

DON'T HESITATE TO DESIGNATE: DOJ LETTERS CLAIM EMPLOYERS MUST DESIGNATE QUALIFYING LEAVE AS FMLA LEAVE

Two recent opinion letters by the Wage and Hour Division of the U.S. Department of Labor ("DOL") interpret the Family and Medical Leave Act ("FMLA") to require that whenever an employee takes leave for an FMLA-qualifying reason, the employer must designate such leave as FMLA leave, even if the employee would prefer to "save up" his/her FMLA leave for a later time—and this is true (according to the DOL) even if a collective bargaining agreement purports to allow the employee to choose whether FMLA-qualifying leave is so designated.

The **first letter** was issued March 14, 2019 and set forth the DOL's view. The DOL maintains that, because the regulations are clear that "employees cannot waive... rights under FMLA," if a requested leave is for an FMLA-qualifying reason (meaning that it is because of a serious health condition that makes the employee unable to perform at least one job function), then the employer must designate it as FMLA leave within five business days of the request for leave whether or not the employee wishes to exercise his/her FMLA rights.

The **second letter** was issued September 10, 2019 in response to a query whether the analysis in the first letter is affected by a collective bargaining agreement that allowed employees to delay taking FMLA leave until after employees had exhausted their accrued paid leave. The DOL answered that it was not—FMLA-qualifying leave must be so designated even if an employee wishes otherwise and has the putative right to delay designation under a collective bargaining agreement.

Notably, the DOL's opinion contradicts precedent from the Ninth Circuit holding that when an employee affirmatively declines to exercise FMLA rights, the employer is justified in withholding FMLA protection. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014). Ironically, the Ninth Circuit reached this conclusion partly in reliance on DOL regulations, which stated (as indeed they still state) that one of the obligations of an employer is to determine "whether FMLA leave is being sought by the employee." *Id.*

It's worth noting that the DOL issues FMLA opinion letters fairly infrequently. Since January 2018, when the DOL restarted issuing opinion letters after an eight year hiatus, only five FMLA opinion letters have been issued. So the fact that two out of those five letters are related to this issue is telling. This looks to be an area the DOL is identifying as being of particular importance.

So what is an employer to do when an employee requests leave for an FMLA-qualifying reason but declines to take FMLA leave? Under Ninth Circuit precedent, it appears that an employee has the right to affirmatively decline designating such leave as FMLA leave. Under the DOL's recent letters, to fail to designate such leave as FMLA leave would violate the law. For now, at least outside the Ninth Circuit, the safest course may be to follow the DOL's lead, at least as to the first letter—but this could become a fast-changing area of law, and the most recent developments should be taken into account. Therefore, even outside the Ninth Circuit, it is probably wise to consult counsel if you are facing this situation.

PRACTICAL TAKEAWAYS

- Employers should review their FMLA and non-FMLA leave policies, particularly with regard to how the policies interact with one another. Employers should ensure that non-FMLA leave policies don't permit an employee to elect to take non-FMLA leave when they are otherwise eligible and qualified for FMLA leave.
- It is unclear how an arbitrator would resolve a conflict between language in a collective bargaining agreement and the DOL's guidance. If you are in this situation, then your attorney is probably already involved and certainly should be.
- If an eligible employee who qualifies for FMLA leave declines FMLA and instead requests a non-FMLA leave of absence, or requests the opportunity to use vacation or paid time off to cover an FMLA qualifying absence, we would recommend consultation with legal, in light of the DOL's most recent opinion letters.

If you have any questions about FMLA leave, please contact **Brian Sabey** at (720) 282-2025 or briansabey@hallrender.com or your regular Hall Render attorney.

To learn more about our Human Resources Consulting services, click [here](#).