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DOL Clarifies Employer Obligation to Designate FMLA Leave

Highlights:

- An eligible employee's absence for an FMLA-qualifying reason must be designated as FMLA leave.
- An employer may not delay this designation, even if an employee does not request FMLA leave because he or she is using paid leave for the absence.
- The absence must count against the employee's annual FMLA leave entitlement.

Resources:

- [The Employer's Guide to the FMLA](#), a DOL publication
- The DOL's [webpage](#) on FMLA compliance, including links to model forms
- DOL [opinion letter](#) (FMLA2019-1-A) on designating FMLA leave

OVERVIEW

The Family and Medical Leave Act (FMLA) provides eligible employees with unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 weeks of leave (26 weeks for military caregiver leave) each year for FMLA-qualifying reasons. Because FMLA leave is unpaid, employees often request time off under another leave program, such as paid sick leave or paid time off (PTO).

An [opinion letter](#) from the Department of Labor (DOL) clarifies that employers cannot delay designating paid leave as FMLA leave, even if the employee would prefer this delay. Employers must notify employees that their leave is FMLA-protected within five days of obtaining enough information to make this determination.

ACTION STEPS

Employers should be prepared to timely designate time off as FMLA leave and count it against employees' annual leave entitlement. To identify when employees' time off requests should be designated as FMLA leave, managers and supervisors must be able to recognize FMLA-qualifying reasons for leave.

FMLA Requirements

When an eligible employee takes time off for an FMLA-qualifying reason, the employer is required to designate the absence as FMLA leave and give written notice of the designation to the employee.

According to the DOL's [FMLA regulations](#), an employer must provide this written designation notice within **five business days** (absent extenuating circumstances) after it has enough information to determine whether the leave is being taken for an FMLA-qualifying reason.

Employees are not required to mention the FMLA in order to have it apply to their absence. The time off request may be made under a separate employee leave policy, such as paid sick leave or PTO.

Employers have questioned whether it is permissible to permit employees to exhaust some or all of available paid leave prior to designating the absence as FMLA-qualifying, even when the absence clearly qualifies as FMLA leave.

DOL Opinion Letter

According to the DOL's opinion letter, an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Employees may prefer that employers delay designating their absence as FMLA leave in order to extend their leave time. For example, an employee with a serious health condition may want to exhaust his or her available PTO or paid sick leave and then take unpaid leave for 12 weeks under the FMLA.

However, according to the DOL, once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employer nor the employee can decline FMLA protection for that leave. This means that an employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer the delay.

DOL's Position Conflicts with Ninth Circuit Ruling

In its opinion letter, the DOL states that it disagrees with the Ninth Circuit's decision in [Escriba v. Foster Poultry Farms](#) (2014). In this case, the court held that an employee may use non-FMLA leave (paid vacation) for an FMLA-qualifying reason and decline to use FMLA leave in order to preserve it for future use. According to the DOL, an employer cannot delay designating leave as FMLA-qualifying, even if the employee would prefer the delay.

An employer is also prohibited from designating more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave. Providing additional leave (such as paid sick leave or PTO) outside of the employer's FMLA leave policy cannot expand an employee's entitlement to leave under the FMLA. If an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement.

According to the DOL's opinion letter, employers cannot delay designating an employee's absence as FMLA leave, even when the employee is using paid leave and does not request FMLA leave. The absence must also count against the employee's annual FMLA leave entitlement.

Advantages to FMLA Designation

Designating an employee's absence as FMLA leave benefits both the employer and the employee:

Benefit to Employer

Designating an employee's time off as FMLA leave **reduces an employee's annual leave entitlement under the FMLA**. For example, if an employee takes two weeks of PTO for an FMLA-qualifying reason and the employer designates the time off as FMLA leave, it will reduce the employee's annual FMLA leave entitlement from 12 weeks to 10 weeks and count against the employee's available PTO for the year. If the time off is not designated as FMLA leave, the employee will use up two weeks of his or her PTO, but will still have up to 12 weeks of FMLA leave available for the year.

Benefit to Employee

Employees can also benefit from having their time off designated as FMLA leave. Although this will reduce how much FMLA leave they have available for the remainder of the year, it will also **trigger the FMLA's job protections**. The FMLA requires that employers restore employees to their same or an equivalent job after leave ends.

Key Takeaways for Employers

When an employer has enough information to indicate that an employee's need for time off may be for an FMLA-qualifying reason (for example, an employee requests time off to care for a sick family member), the employer should begin the FMLA leave process by evaluating whether the employee's time off request is covered by the FMLA.

If the employee's leave request is covered by the FMLA, the employer must designate the time off as FMLA leave and provide a written designation notice to the employee. Absent extenuating circumstances, an employer should provide this notice within five business days of receiving enough information to determine that the absence is FMLA-qualifying.

COMPLIANCE TIP

Managers and supervisors who handle employee leave requests should be trained on the FMLA's qualifying reasons for leave and should consider whether employees' leave requests may be covered by the FMLA.