



New DOL Opinion Letter Clarifies that Employers May Not Delay FMLA Leave Designations

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A recently issued Opinion Letter from the Department of Labor (DOL), Letter FMLA2019-1-A, provides that an employer may not delay designating paid leave as Family and Medical Leave Act (FMLA) leave, and may not permit employees to expand FMLA leave beyond the 12-weeks (or 26 weeks for military caregiver leave) granted under the FMLA.

Under the FMLA, employees of covered employers are entitled to up to 12 weeks of unpaid leave with job protection benefits in the event of certain family and medical situations. The FMLA also permits eligible employees to take up to 26 weeks of leave to care for a covered service member with a serious illness or injury. It is the employer's responsibility under the FMLA to designate leave as qualifying leave for FMLA purposes.

The Opinion Letter was issued in response to an inquiry from an employer as to whether it is permissible for an employer to (i) allow employees to exhaust some or all of the paid sick or other leave available to the employee prior to designating the leave as FMLA-qualifying leave (even in situations where it is clear the leave is FMLA-qualifying), or (ii) provide additional FMLA leave beyond the general 12-week FMLA entitlement. In formulating its opinion, the DOL looked to case law supporting the finding that the employer cannot designate more than 12 weeks of leave, or 26 weeks of military caregiver leave, as FMLA-protected leave, including cases that spoke to Congress's intent in enacting FMLA for the purpose of protecting qualifying leave and with a specific entitlement of 12 weeks of leave.

The Opinion Letter specifically provides that an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave, and notes that neither the employee nor employer can decline FMLA protection for FMLA qualifying leave once the employee has communicated a need to take leave for an FMLA-qualifying reason. Thus, once the employer determines that the leave request is for a qualifying leave, the leave is FMLA-protected and is counted towards the employee's 12-week (or 26-week) FMLA leave entitlement. The Opinion Letter further notes that once the employer determines the leave is FMLA-qualifying leave, the employer must provide notice of the determination within five business days, and the employer does not have the option to delay this determination once the employer has the information to make such a determination.

In addition, the Opinion Letter specifically provides that an employer is prohibited from designating more than 12 weeks of leave (26 weeks in the case of military caregiver leave) as FMLA leave. The DOL notes that an employer must honor any family and medical leave program it offers outside of the FMLA requirements, even if the offered

leave program provides greater leave benefits than that offered under the FMLA. However, any employer-provided leave is separate from the FMLA leave, even if the employer-provided leave runs concurrently with the FMLA leave, and cannot expand an employee's FMLA-designated leave beyond 12 (or 26) weeks.

Winston Takeaway

Employers subject to the FMLA should review their practices, policies, and employee communications regarding FMLA-leave designation and ensure these adhere to the position taken by the DOL in the Opinion Letter. Specifically, employers should be providing notice of determination within five (5) days of making the designation, and should not designate more than 12 (or 26) weeks as FMLA-qualifying leave, even if the employee requests to have more than 12 (or 26) weeks designated as FMLA leave or to have an FMLA-qualifying leave treated as non-FMLA leave. Employers should keep records of the information used to make the FMLA qualification determination, including records evidencing receipt of the information.

In addition, employers should review their treatment of FMLA leave in conjunction with any employer-provided leave programs (paid or unpaid) to determine whether the current treatment is in line with the prohibitions set forth in the Opinion Letter.

Please contact your regular Winston & Strawn Employee Benefits attorney for more information or for assistance in reviewing FMLA-leave determination and coordination of FMLA leave and employer-provided leave programs for legal compliance.

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