DOL Reiterates That Employees Can't Decline Federal FMLA

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Posted By: Jill Pedigo Hall

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When addressing employee's medical issues, employers frequently ask if the employer must designate FMLA qualifying leave as FMLA leave or conversely, whether an employee can decline FMLA leave. The questions are asked despite the FMLA clearly stating that "once the employer has acquired knowledge that the leave is being taken for an FMLA-qualifying reason, the employer must [designate the absence as FMLA leave]." 29 C.F.R. 825.301(a). In Opinion Letter FMLA2019-1A, the Department of Labor ("DOL") expounded upon the requirement that an employer must designate qualifying leave as federal FMLA leave. The agency succinctly and directly answered the designation questions, stating:

> Once the employer has enough information to make this determination (that leave is for an FMLA-qualifying reason), the employer must, absent extenuating circumstances, provide notice of the designation within five business days. 29 C.F.R. § 825.300(d) (1). Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation. *(Emphasis added.)*

For employers subject to the federal FMLA, this signals the need to ensure you are in compliance with the federal FMLA, designating all qualifying leave. Generally, an employer is a "covered employer" under the federal FMLA if it is a private employer employing 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Public agencies, and public as well as private elementary and secondary schools are also covered employers without regard to the number of employees.

The DOL directive, however, does not address employer compliance with other State medical leave laws including the Wisconsin FMLA. Under Wisconsin law, the employee may determine if WFMLA leave will be used during the absence period unless the employer leave to be used by the employee and the WFMLA leave are for the same reasons. Then, the employee use of employer leave will be viewed as an election to use WFMLA leave for the period of absence. This may result in a federal/Wisconsin difference in the use, and availability, of FMLA leave. Additionally, for employers in one of the nine states falling within the jurisdiction of the 9th Circuit Court of Appeals, this Opinion Letter rebukes that Court's decision in *Escriba v. Foster Poultry Farms*, which decided that an employee actually can decline FMLA leave and use paid leave instead, even though the underlying reason for leave would have been FMLA-qualifying leave. Employers within that jurisdiction may wish to consult with counsel if faced with an employee who is refusing to use FMLA for qualifying time off.

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