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Don’t Delay: DOL Issues New Opinion Letter on FMLA Leave

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On March 14, 2019, the U.S. Department of Labor (DOL) issued an opinion letter, FMLA 2019-1-A, addressing compliance issues under the Family and Medical leave Act (FMLA). The FMLA provides eligible employees with up to 12 workweeks of unpaid leave during a 12-month period for certain family and medical reasons or to address certain qualifying exigencies arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty). The FMLA also permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember with a serious injury or illness. At the conclusion of the leave, subject to some exceptions, an employee generally has the right to return to the same or to an equivalent position.

In its opinion letter, the DOL makes clear that employers cannot “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.” In this regard, employers must start the clock on employees’ FMLA leave once they learn that an absence qualifies for federal protection.

The DOL's opinion letter conflicts with a 2014 Ninth Circuit decision holding that employees may defer FMLA leave and take paid time off instead. In *Escriba v. Foster Poultry Farms, Inc.*, (9th Cir. Feb. 25, 2014), the employee indicated that she preferred to take vacation and not FMLA leave to care for her ill father. The employee was fired after she failed to return to work. In support of its decision to terminate the employee, the employer argued that it was within its right to fire her because the leave was not protected. In response, the employee argued that the employer was required to designate her leave as FMLA-protected regardless of whether she declined this designation. The Court of Appeals agreed with the employer, concluding that an employee can affirmatively decline to use FMLA leave even if the underlying reason for seeking time off qualifies under the law. Crucial to its decision was language in the FMLA regulations requiring employers to "inquire further of the employee if it is necessary to have more information about whether FMLA is being sought by the employee." The Court of Appeals also explained that if it were to adopt the employee's argument, employers would be placed in an "untenable situation if the employee's desire is *not* to take FMLA leave[,]" as this could result in employees bringing an interference claim for forcing them to take FMLA leave.

Addressing *Escriba*, the opinion letter points to an FMLA regulation (29 C.F.R. § 825.220(d)) that requires employers to provide notice of an FMLAwithin five days of learning the reason for leave qualifies under the law. Based on this, the DOL opined that "[o]nce 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." Therefore, if an employer allows an employee to substitute paid leave for unpaid leave, the employee's paid leave must be counted toward his or her total FMLA entitlement, and must not expand that entitlement.

As a general matter, courts are not required to defer to DOL opinion letters. This said, an employer's reliance on a DOL opinion letter to justify its actions or decisions may allow it to prove, in the context of a lawsuit, that its violation of the FMLA was in good faith and that it had reasonable grounds to believe its action was not a violation—under which circumstances a court may deny a plaintiff's request for liquidated damages (*see* 29 U.S.C. § 2617(a)(1)(A)(iii)). Especially when an opinion letter appears to conflict with a federal appellate decision, as here, employers should proceed with caution and evaluate the risks of a course of action inconsistent with the agency's guidance.

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