

FMLA Update: Critical Analysis of Voluntary Overtime Becoming Mandatory for Calculating Intermittent FMLA Leave Benefits

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Recently, in *Hernandez v. Bridgestone Americas Tire Operations, LLC*, the U.S. Court of Appeals for the Eighth Circuit held that where overtime is considered mandatory an employer may deduct missed shifts from an employee's allotted intermittent leave allotment under the Family and Medical Leave Act of 1993 (FMLA), but that the employer must also include mandatory overtime hours when calculating an employee's total FMLA-leave allotment. Failure to do so constitutes an FMLA interference claim.

Background Facts

Bridgestone Americas Tire Operations, LLC (BATO) hired Lucas Hernandez in 2003 as an hourly tire builder. BATO maintains an attendance program for all hourly employees that maintain a progressive disciplinary system. Under the policy, absences are excused for approved FMLA leave, accident and sickness leave, jury duty, and bereavement.

In July 2010, Hernandez requested and was approved for FMLA leave. Beginning in November 2011, BATO approved Hernandez for intermittent FMLA leave. Hernandez was granted twelve-hour shifts and forty-two-hour workweeks. A forty-two-hour workweek gave Hernandez 504 hours of FMLA leave. Between October 31, 2011, and July 15, 2012, Hernandez missed work fifty-four times, including six overtime shifts.

On July 10, 2012, Hernandez exhausted his 504 hours of FMLA leave. As a result of the exhaustion of his allotted FMLA leave, two of his absences, although for FMLA-qualifying reasons, counted as unexcused absences under the attendance program. Consequently, Hernandez progressed through the attendance policy progressive disciplinary system. Hernandez then failed to report for his regular shifts on two subsequent days, which advanced him to the final step of the progressive disciplinary policy. Thereafter, Hernandez' employment was terminated because he had progressed through all the steps of the attendance program.

Judicial Proceedings

In May of 2013, Hernandez filed a suit claiming BATO violated his rights under the FMLA. The district court held in favor of BATO on Hernandez's FMLA discrimination, retaliation, and harassment claims. However, the court ruled in favor of Hernandez on his FMLA interference claim on the grounds that the absences for missed overtime shifts should not have been deducted from Hernandez's FMLA entitlement because he initially volunteered for the sporadic overtime; and because BATO treated Hernandez's occasional overtime as voluntary for purposes of calculating his FMLA-leave allotment, it must also treat the overtime hours as voluntary for purposes of deducting hours from his FMLA entitlement.

BATO appealed to the Eighth Circuit the district court's decision to grant Hernandez summary judgment on the FMLA interference claim. The Eighth Circuit affirmed the district court's decision and held that voluntary overtime shifts can be "implied" to be mandatory by an employer's custom or procedure. Where overtime is mandatory an employer may deduct missed shifts from an employee's allotted intermittent FMLA-leave allotment. However, an employer must also include mandatory overtime hours when calculating an employee's total FMLA-leave allotment. Improperly calculating an employee's FMLA-leave allotment interferes with the employee's rights under the FMLA.

In so holding, the Eighth Circuit departed from the district court and DOL's position in applying the definition of "voluntary" holding that if the employee signed up and was selected for overtime he was then required to work unless he had an excuse. The selected overtime shift became mandatory and was treated as a part of the employee's "usual or normal workweek." Thus, if the overtime was "mandatory", his overtime hours should have been included when calculating his total FMLA-leave allotment. The employer's failure to include the overtime hours in the calculation denied the employee FMLA benefits to which he was entitled. Mandatory overtime, or overtime that is a part of the employee's normal workweek, is to be included in the calculation of FMLA leave even where the employer may not know in advance of the workweek when overtime will be scheduled or how much overtime will be worked that week. BATO's overtime selection process made the overtime mandatory, not voluntarily.

Therefore, BATO interfered with Hernandez's rights under the FMLA by improperly calculating his FMLA-leave entitlement. As Hernandez's overtime hours varied from week to week, BATO should have calculated his FMLA leave under Section 825.205(b)(3). Instead, BATO did not consider Hernandez's overtime hours at all. Thus, by scheduling mandatory overtime hours that were not included in Hernandez's FMLA-leave allotment and yet were deducted from his FMLA entitlement when he missed an overtime shift, BATO denied the FMLA benefits to which Hernandez was entitled.

Employer Action: This decision addresses circumstances where voluntary overtime is unsuspectingly converted to mandatory overtime and how it must be taken into consideration for the purpose of intermittent FMLA leave. Employers should carefully review their overtime procedures and practices especially in FMLA intermittent leave scenarios. If an overtime policy or practice, arguably, requires mandatory overtime then an employer should include in the calculation of the employee's FMLA intermittent leave allotment.