DOL Opinion Letter: Employers Cannot Delay Designation of FMLA-Qualifying Leave

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Employers can't delay the designation of a Family and Medical Leave Act-qualifying paid leave or provide additional FMLA leave beyond the 12-week FMLA entitlement, according to a new opinion letter issued by the Department of Labor.

With this opinion letter dated March 14, 2019, the DOL expressed its disagreement with the 2014 holding of the Ninth Circuit in *Escriba v. Foster Poultry Farms, Inc.*, where an employee wanted to save her FMLA leave and use other paid time off for FMLA-qualifying absences. Notwithstanding the DOL regulation allowing an employer to designate leave as FMLA, the Ninth Circuit had held that employees may preserve FMLA leave by taking non-FMLA leave for an FMLA-qualifying reason, but that such non-FMLA leave will not be protected.

Under the FMLA, eligible employees of a covered employer are entitled to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. An eligible employee whose family member is a covered servicemember may take up to 26 weeks leave to care for that servicemember. Under 29 C.F.R. § 825.700, a regulation promulgated by the Wage and Hour Division of the DOL, "an 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."

According to the DOL's opinion letter, an employer is prohibited from delaying the designation of FMLA-qualifying leave, even if the delay is upon the request of or preferred by the employee. Once an eligible employee's need to take leave for FMLA-qualifying reasons is communicated to the employer, FMLA protections attach. In essence, the DOL would count any leave taken for FMLA-qualifying reasons, regardless of the wishes of the employer and the employee, toward the employee's FMLA leave entitlement.

Employers are also not allowed to designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA-protected leave. While the employer can adopt leave policies more generous than those required by the FMLA, any FMLA-qualified leave taken beyond the 12 weeks (or 26 weeks for military caregiver leave) is essentially not protected by the FMLA.

What does this mean for employers?

With this opinion letter by the DOL, it is now clearer for employers that they cannot let their employees take paid leave to defer FMLA-protected leave. Employers must count toward employees' FMLA entitlements any leave taken by employees that is for FMLA-qualifying reasons.

On the flip side, employees cannot delay their federal protections by choosing to use up other types of leave provided by employers first. For example, if an employee has accrued paid medical leave and chooses to take it at the beginning of the year to be used for FMLA-qualifying reasons, that paid leave would count toward the employee's FMLA entitlement.

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It must be noted that while the DOL opinion letter provides the agency's indication as to how the FMLA would be implemented, it is not binding upon courts in interpreting the FMLA. On the other hand, employers are now equipped with an authority to bolster their defense to employees' FMLA claims if declining to allow employees to take FMLA-qualifying leave beyond the 12-week (or 26-week) entitlement.

For further guidance or more information on FMLA, please contact the authors or your Miller Canfield attorney.