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FMLA Can and Should Run Concurrently With Paid Leave

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The U.S. Department of Labor's Wage and Hour Division (W&H Division) recently issued a new Opinion Letter on an issue that has long-plagued employers under the Family and Medical Leave Act (FMLA)—namely, whether an employer can "force" an FMLA designation on leave when the employee resists the designation. The answer is yes. Under the FMLA, employers can and should designate any qualifying leave time as FMLA.

Many employers have struggled with how to treat leave time under its paid leave policies when it was clear that the time away also qualifies as FMLA. This includes workers' compensation, non-work-related disability leave, or simply sick leave. In some instances, the employee might refuse to provide the required FMLA medical certification, choosing to hold FMLA leave for later usage while exhausting employer-provided paid or unpaid leave time.

The W&H Division's new Opinion Letter clarifies that employers are permitted to designate FMLA-qualifying leave—running it concurrently with non-FMLA leaves—even if the employee prefers not to use FMLA leave concurrently. Indeed, according to this Opinion Letter, employers have a *legal obligation* to designate the leave as protected or it risks violating the statute's prohibitions on interference, restraint, or denial of FMLA rights. In other words, the employer has both the authority and obligation to designate leave that qualifies under the FMLA. It is not the employee's option.

This Opinion Letter responded to employer questions regarding whether they may delay designating paid leave as FMLA, or, alternatively, whether employees can choose to delay the use of FMLA leave by electing other forms of leave instead. These questions were prompted by situations in which employees exhausted some or all available paid sick or other leave before having the leave designated as FMLA leave.

The W&H Division determined that employers should not delay designating leave as FMLA leave because, effectively, this results in employees getting more than their statutory entitlement of leave time. "[O]nce an 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." Accordingly, an employer can and must designate the leave as FMLA-qualifying.

The W&H Division also determined that while employers can provide additional leave outside the

FMLA, employers are prohibited from expanding an employee's 12- or 26-week entitlement under the FMLA. In other words, if an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave counts toward his or her FMLA allotment and does not expand that entitlement.

The Opinion Letter acknowledges that it conflicts with the decision by the U.S. Court of Appeals for the Ninth Circuit in *Escriba v. Foster Poultry Farms, Inc.* That case held that employees may preserve their FMLA leave by taking non-FMLA leave—including accrued paid leave—for an FMLA-qualifying reason.

One common situation involving FMLA designation arises when an employee, seeking to defer FMLA usage while using other forms of leave, refuses to provide the FMLA medical certification form. May the employer—or must the employer—designate the leave as FMLA-qualifying without the medical certification? Although the Opinion Letter does not address this situation directly, the answer would appear to be yes, provided the employer otherwise has enough information to determine that the leave is being taken for an FMLA-qualifying reason.

Based on this Opinion Letter, it is critical that employers designate leave as FMLA-qualifying when confronted with facts indicating that the reason for the leave falls under that category. This Opinion Letter also reinforces the need for employers to ensure that managers and supervisors, who often receive first notice of an FMLA situation, are trained on what constitutes a "serious health condition," as well as other circumstances that give rise to FMLA leave, so that timely designations are made. Further, FMLA policies should reflect that the authority to designate leave as FMLA-qualifying rests with the employer and that employees are required to cooperate in providing pertinent information in the designation process.

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