

By Your Leave: FMLA Starts Immediately, Whether the Employee Wants it or Not

March 15, 2019

Employers have been grappling with the intricacies of the Family and Medical Leave Act for over 25 years. As employers know, the FMLA provides for up to 12 weeks of unpaid leave in a 12 month period for certain qualifying family, medical, or military reasons. Employers (or employees) can choose to substitute some of those unpaid weeks as paid leave by using available sick, vacation, or other benefit time. For example, if an employee has four weeks of accrued but unused vacation time, either the employer or employee may direct that four weeks of the 12 weeks of FMLA leave will be paid by drawing against that accrued time.

However, what happens when an employee notifies the employer of the need for a leave which the employer knows would qualify for FMLA, but directs the employer not to charge it against FMLA, preferring instead to use benefit time first? Does the employee have leave to delay FMLA leave?

The U.S. Department of Labor ("DOL") has now emphatically answered this question: NO! In an opinion letter on March 14, 2019, DOL stated that when an employer has been presented with facts indicating that a leave is FMLA-qualifying (for example, for the employee's own serious health condition), the employer MUST designate the leave as FMLA leave and start the 12 week clock. Whether the employer will require the employee to use paid time during that period (most employers do), or allow the employee to tack on that paid leave at the end of FMLA leave (if the employee wants it that way), is a separate matter. The 3-page opinion letter can be found here: https://www.dol.gov/whd/opinion/FMLA/2019/2019_03_14_1A_FMLA.pdf

Remember that it is the employer's responsibility to recognize that a leave may be FMLA-qualifying. The employee need not mention the FMLA or even be aware of its existence, but the employer must recognize the leave request for what it is.

The bottom line is that employers may not permit, and employees may not request, that FMLA leave be delayed for any reason.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of employment law, please contact Thomas B. Wassel at (516) 357-3868 or twassel@cullenanddykman.com, or Gary Fishberg at (516) 357-3703 or gfishberg@cullenanddykman.com.

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