

Employers May Not Delay Designating FMLA Leave or Expand FMLA's 12-week Statutory Entitlement, DOL Says

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Executive Summary

The Wage and Hour Division of the U.S. Department of Labor (“WHD”) recently released an opinion letter addressing whether an employer may (1) delay designating paid leave as Family and Medical Leave (“FMLA”) or (2) permit employees to expand their FMLA leave beyond the 12-week statutory entitlement. According to the WHD, employers may not do either.

An employer may not wait to designate leave as FMLA-qualifying, i.e. an employer may not voluntarily permit its employees to exhaust some or all available paid sick (or other leave) prior to designating leave as FMLA leave. This is because, according to the WHD, once an eligible employee communicates to his or her employer a need to take leave for a FMLA-qualifying reason, neither the employee nor the employer can decline FMLA protection for that leave. As soon as the employer determines that the leave requested is for an FMLA-qualifying reason, the leave is FMLA-protected and counts toward the employee’s 12-week FMLA entitlement. Additionally, under WHD’s regulations, once an employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason, an employer is required to provide written “designation notice” to an employee within five business days, absent extenuating circumstances. Accordingly, an employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation.

An employer may also not designate more than 12 weeks of leave as FMLA leave. While, according to WHD regulations, an employer must “observe any employment benefit or program that provides greater family medical leave rights to employees than the rights provided by the FMLA,” this does not mean that an employer can expand an employee’s 12-week entitlement under the FMLA. Accordingly, if an employee substitutes paid leave for unpaid FMLA, the employee’s paid leave will count toward the employee’s 12-week entitlement under the FMLA.

FMLA leave entitlement and procedures are often misunderstood. Should you have any questions on FMLA rights, process or procedures, please contact your Masuda Funai relationship attorney.