What Do You Do When Your Employee Doesn't Want to Count Leave Against FMLA Entitlement?

June 13, 2019

A couple common scenarios:

- Your longtime employee, Karen, tells you that she wants to take leave to care for her sick husband—leave that would certainly constitute "qualifying leave" under the Family and Medical Leave Act ("FMLA") as you are a "covered" employer under the FMLA and Karen is eligible for the leave. However, Karen tells you that she doesn't want you to certify it as FMLA leave *just yet* because she is pregnant and she wants to "save" all of her 12 weeks of FMLA leave until after her baby is born. Karen says she will even take the first leave on an unpaid basis, just as long as she still has 12 weeks of protected leave when she comes back.
- Your employee, Rob, wants to take leave for a planned surgery, but tells you that he wants to take all of his available paid time off "first" and wants you to delay certifying the leave as FMLA leave until after he has run out of paid time off.

What should you do? Under circumstances like these, can you delay designating either of these leaves as FMLA leave since Karen and Rob have asked that you do so?

On March 14, 2019, the Department of Labor (DOL) issued an opinion letter that provides needed clarity. The opinion letter was issued in response to an employer's queries as to (1) whether it could delay designating an employee's paid leave as leave under the FMLA or (2) whether it could permit employees to expand their FMLA leave beyond the statutory 12-week entitlement.

The DOL noted that pursuant to the applicable regulation, 29 C.F.R. § 825.300(d)(1), the employer is responsible in all circumstances for properly designating any leave that qualifies under FMLA and providing notice of the designation to the employee. Unless extenuating circumstances exist, employers must send the employee a "designation notice" *within five business days after the employer has enough information to determine whether the leave is being taken due to a FMLA-qualifying reason*. If an employer fails to provide the designation notice within five business days, then the employer could be seen as interfering, restraining, or

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denying an employee's FMLA rights and leave.

According to the DOL, this means that employers must designate FMLA-qualifying leave as such as soon as they have enough information to do so and must deduct that leave from the employee's total FMLA allotment "even if the employee would prefer that the employer delay the designation." Employees may not take paid leave to *defer* the designation of FMLA protected leave. Rather, employers may permit employees to save their available PTO and take it after their FMLA-designated leave has been exhausted.

Wisconsin employers should know that employees in this state have the right to decide whether Wisconsin Family and Medical Leave Act ("WFMLA") leave will be used or not during a period of absence *unless the employer leave to be used by the employee (such as FMLA leave) and the WFMLA leave are for the same reasons*. If the FMLA leave is for the same reason as potential WFMLA leave, then the FMLA leave will be viewed as an election to use WFMLA leave as well.

Importantly, the DOL opinion letter reminds employers that while the FMLA grants eligible employees 12 weeks of leave in a year, there is nothing in the law that prevents employers from providing additional leave to their employees, so long as they don't label that expanded leave as FMLA leave. An employer thus may adopt a policy providing more generous personal leaves to its employees, or it may allow an employee to use available paid time off ***after*** his or her FMLA leave allotment has been exhausted. The important distinction is that an employer cannot designate more than 12 weeks of leave (or 26 weeks of leave for military caregiver leave) as FMLA leave.

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