

## FMLA--Employer Must Spell Out Family Leave Calculation Method

As an employer, you must notify employees regarding what method you will use to calculate the 12-month period during which they can take 12 workweeks of federal family leave (FMLA), the 9<sup>th</sup> U.S. Circuit Court of Appeals announced Wednesday. Employees who do not receive clear notice of the calculation method you plan to use can choose whichever method provides them the most family leave time. You should review your family leave policy immediately to make sure you have communicated your calculation method clearly to your employees.

Under the FMLA, eligible employees are entitled to 12 workweeks of leave during any 12-month period for their own illnesses, to care for family members who are ill, or to care for new babies. The U.S. Department of Labor's FMLA regulations permit you to choose one of the following methods to determine the 12-month leave period in which the 12 weeks of leave entitlement occurs:

1. The calendar year;
2. Any fixed 12-month "leave year," such as a fiscal year, a year required by state law, or a year starting on an employee's "anniversary" date;
3. The 12-month period measured forward from the date an employee's first FMLA leave begins; or,
4. A "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

For example, if you choose the rolling option, an employee who used her full twelve weeks of FMLA leave starting on February 1 would not be entitled to any additional FMLA leave until February 1 of the following year. If you choose the calendar year option, each January 1 an employee would be entitled to a full 12-week bank of FMLA-protected leave, no matter how much protected leave the employee used the previous year nor when she used it.

In one case, an America West employee was terminated in part for taking too much leave after exhausting her FMLA entitlement for a rolling 12-month period. The court concluded America West's handbook, stating "employees are entitled to up to twelve calendar weeks of unpaid [FMLA] leave within any twelve month period," does not sufficiently communicate that America West uses the rolling method for calculating whether an employee is eligible for leave. The 9<sup>th</sup> Circuit Court sent the case back to the lower court with instructions to calculate the employee's leave under the calendar year method, which was the most beneficial to her because it made the time off for which she was terminated protected FMLA leave. (Bachelder v. America West Airlines, No 99-17458 8/8/01)

### WHAT SHOULD YOU DO?

1. Review your FMLA policy. Make sure it is very clear which of the four methods you use to calculate FMLA leave.
2. If your policy is vague, choose a calculation method, revise your policy and distribute it to all employees. The calculation method you choose will become effective 60 days after you notify employees. Until then, the method that is most beneficial to each particular employee will apply.
3. If you subsequently change your calculation method (for example, from rolling to calendar), you must provide employees with at least 60-days notice before implementing the change. The transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever

method affords the greatest benefit to the employee.