

## DOL Opinion Letter Addresses Paid Leave Under FMLA

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Sick leave and FMLA leave must run concurrent.

So says the the U.S. Department of Labor's Wage and Hour Division, [which said Thursday](#) that employers cannot allow an employee to exhaust all sick or paid leave time before designating remaining leave as Family and Medical Leave Act (FMLA) time.

The DOL issued an opinion letter addressing whether an employer may delay designating paid leave as FMLA or permit employees to expand their FMLA leave beyond the statutory 12-week entitlement. The letter was prompted by an inquiry regarding a group of employers who voluntarily permit employees to exhaust some or all available paid sick (or other) leave prior to designating the leave as FMLA-qualifying even when the leave clearly qualifies as FMLA.

The DOL concluded that an employer may not delay the designation of FMLA-qualifying leave or designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA. The new opinion letter made clear that once the employer is aware that the leave is for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. Consequently, the employer must designate the time off as FMLA and may not delay the designation until paid sick or other paid leave is exhausted.

The DOL also noted that while an employer may provide additional leave outside of the 12-week entitlement under the FMLA, it cannot expand FMLA leave beyond the act's 12 provided weeks (or 26 weeks for military caregiver leave). So if an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave must be counted concurrent with the FMLA towards the employee's 12-week (or 26-week) FMLA entitlement.

It is critical that employers designate any leave that qualifies as FMLA upfront. It is the employer's responsibility in all circumstances to designate the leave and the regulations require employers to provide a written "designation notice" to an employee. The notice must be provided within five business days after the employer has enough information to determine that the leave qualifies as FMLA. This recent opinion letter makes clear the DOL's position that an employer cannot delay designating FMLA leave until an employee exhausts his/her paid time off, including sick leave. Rather, the employer must concurrently designate the time as both paid time off and FMLA leave.

Our practice group regularly reviews FMLA policies and provides advice to employers on FMLA issues. Please [contact me](#) or any member of the [employment law group](#) for assistance.

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