PUBLICATION

Don't Delay FMLA: DOL Makes Clear that Employers Must Designate Leave

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Does this scenario ring a bell? An employee needs time off from work for a health-related problem that appears to trigger the employee's rights under the Family and Medical Leave Act (FMLA). The Human Resources Manager meets with the employee to discuss FMLA rights and responsibilities and the like, but the employee says, "I don't need FMLA leave, I just want to use my PTO (vacation, sick, etc.). I'll save my FMLA for later." Or, the employer has a policy or practice that allows employees to use various forms of paid time off before job-protected FMLA leave begins.

In a recent FMLA Opinion letter (FMLA2019-1-A, Mar. 14, 2019), the U.S. Department of Labor (DOL) made clear that employers and employees cannot delay the start of FMLA leave. In other words, employees do not get to choose when their rights apply, and employers must designate FMLA leave from the first day of the employee's qualifying absence.

What Did Employers Ask the DOL?

Employers asked the DOL whether it is permissible to permit employees voluntarily to exhaust all or some of their available sick or other paid time off prior to designating the time away from work as FMLA-qualified leave where employers know that the leave would otherwise qualify as job-protected FMLA leave. In justifying this practice, employers relied on an FMLA regulation that provides, "[a]n employer must observe any employment benefit or program that provides greater family and medical leave rights to employees than the rights provided by the FMLA." 29 C.F.R. § 825.700.

What Was the DOL's Answer?

First, the DOL explained that under the substitution of paid time off regulation, an employer may require, or an employee may elect to substitute concurrently, available paid time off to cover any part of the FMLA entitlement period. 29 C.F.R. § 825.207. Further, the DOL reminded employers that it is always their responsibility to provide a written designation notice to employees within five business days after the employer "has enough information to determine whether the leave is being taken for an FMLA-qualifying event." 29 C.F.R. § 825.300. As covered employers should know, failure to timely provide either the required notice of rights and responsibilities (DOL Form WH-381) within five business days or the required designation notice (DOL Form WH-382) also within five business days may constitute interference with an employee's rights under the FMLA. In other words, failure to follow the regulatory requirements for issuing FMLA notices is a violation of the FMLA.

The DOL also explained that nothing in the FMLA restricts employers from adopting more generous leave policies – but, an employer may not designate more than 12 weeks of FMLA leave (or 26 weeks for military caregiver leave) as FMLA-protected.

After that long wind-up, the DOL succinctly answered the question at hand in simple terms: "An employer may not delay the designation of FMLA-qualifying leave or designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave." Seems obvious, right? Employers must designate and cannot "give in" to employees' requests to "save" FMLA for some other qualifying use at some other time. In fact, once an employer has knowledge of a need for FMLA leave, neither the employee nor the employer may "decline"

FMLA protection for that leave, even if the employee would prefer that the employer delay designation of the FMLA-qualifying leave. Further, the DOL made clear that an employee's use of available paid time off does not extend FMLA or somehow transform the need for leave into a non-qualifying FMLA event.

As for the regulation cited above upon which employers relied in seeking the DOL's opinion, the DOL stated that an employer can provide additional forms of leave, but those leaves cannot delay or expand an employee's 12 (or 26) week FMLA leave entitlement. Notably, the DOL stated that it disagrees with a Ninth Circuit decision, which held that an employee may use non-FMLA leave for an FMLA-qualifying event and decline to use FMLA leave in order to preserve it for future use. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014). The DOL also rescinded its previous opinion letters that are inconsistent with its "new" position on this issue. *See* WHD Op. Ltr. FMLA-67; 1995 WL1036738, at *3 (July 21, 1995); WHD Op. Ltr. FMLA-49; 1994 WL 1016757, at *2 (Oct. 27, 1992).

Employers Should Take Notice

One thing is clear from the DOL's Opinion Letter: employers who maintain a practice of allowing employees to delay FMLA leave to first use other forms of leave need to revise those practices and policies. One way to think about this is that paid time off is just that – paid time off – it is not "leave." Employees may substitute paid time off during an employer-approved leave of absence, including FMLA, but the leave still must be approved. That likely is a conceptual shift for some employers and many employees, but it may be helpful to view the issues through that lens.

Further, employers should educate managers on their FMLA obligations – that is, to recognize when an employee is requesting leave (a low bar, e.g., I need some time off to take care of my mom) and coordinate with Human Resources so that the required notices are issued timely. Remember, Human Resources employees and managers/supervisors can be held individually liable for FMLA violations. Finally, some employers will need to re-educate employees on their rights under the FMLA and why it is imperative to designate FMLA leave properly – simply stated, employers must follow the law. It is true that a court need not recognize the DOL's opinion as binding, but not all courts would decide this issue as the Ninth Circuit did.

For additional information regarding FMLA, please contact the author, Donna M. Glover, or any member of Baker Donelson's Labor & Employment Group.