



# LEGAL UPDATE

## 9th Circuit: FMLA Leave Includes “Off” Time in Rotating Schedules

An employee working a “one week on, one week off” schedule who takes 12 workweeks of federal Family and Medical Leave Act (FMLA) leave may be required to return to work 12 weeks later, a federal appeals court has held. In [\*Scalia v. State of Alaska\*](#), the 9th Circuit Court of Appeals found that an employer may count both “on” and “off” weeks against the FMLA leave entitlement of an employee on a rotating schedule.

Ninth Circuit decisions apply in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands. The opinion was issued Jan. 15, 2021.

### FLSA Definition of “Workweek” Adopted for FMLA

The court rejected the U.S. Department of Labor’s (DOL) argument that “workweek” in the FMLA includes only weeks in which an employee was otherwise scheduled to work. Drawing on the FMLA’s legislative history, the court applied the Fair Labor Standards Act (FLSA) definition of “workweek”: a week-long period, designated in advance by the employer, during which the employer is in operation.

The court noted that it would be unfair to both employers and nonrotational employees if rotational employees were allowed to remain on FMLA leave for 24 weeks instead of the 12 weeks provided for in the statute.

### Background

The DOL had filed suit against the Alaska Department of Transportation and Public Facilities, which, for employees who worked seven days on, seven days off, had counted days off against their FMLA entitlement. Rotational and nonrotational employees in the case generally worked and earned the same amount. The lower court agreed with the DOL’s interpretation of workweek; the 9th Circuit reversed and remanded for summary judgment for Alaska.

---

Provided to you by **Insure NW**

### Highlights

#### Workweek Defined

The 9th Circuit adopted the FLSA definition of workweek (a week when the employer is in operation), for calculating an employee’s FMLA leave entitlement.

#### Decision Limited to Certain Employees

The decision concerned workers on a rotating time on/time off schedule who take continuous (not intermittent) FMLA leave.

*When an employee working a week on, week off schedule takes continuous leave, the employer may count the off weeks toward the FMLA entitlement.*