

Employers Must Comply with FMLA Leave Designation Rules

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Employers seeking to juggle employee leave demands with their own regulatory compliance obligations received clarification from the U.S. Department of Labor (DOL). Specifically, the DOL published a clarifying opinion letter regarding the issue of whether an employer may delay the designation of leave that qualifies under the Family and Medical Leave Act (FMLA) and provide employees with leave beyond the 12-week statutory entitlement. The DOL ruled the employer cannot delay the designation.

This scenario usually arises when either employers or employees seek to utilize other paid benefits available under an employer's policies *before* designating a leave as FMLA-covered. This essentially allows an employee to increase the duration of their leave beyond the 12-week statutory entitlement. In its opinion letter, the DOL concluded that an employer cannot delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation. The DOL also concluded that an employer is prohibited from designating more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave.



The opinion letter traces the history of the regulations issued by the DOL after the enactment of the FMLA. In particular, the DOL noted that the responsibility lies with an employer in all circumstances for designating leave as FMLA-qualifying and once the employer has enough information to make the determination, they must give notice of the designation to the employee within five (5) business days, absent extenuating circumstances. See 29 C.F.R. Section 825.300 (d)(1). The DOL concluded an employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation. The DOL also cited Eleventh Circuit precedent holding that the employer may not choose whether an employee's FMLA-qualifying absence is protected or unprotected by the FMLA. Allowing an employee to delay the designation and instead

utilize available paid time off benefits—such as vacation or PTO—effectively compromises the employer’s obligation to designate leave and permits an employee to extend the FMLA benefit beyond 12 weeks. *Citing* 29 C.F.R. Section 825.220 (d), the DOL concluded that once an eligible employee communicates a need for leave under the FMLA, neither the employee nor the employer may decline FMLA protection for that leave. In issuing the advisory opinion, the DOL also affirmatively cited *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81, 93-94 (2002): “[T]he 12-week figure was a result of compromise between groups with marked but divergent interests in the contested provision --- courts and agencies must respect and give effect to these sorts of compromises.”

Employees may offer a variety of reasons for asking an employer to delay the designation of FMLA or not to designate at all. One common example involves situations where an employee is pregnant and incurs a pre-delivery medical issue which qualifies for leave under the FMLA. Under the DOL’s opinion letter, the employer cannot delay the designation even though the employee wishes to preserve the entire 12-week entitlement following the birth of their child. In another scenario, an employee might approach their employer with a request to delay the designation because they are seeking leave for more than 12 weeks. While these requests may sound reasonable, employers must adhere to the FMLA designation rules.

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