incapacity. A condition lasting more than three days, even if it only lasts 3.5 days, meets the “more than three consecutive calendar days” requirements found in 29 C.F.R. § 825.114. In

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<sup>4</sup> See Topic B for a description of the proposals to change the amount of time that should be required to five or seven consecutive work days.

## EMPLOYEE-SIDE COMMENTS

the absence of any language in the rules or regulations to suggest that a four-day rule was intended, there is no basis to create such a rule via regulation.

- Employee advocates state that “more than” three days properly reflects congressional intent to draw a line between serious health conditions that last longer than a few days and minor illnesses that last only a few days. Employee advocates express concern that if the period of incapacity were extended to four full days, some serious health conditions would be improperly excluded.
- The American Association of University Professors expressed the view that employee absences during holidays and breaks during the academic school year, even if otherwise FMLA-qualifying, should not be counted against total FMLA leave allotments.

**PART TWO**

**THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC C HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.**

**STATUTE**

**29 U.S.C. § 2611(11)**

Serious health condition - The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

- (A) inpatient care in a hospital, hospice, or residential medical care facility; or
- (B) continuing treatment by a health care provider.

**REGULATIONS**

**29 C.F.R. § 825.114(a)**

For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves: . . . .

- (2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
  - (i) **A period of incapacity** (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) **of more than three consecutive calendar days**, and any subsequent treatment or period of incapacity relating to the same condition...

**29 C.F.R. § 825.200(f)**

For purposes of determining the amount of leave used by an employee, **the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave.** However, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. . . .

## MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI<sup>5</sup>

### Cases

- *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

### DOL Opinion Letters & Guidance

- Dep't of Labor Opinion Letter, FMLA 2002-1 (May 9, 2002),  
[http://www.dol.gov/esa/whd/opinion/FMLA/2002\\_05\\_09\\_1\\_FMLA.pdf](http://www.dol.gov/esa/whd/opinion/FMLA/2002_05_09_1_FMLA.pdf)
- Dep't of Labor Opinion Letter, FMLA-70 (Aug. 23, 1995),  
<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-70.pdf>
- Dep't of Labor Opinion Letter, FMLA-20 (Dec. 7, 1993),  
<http://www.dol.gov/esa/whd/opinion/fmla/prior2002/FMLA-20.pdf>

### Other Materials

- Janemarie Mulvey, *The Cost and Characteristics of Family and Medical Leave*, EMPLOYMENT POLICY FOUNDATION, April 19, 2005.

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<sup>5</sup> Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.