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DOL: EMPLOYERS MAY NOT DELAY FMLA DESIGNATION, EVEN AT EMPLOYEE'S REQUEST

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It is not uncommon for employees to ask whether they can first use paid time off available under the employer's leave policies and "save" their unpaid – and protected – Family and Medical Leave Act (FMLA) leave entitlement until later, in the event that they need additional leave. Some employers permit this approach, perhaps out of a desire to be "generous" to employees with respect to leave, or sometimes inadvertently due to not realizing that paid leave and unpaid FMLA leave can run concurrently, or even because of a failure to recognize at the beginning of an employee's leave that the FMLA applies.

In an opinion letter issued on March 14, 2019, the U.S. Department of Labor (DOL) took a firm stand against this practice, stating unequivocally that "the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation." *See* FMLA2019-1-A.

In reaching this conclusion, the DOL relied heavily on the FMLA regulation precluding the waiver of FMLA rights, *see* 29 C.F.R. § 825.220(d), stating that, in light of the prohibition on such waivers, neither the employee nor the employer "may decline FMLA protection" for FMLA-qualifying leave. The DOL also noted that delaying FMLA leave until after paid leave is exhausted would run afoul of the regulation that requires employers to provide the FMLA designation notice within five business days of having sufficient information to determine that leave is for an FMLA-qualifying reason. *See* 29 C.F.R. § 825.300(d)(1).

Although the opinion letter appears employer-friendly, in that employers have a solid basis for declining an employee's request to first exhaust paid leave before dipping into their unpaid FMLA leave entitlement, the key underpinning of the opinion letter is the DOL's desire to ensure that, when an employee takes leave for an FMLA-qualifying reason, the employee receives the protections of the FMLA, both with respect to the ability to take leave in the first place, and with respect to other protections such as the right to reinstatement following the conclusion of such leave.

In this regard, it is notable that, in the opinion letter, the DOL expressly disagreed with the Ninth Circuit opinion in *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014), in which

the court held that that an employee may decline to use FMLA leave in order to preserve it for future use, even if the employee's leave time is for an FMLA-qualifying reason. In that case, the employee had requested two weeks of vacation to care for her sick father, and she explicitly declined to have her time off counted as FMLA leave. Accordingly, when the employee failed to return to work immediately after her approved two-week vacation, the employer terminated her employment. The court rejected the employee's claim that the employer's actions constituted an unlawful interference with her FMLA rights. In reaching its conclusion, the court found that the employee's decision to not use FMLA leave did not amount to an invalid *waiver* of her FMLA rights, but instead was a conscious decision to *preserve* her FMLA rights for later. By implication, the DOL has rejected this reasoning. *See* FMLA2019-1-A at n.3.

Ultimately, it is the employer's responsibility to designate leave as FMLA-qualifying when the FMLA applies. Accordingly, critical takeaways for employers in light of this DOL opinion letter are:

- Managers and Human Resources personnel must be trained in recognizing when an employee's request for leave is – or could be – FMLA-qualifying, so that appropriate steps to make this determination and designate the leave are taken in a timely manner.
- If an employee's leave is for an FMLA-qualifying reason, and if the employee is eligible for and has FMLA leave time available, the employer should comply with the FMLA notice provisions and ensure that the leave time is designated as FMLA leave.
- Employee requests to "delay" or "save" FMLA time until after paid leave time is used should be denied; if it is clear that the FMLA applies, then paid leave and unpaid FMLA leave should run concurrently.

One other aspect of the DOL's opinion letter bears mentioning: The DOL emphasized that, while employers may adopt more generous leave policies than required by the FMLA, an employer "may not designate more than 12 weeks of leave – or more than 26 weeks of military caregiver leave – as FMLA-protected." Again, this point appears employer-friendly, in that the DOL essentially reiterated the limitation of the FMLA protections to 12 weeks of qualifying leave in the applicable 12 month leave period. Employers should bear in mind, however, that if the employee has exhausted his or her 12-week FMLA entitlement but is provided additional leave under generous employer leave policies, such additional leave cannot be designated as FMLA leave as a way to "begin using up" FMLA leave that would be available to the employee in the next 12 month leave period.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess best practices under FMLA. If you or your organization would like more information on FMLA or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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