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## DOL Requires FMLA Leave to Run Concurrently with Other Forms of Paid Leave

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The U.S. Department of Labor (DOL) has issued an opinion letter that states that employers must run leave under the Family Medical Leave Act (FMLA) concurrently with other forms of paid leave. Thus, employers can no longer permit employees to use paid leave – vacation time, sick pay, short-term disability, PTO, etc. – prior to tapping into their unpaid FMLA leave.

The FMLA entitles covered employees to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons (or 26 weeks for a military caregiver). In 2014, the federal Court of Appeals for the Ninth Circuit ruled in *Escriba v. Foster Poultry Farms, Inc.*, that an employee may elect to use another type of leave, such as vacation time, for an FMLA-qualifying situation and defer taking FMLA allotted time for a future use.

The DOL's March 14, 2019 opinion letter rejects the Ninth Circuit's holding in *Escriba*. The opinion letter states that the FMLA prohibits employees from exhausting some or all of their paid leave (i.e., vacation, PTO, sick days, etc.) prior to using their FMLA leave when the leave is FMLA qualifying. Instead, according to the DOL, the moment an employer learns that an employee's absence qualifies for FMLA leave, the employer must start the clock on the employee's allocated 12 weeks under the FMLA. An employee may elect to substitute accrued paid leave for the unpaid FMLA leave, but the employee cannot delay the taking of FMLA leave until after the paid leave has been exhausted. Furthermore, the DOL opinion letter clarifies that an employee's FMLA protection is limited to 12 weeks, even if the employer provides more generous leave policies.

This opinion letter may also impact the practice by many employers of not counting time spent on workers' compensation leave as FMLA time. FMLA leave time may now also have to run concurrently with time off for work-related injuries.

As a result of this new interpretation of the FMLA, many employers' relevant documents, policies and procedures may need to be revised or at least given a closer look. Many collective bargaining agreements that require paid leave be exhausted first, before the clock begins to run on FMLA leave, should be re-evaluated when negotiations open. In addition, employers should consider how they are coordinating FMLA leave with other types of leaves.

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