

GONZALEZ  
SABGIO  
HARLAN

## The GSH 60-Second Memo

December 10, 2008

*Sponsored by the GSH Employment Group*



Brian A. Price, Esq.

[www.gshllp.com](http://www.gshllp.com)

(414) 277-8500

Want more  
Information on  
this topic?

[CLICK HERE!](#)

### **Sixth Circuit Court of Appeals Holds that Employee's Intermittent FMLA Leave Does Not Carry Over From One Year to the Next**

By: Brian A. Price, Esq.

In September, you approve an employee's request for intermittent (on and off) leave under the Family and Medical Leave Act ("FMLA"). Then, the following January 3, the employee misses additional work, for the exact same reason that led to the September leave. Is the employee entitled to additional FMLA leave? The answer: It depends. First, you need to check and see if you follow the calendar year when measuring FMLA leave. Because, if you do, the employee is not entitled to carry over approved intermittent FMLA leave into the next leave year, at least according to the recent decision of the Sixth Circuit Court of Appeal (covering Kentucky, Michigan, Ohio and Tennessee) in [\*Davis v. Michigan Bell Telephone Co.\*, 543 F.3d 345 \(6th Cir. 2008\)](#).

In *Davis*, employer Michigan Bell Telephone Co. ("Michigan Bell") approved Ms. Davis' request for intermittent FMLA leave in September of 2004. At that time, Ms. Davis just barely met the FMLA's requirements that she have been employed with her employer for at least 12 months and have 1,250 hours of service

during the prior 12-month period.

Michigan Bell's approval of the intermittent FMLA leave was based upon a certification from Ms. Davis' healthcare provider that she suffered from depression, and that the depression was a chronic condition that would require intermittent FMLA leave. Between September 24 and December 13, Ms. Davis' depression caused her to take several discrete absences from work. Each time she was absent, Ms. Davis submitted medical certification forms which indicated that the absence was caused by her depression. Michigan Bell approved each of Ms. Davis' subsequent requests for FMLA leave without re-evaluating her eligibility for the leave on the date of each absence (aside from her submitting the required medical certification), reasoning that eligibility should be evaluated as of September 24, the date the intermittent leave commenced.

When 2005 began, Ms. Davis was absent several more days due to her depression, and she sought approval for more intermittent leave under FMLA, commencing January 3, 2005. This time, Michigan Bell denied the request, concluding that Ms. Davis was not eligible to receive FMLA benefits. Michigan Bell's conclusion was based upon the following factors: (1) it elected to use a calendar year as its leave year; (2) Ms. Davis had not worked 1,250 hours in the 12 months preceding January 3, 2005; and (3) it assumed that FMLA eligibility does not carry over from one leave year to another.

Denied FMLA leave, Ms. Davis reached the number of unexcused absences that triggered mandatory discharge. As a result, Michigan Bell terminated Ms. Davis's employment.

Ms. Davis brought suit against Michigan Bell, arguing that she was entitled to FMLA leave for her absences after January 1, 2005. The District Court agreed with Michigan Bell that Ms. Davis was not eligible for FMLA leave and dismissed Ms. Davis' claim. On appeal, the Sixth Circuit affirmed.

The Sixth Circuit noted that a determination of FMLA eligibility must be made as of the date the leave commences. The Court held that if an employee has a chronic health condition for which intermittent FMLA leave has been approved, "the leave commences upon the occurrence of the first absence caused by that condition, and it extends to cover every other absence caused by that condition during the same" leave year. *Davis*, 543 F.3d at 350. In other words, in the case of intermittent leave for the same medical condition, each absence is not treated as a separate period of FMLA leave with its own commencement date. Therefore, if an employee meets the FMLA's requirement of being employed for 1,250 hours of service on the date of the *first* absence of an intermittent leave, he or she does not have to meet that requirement on the date of subsequent absences in the same leave year.

However, once a new leave year begins, additional absences caused by the same chronic condition constitute a new period of intermittent FMLA leave. Therefore, in order for an employee to be eligible for the new period of FMLA intermittent leave, the employee must have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the

**GONZALEZ  
SAGGIO  
HARLAN**

**Office Locations:**

Illinois  
Indiana  
Iowa  
Nevada  
New York  
Ohio  
Washington D.C.  
Wisconsin

**[www.gshllp.com](http://www.gshllp.com)**

commencement of the new leave period In Ms. Davis' case, she had not.

The Court rejected Ms. Davis' argument that her intermittent leave, which commenced on September 24, 2004 could carry over into the new leave year that began on January 1, 2005. The Court reasoned that allowing intermittent leave to carry over from one leave year to the next would pose an undue burden on employers because it theoretically could require them to provide an employee with twelve weeks of intermittent leave perpetually based on the fact that the employee was eligible for FMLA benefits on a single day.

Ms. Davis' ineligibility was, in part, due to chance based upon the leave year used by Michigan Bell. The FMLA allows an employer to elect one of the following four options as its leave year: (1) the calendar year; (2) any fixed year as required by a state law or commencing on the employee's anniversary date; (3) a 12-month period measured forward from the date of the employee's first FMLA leave; or (4) a rolling 12-month period measured backward from the date the employee uses any FMLA leave.

None of the four options are inherently better than any other. In consultation with their counsel, employers should elect the leave year that complies with any applicable state family and medical leave laws, serves its business needs and is easy to administer. The leave year an employer elects should be clearly set forth in its family and medical leave policies and must be consistently administered to employees.

*The 60-Second Memo is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.*

*Copyright 2008 Gonzalez Saggio & Harlan LLP. All rights reserved.*