

FMLA FAQ: Can an Employer Credit Pre-FMLA Leave Against an Employee's FMLA Entitlement When the Employee Becomes Eligible?

By [Jeff Nowak](#) on October 18, 2011

Q. We provide our employees “non-FMLA” leave after they have worked for us for six months. They are given up to six weeks off during that time if it can be certified by a physician. Since these employees are not eligible for FMLA leave at this point, can we credit the time they took off against their allotment for the following FMLA year as soon as they become eligible for FMLA leave?

A. First of all, good for you for offering this benefit to your employees. However, the Department of Labor is not going to give you a big pat on the back. In the FMLA regulations, it is clear (if it wasn't before) that an employer *cannot* credit leave given in the first year of employment against an employee's FMLA allotment once he or she becomes eligible for FMLA leave. This is true even if the employee otherwise suffered from a serious health condition that would have been covered by the FMLA had he or she otherwise been eligible. This situation is covered, in part, by the following regulation:

“The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. *An employee may be on “non-FMLA leave” at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be “FMLA leave.”* [29 CFR 825.110\(d\)](#) (emphasis added)”

As the regulation makes clear, a leave of absence can only be designated as FMLA leave after the employee meets eligibility requirements. This situation is covered even more explicitly in the preamble to the FMLA regulations, which I provide [here](#). In the preamble, the DOL states:

“...any leave that employers voluntarily provide before an employee attains eligibility under the FMLA is not FMLA leave. Therefore, the FMLA protections do not apply to such leave, and employers may apply their normal policies to such leave. Employers may not, however, count any such non-FMLA leave toward the employee's 12-week FMLA entitlement.”

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