

DOL Opinion Letter Clarifies Designation and Use of FMLA Leave

Saturday, March 16, 2019

On March 14, 2019, Keith Sonderling, the acting administrator of the Wage and Hour Division (WHD) of the Department of Labor (DOL) issued [an opinion letter](#) clarifying the DOL's position on designating and taking leave under the Family and Medical Leave Act (FMLA) and placing the department at odds with the [Ninth Circuit's Escriba decision](#). The opinion letter provides that "an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave" and must notify the employee of the FMLA status of the employee's leave within five days of the employer obtaining enough information to make the determination.

Ultimately, this means FMLA qualifying leave must be designated as such and be deducted from the employee's FMLA allotment "even if the employee would prefer that the employer delay the designation." The opinion letter explicitly states the WHD's disagreement with the Escriba decision, which held that employers may decline FMLA leave to preserve it for future use and instead use vacation time before using FMLA leave.

Additionally, the letter prohibits an employer from designating more than 12 weeks of leave (or 26 weeks of leave for military caregiver leave) in a year as FMLA leave. Therefore, if an employee elects to take paid leave for reasons that qualify for FMLA protection over unpaid FMLA leave, the paid leave counts toward the 12-week FMLA entitlement and does not expand it.

Key Takeaways

Employers may want to consider educating human resources and supervisors on the WHD's stance on this issue. This opinion letter provides clarification to employers that may have employees who prefer to use their paid leave/vacation time before tapping into their FMLA allotment. According to the WHD's guidance, employers may designate FMLA leave as such—even if the employee would prefer to use paid time off before tapping into his or her FMLA leave. If the employee has other forms of leave available to him or her after the 12 weeks of leave are exhausted, the employee may then use that additional paid leave.

Opinion letters from the WHD's administrator may provide employers with a potential good faith reliance defense for actions that otherwise may constitute violations of law. In other words, an employer may be able to act in reliance on an opinion letter when making employment decisions regarding certain federal laws, including the FMLA, on which opinion letters have been issued.

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