

DOL Says Employers May Not Delay, or Permit Waiver of, FMLA Leave

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Employers may not delay or allow employees to waive a leave of absence under the Family and Medical Leave Act (FMLA), even if the employee requests to do so, according to an opinion letter (Op. Ltr. FMLA2019-1-A) issued by the U.S. Department of Labor (DOL) on March 14, 2019.

Background

The FMLA regulations state that “[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. Many employers have interpreted this Section to mean that they must permit employees to exhaust some or all available paid sick (or other) leave prior to (or in lieu of) designating leave as FMLA-qualifying, either as a matter of employer policy or at the employee’s request. Until this week, the DOL had not provided clarifying guidance on this question.

DOL Opinion Letter

In response to an employer’s request for an opinion on a related matter, the DOL opined that “Once an eligible 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. . . . Accordingly, when an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee’s FMLA leave entitlement. . . . even if the employee would prefer that the employer delay the designation.”

What Employers Should Do Now

It is important to note that DOL opinion letters are not binding. They are informal guidance (unlike regulations). However, they offer a statement of general principles and as such can be instructive. With that in mind, employers should review their FMLA policies and procedures with employment counsel regarding whether any employer-provided paid leave is delaying designation of an otherwise FMLA-qualifying leave as FMLA leave.

Resources

The DOL Opinion Letter (Op. Ltr. FMLA2019-1-A) is available [here](#).

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