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FMLA Qualifying Leave Must Be Under the FMLA

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Employers cannot permit employees to use PTO or other paid leave prior to using unpaid FMLA leave for an FMLA qualifying condition, according to a new Department of Labor Opinion Letter. The Opinion Letter also provides that employers cannot designate more than 12 weeks of leave per year as FMLA (or 26 weeks per year if leave qualifies as FMLA military caregiver leave).

FMLA-Qualifying Leave Must Run Concurrently With Paid Leave Policies

Under the FMLA, covered employers must provide eligible employees up to 12 weeks of unpaid, job and benefit-protected leave per year for qualifying medical or family reasons (or up to 26 weeks per year for qualifying military caregiver leave). The Opinion Letter addresses the situation where an employee anticipates a leave of absence for an FMLA-qualifying reason and the employee wants to take off more than the 12 weeks allotted under the FMLA by using other available paid leave policies (such as vacation, sick pay, PTO, etc.) at their disposal. Under this scenario, the employee notifies the employer that he or she plans to exhaust an available paid leave policy first for an FMLA-qualifying reason, and then after that time has run out, he or she desires to take the 12 weeks of FMLA leave.

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In the Opinion Letter, the DOL rejected this practice, stating that the FMLA precludes employees from taking advantage of paid leave policies for FMLA-qualifying reasons before designating FMLA leave. The Opinion Letter makes clear that once an employer learns that an employee's absence qualifies for FMLA leave, the employer must start counting that absence against the employee's 12 weeks under the FMLA and give notice to the employee of such designation within five business days thereafter. In fact, according to the DOL, it is not acceptable to delay FMLA leave in favor of a paid time off policy even if the employer and employee both desire to do so because the employee would lack the substantive protections of the FMLA during the period of time that they were exhausting a paid-time off policy. To avoid confusion, the Opinion Letter confirms that an employer may require, or an employee may elect, to substitute a paid time off policy to cover all or part of an unpaid FMLA leave; however, the paid leave must run concurrently with unpaid FMLA leave.

FMLA Leave Is Limited to 12 (or 26) Weeks

The Opinion Letter also prohibits an employer from designating more than 12 weeks of FMLA leave in a year. In other words, while employers may offer employees paid leave policies that provide greater rights and protections than the FMLA, FMLA leave is limited to 12 (or 26) weeks and cannot be expanded.

Takeaways

All personnel in charge of implementing and administering leave policies and requests should be made aware of the DOL's position in the Opinion Letter. As a result of this Opinion Letter, employers should review and update relevant leave policies to ensure, among other things, that practices are in place to make the correct leave designation promptly so that employees are afforded the full protection of FMLA as soon as they are eligible. Employers should also be sure to count time off for FMLA-qualifying reasons against the employee's annual FMLA leave

allotment and notify the employee that it is doing so, even if the employee is taking leave concurrently under an available paid time off policy.

For employers in the Ninth Circuit (covering Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington), the Opinion Letter explicitly rejects the 2014 decision in *Escriba v. Foster Poultry Farms, Inc.* In *Escriba*, the U.S. Court of Appeals for the Ninth Circuit held that an employee could decline to begin using available FMLA leave until the employee exhausted leave available under other employer policies. Although the Opinion Letter is not binding authority and does not reverse the Ninth Circuit's *Escriba* decision, employers should be aware that a court revisiting this issue may defer to the DOL's new guidance. Given the opposing views taken by the DOL and the Ninth Circuit on this issue, employers in the Ninth Circuit should consult legal counsel on how to best navigate this discrepancy. However, employers in other jurisdictions may rely on the DOL's pronouncement as a defense in litigation that it was acting in good faith reliance on the Opinion Letter when making FMLA decisions.

As a final note, employers should be mindful of their responsibilities and obligations under other laws such as the Americans with Disabilities Act (ADA) and analogous state law to provide additional leave when appropriate as a reasonable accommodation. Such additional leave may extend *beyond* the number of weeks available for leave under FMLA. For assistance with complicated ADA and FMLA leave issues, contact your Akerman employment lawyer.

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the information contained in this email without seeking the advice of legal counsel.