DOL issues opinion letter regarding employers' designation of FMLA leave

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On March 14, 2019, the U.S. Department of Labor (DOL) issued three new opinion letters. Opinion Letter FMLA2019-1-A provided some additional insight on how employers should designate Family and Medical Leave Act (FMLA) leave when an employee has both paid sick time and FMLA leave available.

FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. The employer may require or the employee may elect to "substitute" accrued paid leave to cover any part of the unpaid FMLA entitlement period.

The DOL guidance expressly states that an employer may not delay designating FMLA-qualifying leave as FMLA leave. After an eligible employee communicates a need to take leave for an FMLA-qualifying reason, the employer must review the information provided by the employee to determine if the leave qualifies for FMLA leave. Once the employer has made its determination, it must provide notice of the determination to the employee within five business days and count the leave toward the employee's FMLA leave entitlement.

The DOL opined that neither the employee nor the employer may decline FMLA protection for the leave. In instances

when an employee has both paid sick time and FMLA leave available for use, the DOL stated that the employer should not delay designating the employee's absence as FMLA-qualifying even if that is the employee's preference. Thus, if an employee is eligible for both leaves and elects to take paid sick leave, employers must designate the paid sick leave as FMLA leave as soon as the paid sick leave begins. This guidance suggests that employee cannot save his or her FMLA leave for later use.

This guidance also clarifies that employers are prohibited from designating more than 12 weeks of leave as FMLA leave. While employers must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA, the additional leave should not be considered an extension of their entitlement to FMLA leave.

The final takeaway from this guidance can be summed up in the DOL's final sentence of its opinion: "Therefore, 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."

Employers should consider the impact of this DOL opinion on how they administer their FMLA leave program.

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