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Department of Labor Clarifies Position on No-Fault Attendance Policies under the Family Medical Leave Act

By Amy Jordan Wilkes and Emily C. Burke September 2018

On August 28, 2018, the Department of Labor's Wage and Hour Division issued an opinion letter clarifying the permissibility of no-fault attendance policies under the Family and Medical Leave Act (FMLA). Employers frequently use no-fault attendance polices to control employee absenteeism and tardiness; however, such attendance policies can create issues under federal employment laws including the FMLA and Americans with Disabilities Act. The Department of Labor has previously cautioned employers that FMLA-related absences cannot be counted toward an employee's absence limit, and in its most recent opinion letter it found that an employer's no-fault attendance policy that essentially "froze" the number of attendance points an employee had accrued prior to his or her taking leave did not violate the FMLA.

Employers typically implement "no-fault" policies to correct patterns of absence abuse. In doing so, these policies progressively discipline an employee once the employee has accumulated a set number of absences, late arrivals, or early departures. However, when the reason for an employee's absence falls under the FMLA, calculations must exclude the protected FMLA absences.

Under the employer's attendance policy at issue, employees accrued points for both tardiness and absences; however, points were not accrued for protected FMLA absences. After eighteen points, an employee was automatically discharged. After accrual, points remained on an employee's record for twelve months of "active service." As a result, employees who had been on FMLA leave may have had points lingering on their record for longer than twelve months. However, employees using FMLA leave are not entitled to greater benefits than they would otherwise be entitled to receive had they not taken leave. Accordingly, the Department of Labor concluded that the removal of attendance points was a reward for working and thus constitutes an employment benefit so that employees taking FMLA leave did not lose any benefit that accrued prior to taking leave, nor did they accrue any benefit to which they would not otherwise be entitled. Although the employer's policy failed to define "active service," the Department of Labor found that such practices do not violate the FMLA if employees on equivalent types of leave receive the same treatment. Therefore, an attendance point freezing policy does not violate the FMLA, provided that the employer does not count equivalent types of leave as "active service" under the no-fault attendance policy.

In light of this opinion letter, employers should review their no-fault attendance policy to ensure attendance points are accrued in a manner that complies with the FMLA and that the policy is applied consistently among employees taking leave.

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