

Generous Employers Beware: FMLA Leave Cannot Be Delayed

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Many employers offer paid leave, including sick leave or paid time off, as a benefit beyond the unpaid leave entitlements of the Family and Medical Leave Act (“FMLA”). State or local laws may also require paid leave beyond FMLA entitlements. Seeking to maximize time off work, employees may ask to take paid leave before commencing 12 weeks (or 26 weeks, in the case of military caregiver leave) of unpaid FMLA leave. While generous employers may consider approving such a pro-employee arrangement, by Opinion Letter dated March 14, 2019, the United States Department of Labor (“DOL”) prohibited this approach.

The DOL’s March 14, 2019 Opinion Letter requires the FMLA entitlement period to run from the earliest possible date, regardless of employers’ paid leave policies or employees’ preferred sequencing of leave. In addition, employers “may not designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave.” The DOL’s March 14, 2019 Opinion Letter departs from DOL Opinion Letter No. 49 (1994), which authorized employers to “extend” FMLA benefits by delaying the start of the FMLA leave period until after employees exhausted paid leave benefits.

With appropriate notice in written policies and in the FMLA-required Rights and Responsibilities Notice, employers may continue to require employees to take paid leave *concurrently* with unpaid FMLA leave. Alternatively, employers may let employees choose whether to take paid leave concurrently with FMLA leave, or take FMLA leave as unpaid and save paid leave for later use. In all cases, according to the DOL, the first 12 (or 26) weeks of FMLA-qualifying leave in the calendar year must be designated as FMLA leave.

The many procedural requirements of the FMLA can be a trap for the unwary. Guidance from experienced counsel can help to avoid interference with employees’ FMLA rights, while minimizing the risks of FMLA fraud and misuse.

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