



FMLA2019-3-A

September 10, 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 if the delay complies with a collective bargaining agreement (CBA) and the employee prefers that the designation be delayed. 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

Your employer is a local government public agency. You state that the employees at your workplace are subject to CBAs that provide job protection when they use employer-provided paid leave for certain medical and family reasons. Under these CBAs, you represent that employees may, or under one of these CBAs employees must, delay taking unpaid leave, including unpaid FMLA leave, until after CBA-protected accrued paid leave is exhausted. Furthermore, you state that the period covered by the CBA-protected accrued paid leave "is treated as continuous employment" without affecting an employee's seniority status under state civil service rules. You suggest that this is not the case for a period of unpaid leave, including unpaid FMLA leave. Thus, you assert that the CBAs provide "for a greater benefit" to employees and, therefore, employees would prefer to postpone using unpaid FMLA leave until after they have used their paid leave.

You state that your employer recently announced a change in its leave policy, relying on guidance in WHD Opinion Letter FMLA2019-1-A, issued on March 14, 2019. Per your employer's new policy, as soon as your employer becomes aware that an employee needs leave for an FMLA-qualifying reason, it will inform the employee of his or her rights under the FMLA and may require that when the employee takes CBA-protected accrued paid leave, such leave will be designated as FMLA leave, *i.e.*, that the leave is concurrently CBA-protected paid leave and FMLA leave. You ask whether your employer must designate FMLA-qualifying leave as FMLA leave when an employee would prefer to delay the start of FMLA leave, particularly in light of your concern that taking FMLA leave before taking accrued paid leave may negatively impact the employee's seniority status under the applicable CBA and state civil service rules, as determined by your state's civil service commission.

GENERAL LEGAL PRINCIPLES

The FMLA provides eligible employees of covered employers with up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. *See* 29 U.S.C. § 2612(a).¹ The FMLA provides that an employer may require, or the employee may elect, to “substitute” accrued paid leave to cover any part of the unpaid FMLA entitlement period. *See* 29 U.S.C. § 2612(d)(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).

Within five business days of learning of a FMLA-qualifying leave request from an employee, an employer must provide critical information to the employee about the FMLA, *e.g.*, whether the employee is eligible for FMLA leave, whether the employee has to obtain a medical certification, and whether the employee has to make arrangements for health insurance to continue. *See* 29 C.F.R. §§ 825.300, 825.301. The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and giving notice of the designation to the employee in writing. *See* 29 C.F.R. § 825.300(d). Failure to follow the FMLA’s notice requirements may constitute an interference with, restraint on, or denial of the exercise of an employee’s FMLA rights. *See* 29 C.F.R. §§ 825.300(e) and 825.301(e).

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* WHD Opinion Letter FMLA2019-1-A, 2019 WL 1514982, at *2 (Mar. 14, 2019) (*citing* 29 C.F.R. § 825.220(d) and *Strickland v. Water Works, Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1204 (11th Cir. 2001)).² Thus, an employer may not delay the designation of FMLA-qualifying leave as FMLA leave. *See id.*

An employee’s entitlement to benefits other than group health benefits, such as the accrual of seniority, during a period of FMLA leave is determined by the employer’s established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as relevant). *See* 29 C.F.R. § 825.209(h).³ If the employer’s established leave policies do not permit the accrual of seniority during an unpaid leave of absence, for instance, these same policies would apply to unpaid FMLA leave. *See* WHD Opinion Letter FMLA-109, 2000 WL 33157360 at *1 (Sept. 8, 2000). However, if the employer’s established leave policies do

¹ Although employees are generally entitled to up to 12 weeks of leave, the FMLA provides that an eligible employee who is a spouse, child, 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 As noted in FMLA2019-1-A, WHD disagrees with the Ninth Circuit’s holding that an employee may decline to use FMLA leave for an FMLA-qualifying reason in order to preserve FMLA leave for future use. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014).

³ In addition, any benefits an employee accrues prior to a period of FMLA leave cannot be lost as a result of the leave and must be available to the employee when he or she returns from leave. *See* 29 U.S.C. § 2614(a)(2); 29 C.F.R. § 825.215(d)(2).

provide for the accrual of seniority during a paid leave of absence, then the employer must permit, consistent with its policies, the accrual of seniority during any portion of FMLA leave that is substituted for paid leave, *i.e.*, during FMLA leave that runs concurrently with paid leave. *See id.* In other words, an employer may not treat employees who take FMLA leave in a manner that discriminates against them. *See* 29 U.S.C. § 2615; 29 C.F.R. §§ 825.209(h), 825.220(c) (“For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave.”).⁴

The FMLA applies in addition to or along with an employer’s policies or any CBAs. Employers may adopt, retain, or amend leave policies, including policies that provide more generous leave, as long as they comply with the FMLA. Moreover, the terms of any employment practice, policy, benefit program, or plan, including a CBA, may not reduce or deny FMLA benefits and protections. *See* 29 U.S.C. §§ 2652-53; 29 C.F.R. § 825.700.

OPINION

Once your employer has enough information to determine that an employee’s leave request qualifies as FMLA leave, your employer must designate the leave as FMLA leave. As noted in WHD Opinion Letter FMLA2019-1-A, once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, an employer may not delay designating such leave as FMLA leave, and neither the employee nor the employer may decline FMLA protection for that leave. *See* WHD Opinion Letter FMLA2019-1-A, at *1; *see also* 29 C.F.R. § 827.700(a) (“[T]he rights established by the Act may not be diminished by any employment benefit or program” including a CBA); 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”). This is the case, for instance, even if the employer is obligated to provide job protections and other benefits equal to or greater than those required by the FMLA pursuant to a CBA or state civil service rules. *See* 29 U.S.C. §§ 2652-53; 29 C.F.R. § 825.700.

You have indicated that your employer now requires employees to substitute FMLA leave for accrued paid leave, which means that the leave is both FMLA leave and CBA-protected paid leave. If, pursuant to a CBA and other policies, your employer provides for the accrual of seniority when employees are utilizing accrued paid leave, it must permit employees to accrue seniority when they are substituting FMLA leave for paid leave. Failure to permit an employee to accrue seniority when the employee is substituting FMLA leave for accrued paid leave, if the employee would otherwise be permitted to accrue seniority when utilizing accrued paid leave, would constitute interference with the employee’s FMLA rights, in violation of section 105(a) of the Act. *See* 29 U.S.C. § 2615(a); 29 C.F.R. §§ 825.209(h), 825.220(c). Thus, your employer is properly applying the FMLA by requiring that FMLA-qualifying leave be designated as FMLA

⁴ We acknowledge that the statute explicitly provides that an employee may, but is not entitled to, accrue seniority while taking FMLA leave. *See* 29 U.S.C. § 2614(a)(3); 29 C.F.R. § 825.215(d)(2). However, the prohibition against discriminating against employees who take FMLA leave described above, which also appears in the statutory text, *see* 29 U.S.C. § 2615, requires that the employer’s established policy for providing benefits when the employee is on other forms of leave (paid or unpaid, as relevant to the circumstances) be applied to FMLA leave.

leave. However, given your employer's policies regarding accrual of seniority, when an employee takes FMLA leave that runs concurrently with CBA-protected accrued paid leave, the employee's seniority status would be the same as it would if the employee took only CBA-protected accrued paid leave.⁵

We trust that this is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Cheryl M. Stanton", followed by a horizontal line.

Cheryl M. Stanton
Administrator

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

⁵ We offer no opinion regarding whether the CBAs at issue, as you have explained their operation prior to your employer's new policy adopted in light of WHD Opinion Letter FMLA2019-1-A, were compliant with the FMLA.