

Department of Labor Warns Employers Not to Delay Designating FMLA Leave

Friday, March 15, 2019

The US Department of Labor (DOL) issued a new Opinion Letter on March 14 reinforcing the prohibition against an employer delaying the designation of FMLA-qualifying leave as FMLA leave. The question posed to the DOL was whether an employer may permit employees to exhaust some or all available paid sick or other leave prior to designating leave as FMLA-qualifying, even when the leave is clearly FMLA-qualifying.

Citing the regulations interpreting the FMLA, the DOL explained that when 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. Once the employer has enough information to determine whether a leave is being taken for a FMLA-qualifying reason, the employer has **five business days** to provide a written “designation notice” to an employee, absent extenuating circumstances. Failure to provide that notice may constitute an interference with the employee’s FMLA rights in violation of the law. Therefore, the DOL instructed that an employer cannot allow its employee to use paid leave or other leave before designating FMLA-qualifying leave as FMLA leave. Of course, the employer may require the employee to “substitute” accrued paid leave to cover any part of the FMLA unpaid leave period, but it will run concurrently with FMLA leave, not precede it.

This Opinion Letter is a good reminder to employers to check their procedures to ensure that a FMLA designation notice is going out promptly (within five business days) once the employer has enough information to determine that the leave is FMLA-qualifying.

DOL Opinion Letter: https://www.dol.gov/whd/opinion/FMLA/2019/2019_03_14_1A_FMLA.pdf

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