



FMLA2019-1-A

March 14, 2019

Dear **Name***:

This letter responds to your request for an opinion on whether an employer may delay designating paid leave as Family and Medical Leave Act (FMLA) leave or permit employees to expand their FMLA leave beyond the statutory 12-week entitlement. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You represent that some employers “voluntarily permit[] employees to exhaust some or all available paid sick (or other) leave prior to designating leave as FMLA-qualifying, even when the leave is clearly FMLA-qualifying.” You state that employers justify this practice by relying on 29 C.F.R. § 825.700, which provides in relevant part that “[a]n employer must observe any employment benefit or program that provides greater family and medical leave rights to employees than the rights provided by the FMLA.” You ask whether it is indeed permissible under this provision for an employer to delay the designation of FMLA-qualifying paid leave as FMLA leave or to provide additional FMLA leave beyond the 12-week FMLA entitlement.

GENERAL LEGAL PRINCIPLES

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. 29 U.S.C. § 2612(a).¹ The employer may require, or the employee may elect, to “substitute” accrued paid leave (*e.g.*, paid vacation, paid sick leave, etc.) to cover any part of the unpaid FMLA entitlement period. *Id.* at § 2612(d)(2).²

The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee. 29 C.F.R. § 825.300(d)(1). WHD’s regulations require employers to provide a written “designation notice” to an employee within five business days—absent extenuating circumstances—after the employer “has enough information to determine whether the leave is being taken for a FMLA-qualifying reason.” *Id.*

¹ Although employees are generally entitled to 12 weeks of leave, the FMLA provides that an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious illness or injury may take up to 26 weeks of leave during a single 12-month period to care for the servicemember. *See* 29 U.S.C. § 2612(a)(3). WHD refers to this type of leave as “military caregiver leave.”

² Under the FMLA, “[t]he term substitute means that the paid leave provided by the employer ... will run *concurrently* with the unpaid FMLA leave.” 29 C.F.R. § 825.207(a) (emphasis added).

Failure to follow this notice requirement may constitute an interference with, restraint on, or denial of the exercise of an employee’s FMLA rights. 29 C.F.R. §§ 825.300(e), 825.301(e).

Nothing in the FMLA prevents employers from adopting leave policies more generous than those required by the FMLA. 29 U.S.C. § 2653; *see* 29 C.F.R. § 825.700. However, an employer may not designate more than 12 weeks of leave—or more than 26 weeks of military caregiver leave—as FMLA-protected. *See, e.g., Weidner v. Unity Health Plans Ins. Corp.*, 606 F. Supp. 2d 949, 956 (W.D. Wis. 2009) (citing cases for the principle that “a plaintiff cannot maintain a cause of action under the FMLA for an employer’s violation of its more-generous leave policy”); *cf. Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (“[T]he 12-week figure was the 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.”); *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204–06 (11th Cir. 2001) (“Congress intended that the FMLA provide employees with a minimum entitlement of 12 weeks of leave, while protecting employers against employees tacking their FMLA entitlement on to any paid leave benefit offered by the employer.”).

OPINION

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 leave.

First, an employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. *See* 29 C.F.R. § 825.220(d) (“Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA.”); *Strickland v. Water Works and Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204 (11th Cir. 2001) (noting that the employer may not “choose whether an employee’s FMLA-qualifying absence” is protected or unprotected by the FMLA). Accordingly, when an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected and counts toward the employee’s FMLA leave entitlement. *See* 29 C.F.R. § 825.701(a) (“If leave qualifies for FMLA leave ... the leave used counts against the employee’s entitlement ...”); WHD Opinion Letter FMLA2003-5, 2003 WL 25739623, at *2 (Dec. 17, 2003) (“Failure to designate a portion of FMLA-qualifying leave as FMLA would not preempt ... FMLA protections ...”).³ Once the employer has enough information to make this determination, 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.

An employer is also prohibited from designating more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave. *See, e.g., Weidner*, 606 F. Supp. 2d at 956; *cf. Ragsdale*, 535 U.S. at 93–94; *Strickland*, 239 F.3d at 1204–06. Of course, “[a]n employer must

³ WHD therefore disagrees with the Ninth Circuit’s holding that an employee may use non-FMLA leave for an FMLA-qualifying reason and decline to use FMLA leave in order to preserve FMLA leave for future use. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014).

observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA.” 29 C.F.R. § 825.700. But providing such additional leave outside of the FMLA cannot expand the employee’s 12-week (or 26-week) entitlement under the FMLA. *See, e.g. Weidner*, 606 F. Supp 2d at 956. Therefore, if an employee substitutes paid leave for unpaid FMLA leave, the employee’s paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement.

We trust that this letter is responsive to your inquiry.⁴

Sincerely,



Keith E. Sonderling
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

⁴ WHD rescinds any prior statements in previous opinion letters that are inconsistent with this opinion. *See* WHD Opinion Letter FMLA-67, 1995 WL 1036738, at *3 (July 21, 1995); WHD Opinion Letter FMLA-49, 1994 WL 1016757, at *2 (Oct. 27, 1994).