DOL Provides More Insight into FMLA Leave Designation

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Executive summary: Under the Family and Medical Leave Act of 1993 (FMLA), eligible employees of covered employers are entitled to up to 12 weeks of unpaid leave (26 weeks, if for care of a covered service member) with job protection benefits in cases of enumerated family and medical situations. In two recent opinions, the United States Department of Labor (DOL) announced its positions with respect to certain employers' responsibilities under FMLA. Specifically, following the DOL's March and September 2019 Opinion Letters, companies: 1) may not delay designating paid leave as FMLA leave even if the delay otherwise complies with a collective bargaining agreement and the employee in fact prefers a delay; 2) must provide notice of determination within five business days of being put on notice of the employee's need for leave for an FMLA-qualifying reason; and 3) may not designate more than 12 (or 26) weeks as FMLA leave, even if the employee requests additional weeks to be designated under FMLA.

March 2019 DOL Opinion

On March 14, 2019, the DOL issued Opinion FMLA2019-1-A in response to an inquiry from a company as to whether it could: (1) voluntarily permit employees to exhaust some or all of the paid sick or other leave available under the company policies before designating their leave as FMLA-qualifying (even where the leave is "clearly" FMLA-qualifying); and/or (2) grant further FMLA leave in addition to the FMLA's 12-week entitlement. The DOL concluded that employers may not delay the designation of FMLA-qualifying leave as FMLA leave, and neither the employee nor the company can decline FMLA protection for FMLA-qualifying leave once the employee has shared a need for leave for one of the FMLA-qualifying reasons. Thus, once the employer determines the leave request is for a qualifying leave, the leave is FMLA-protected and is counted towards the employee's 12-week (or 26-week) leave entitlement. Further, once the employer determines the leave qualifies under FMLA, the employer must generally provide a written "designation notice" within five business days, and may not delay this notice once it possesses sufficient information to make the determination (even if the employee would prefer a delay).

Further, Opinion FMLA2019-1-A warns that a company may not designate more than 12 weeks of leave (or 26 weeks, if military caregiver leave) as FMLA leave. An employer may still implement and enforce family and medical leave programs that offer protections outside of the FMLA requirements—even those that offer greater leave benefits—but any employer-provided leave is separate from the FMLA leave, even if it runs concurrently with the FMLA leave, and cannot extend an employee's FMLA-designated leave beyond the 12- (or 26-) week entitlement.

September 2019 DOL Opinion

On September 10, 2019, the DOL issued Opinion FMLA2019-3-A, which built on the March Opinion Letter and further clarified companies' obligations under the FMLA. The September Opinion Letter responded to an employee's inquiry as to whether the company could delay designating paid leave as FMLA leave if the delay complied with a collective bargaining agreement (CBA) and the employee in fact preferred a delayed designation. The DOL reiterated its March 2019 position that neither the employee nor the company could decline FMLA protections for a leave after an eligible employee has shared a need for leave for an FMLA-qualifying reason, even if the delay complies with a CBA and/or is preferred by the employee.

In certain circumstances, a CBA may provide that covered employees may—or must—delay taking unpaid leave, including FMLA leave, until after accrued CBA-protected paid leave has been exhausted. A CBA may in fact provide greater benefits and protections than FMLA, for example with respect to protecting seniority rights. In these circumstances, employees may prefer to postpone using unpaid FMLA until after exhausting their paid leave pursuant to the CBA. Notwithstanding the greater protections that may come with a CBA or employees' preferences, the DOL pronounced, FMLA does not authorize the employer to forego FMLA protection for FMLA-qualifying leave.

In Opinion FMLA2019-3-A, the DOL reiterated its earlier position that, once the employer has enough information to determine that an employee's leave request is FMLA-qualifying, it must designate the leave as FMLA leave, may not delay designating such leave as FMLA leave, and neither the employee nor the employer may decline FMLA protections. "This is the case ... even if the employer is obligated to provide job protections and other benefits equal to or greater than those required by the FMLA pursuant to a CBA or state civil service rules."

If the employer requires employees to substitute FMLA leave for accrued paid leave (in which case, the leave qualifies as both FMLA leave and CBA-protected paid leave), and where the employer provides for the accrual of seniority when employees are using accrued paid leave, it must permit employees to accrue seniority when they are substituting FMLA for paid leave. Importantly, according to the DOL, "[f]ailure to permit an employee to accrue seniority when the employee is substituting FMLA leave for accrued paid leave, if the employee would otherwise be permitted to accrue seniority when utilizing accrued paid leave, would constitute interference with the employee's FMLA rights, in violation of ... the [FMLA]."

In drawing this conclusion, the DOL acknowledged that FMLA explicitly provides that an employee may, but is not entitled to, accrue seniority while taking FMLA leave. However, the DOL reasoned, the prohibition against discriminating against employees who take FMLA leave requires that the employer's established policy for providing benefits when the employee is on other forms of leave (paid or unpaid, as relevant to the circumstances) be applied to FMLA leave.

***Conclusion*:** Read in conjunction, Opinion FMLA2019-1-A and Opinion FMLA2019-3-A serve as a reminder that employers subject to FMLA should review their practices and policies, and communications with eligible employees regarding FMLA-leave designation to ensure they align with the DOL's March and September positions. In doing so, companies should keep in mind that they may not delay designating paid leave as FMLA leave even if the delay would otherwise comply with a CBA or the employee would prefer a delay. Employers must also provide a written notice within five business days of determining that the leave qualifies under FMLA, and may not designate more than 12 (or 26) weeks as FMLA-qualifying leave, even if the employee requests more than 12 (or 26) weeks designated as FMLA leave or requests to treat an FMLA-qualifying leave as non-FMLA leave. Employers should review their treatment of FMLA leave vis-à-vis any employer-provided leave programs to determine whether the current treatment aligns with the DOL's positions.

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[i] If you have any questions about the DOL's Opinion Letters or their application to your company's leave policies, please feel free to contact Viktoryia Johnson, (813) 261-7814 or vjohnson@fordharrison.com.