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Focusing On Legal Issues For Personnel Administrators

U.S. DOL Opinion Letter: Employers May Not Delay Designating FMLA Leave and Employees May Not Decline FMLA Leave

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The United States Department of Labor ("DOL") recently issued an official Opinion Letter clarifying the federal regulations regarding an employer's obligation to designate leave as FMLA-qualifying once it has obtained sufficient information to determine that the leave qualifies as FMLA leave.

Various provision in the FMLA regulations require an employer to designate employee leaves as "FMLA"-qualifying leave whenever the employer has determined that the leave is being (or has been) taken for one or more of the reasons covered by the FMLA. See, e.g., Sections 825.127(a)(4) and 825.300(d)(1) ("When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (e.g., after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave.")

Some employers have voluntarily permitted employees to exhaust some or all available paid sick (or other) leave prior to designating leave as FMLA-qualifying, even when the leave is clearly FMLA-qualifying. Similarly, some employees wish to decline requesting or taking FMLA leave-either because they would like to use other available leave and "save" FMLA leave, or because they do not want to make the effort to obtain a required medical certification, or for other reasons. The DOL Opinion Letter makes clear that neither of those options is permissible under the FMLA: "Once an employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave."

Can An Employer Provide Additional FMLA Leave?
No. An employer may provide leave in addition to FMLA leave, but not additional FMLA leave. Sound confusing? Under Section 825.700(a) of the federal regulations, an employer "must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." However, any additional leave should not be characterized as "FMLA" leave according to the DOL Opinion Letter: "An employer may not . . . designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave." As a result, any leave beyond the 12 weeks (or 26 weeks) is in addition to FMLA leave. Any paid leave to which the employee is entitled that also qualifies as FMLA leave must run "concurrently" with unpaid FMLA leave under Section 825.207(a), not consecutively.

Do Unions Represent Your Employees?
The DOL Opinion Letter has significant implications for unionized employers: Some labor organizations have relied upon the language in Section 825.700(a) to propose the inclusion of collective bargaining agreements provisions that provide greater than 12 weeks of FMLA leave for an employee with a serious health condition. For example, they have proposed that an employee may first use up to six (6) weeks of available paid sick leave at the start of a leave after childbirth, and then have the employer begin counting the employee's 12-week FMLA entitlement period after the six weeks has passed. The unions have successfully convinced many employers to include collective bargaining agreements provisions that in effect require the employer to delay designating leave as FMLA-qualifying leave when it clearly qualifies as FMLA leave. Based upon the DOL Opinion Letter, such provisions are plainly in violation of the federal regulations and the DOL's official position. The first 12 weeks must be counted as FMLA leave if it qualifies as FMLA leave. Employees are not permitted to "save" FMLA leave for future use and employers must always designate FMLA leave once they are certain that the leave is FMLA-qualifying.

Conflicting Court Opinion
The DOL's Opinion Letter conflicts with a 2014 decision by the 9th U.S. Circuit Court of Appeals, Escriba v. Foster Poultry Farms Inc., which held that an employee may decline to have FMLA leave designated even if the reason for the leave qualifies for such job-protected time off (i.e., employees may use other available leave and "save" FMLA leave). The 9th Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. Employers in those states should seek legal advice as to how to handle the conflict, but the DOL Opinion Letter may give employers in those states a defense if they follow the DOL rule.

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