

# TWU

Transport Workers Union of America, AFL-CIO  
Air Transport Division  
Local 555  
Southwest Airlines Ramp, Operations, & Provisioning



## FMLA ADVISORY

July 16, 2007

TWU Local 555 receives positive press regarding current litigation with Southwest Airlines in a recent Business and Legal Reports publication. See article below.



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### Leave Accruals/Deductions For Employees Working Variable Hours

**Q:** If an employee normally works an 8-hour day but also occasionally works overtime and/or additional shifts, how much time should be credited to the employee's FMLA leave bank? Similarly, if an employee who normally works an 8-hour day needs to take FMLA-covered leave but is scheduled to work overtime and/or an additional shift during the leave period, how much time should be deducted from the employee's FMLA leave bank?

**A:** These issues are currently the subject of a class action lawsuit filed on behalf of ramp, operations, and freight agents against Southwest Airlines. The case is pending in the Northern District of Texas (*Clary v. Southwest Airlines*, No. 07-126). At issue is the disparity between an employer's ability to deduct more than 8 hours of leave time for a given day an employee takes leave against the employee's FMLA leave bank and the employee's inability to accrue more than 8 hours of leave time in any given day.

Specifically, it is alleged on behalf of the proposed class that Southwest credited an FMLA-eligible employee who is regularly scheduled to work an 8-hour day with a maximum of 40 hours per week for 12 weeks (a maximum of 480 hours), but did not credit additional time in the leave bank if an employee worked overtime and/or additional shifts. It is also

alleged in the lawsuit that the company made too many deductions from certain employee FMLA leave banks. For example, if an employee was out on FMLA leave but was scheduled to work 16 hours on one of the days due to overtime and/or an additional shift, it is alleged that the company deducted 16 hours against the FMLA leave bank, rather than the 8 hours the employee would have normally worked.

According to the FMLA regulations, if an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks preceding the leave period should be used for calculating the employee's normal workweek for FMLA purposes (29 CFR 825.205(d)).

For example, if an employee worked an average of 50 hours over the prior 12-week period, the employee would be entitled to an FMLA leave bank of 600 hours (not 480 hours). In addition, the FMLA regulations also state that where an employee normally works variable hours, the amount of leave to which an employee is entitled is determined on a pro rata, or proportional, basis by comparing the new schedule with the employee's normal schedule (29 CFR 825.205(b)).

Although the Southwest lawsuit was recently filed and no determination has been made on the merits, companies whose employees work variable hours should heed its warning to examine closely the way they are measuring accrual and usage of FMLA leave time. In addition, this case also serves as a reminder that litigants may seek to prosecute FMLA claims by class or collective action just like they do other types of employment claims.

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