

Electronic Alert

Volume 22, Issue 5

March 18, 2019

Not So Fast: One More Thing For Your Updated FMLA Policy

By Trevor Caldwell & Charlotte Hodde

Do you still have FMLA on the brain after last Tuesday's breakfast seminar? An opinion letter out late last week from the U.S. Department of Labor (DOL) might have you unnecessarily reaching for the red pencil. The letter explains the DOL's position that employees cannot opt to use accrued paid leave (think PTO and paid sick leave) before starting the clock on their 12 weeks of FMLA leave. The DOL insists FMLA must run concurrently with any paid leave if the employee would otherwise be entitled to FMLA-protected leave and that the employee cannot decline FMLA.

But the DOL opinion letters are merely advisory and do not overturn decisions from federal courts. And it just so happens there is a contradictory opinion on this exact question from the United States Court of Appeals for the 9th Circuit.

Since 2014, the 9th Circuit has held that an employer must permit employees to voluntarily decline FMLA and instead use available paid leave even if the leave is FMLA-qualifying. In other words, since 2014 it has been legal for an employee to decline to start FMLA leave and use paid time off provided by the employer instead even during a FMLA-qualifying absence.

This means Oregon employers need to follow the 9th Circuit and allow employees to decline the use of protected leave while they exhaust their paid leave banks. The same goes for Oregon Family Leave Act (OFLA) leave, as well since the Oregon Bureau of Labor and Industries (BOLI) enforces OFLA in precisely the same manner.

Where does that leave us? A policy that requires the concurrent use of paid leave and FMLA leave for a FMLA-qualifying condition is legal. But such policies cannot be enforced if the employee rejects the application of FMLA to the absence. Conversely, policies that allow employees to decline starting FMLA leave even when they qualify and instead use paid leave to cover their absences are also legal.

Best practice is for the employer to designate every qualifying leave as OFLA/FMLA. However, if an employee declines FMLA for a qualifying absence, the employer should inform the employee in writing that his or her absence will not be protected under OFLA/FMLA and will be subject to the company's normal attendance policies. If the employee still requests to use only paid leave and not accept the protections of OFLA/FMLA, the employer should honor that request. Taking these steps will significantly reduce the risk of an employee later claiming that he or she was either entitled to more leave than allowed by FMLA and OFLA or that he or she should not have been subject to the employer's normal attendance policies when absent due to a FMLA-qualifying condition when they declined FMLA's protections. For questions on FMLA or OFLA leave and accommodation requirements, contact Trevor Caldwell at tcaldwell@barran.com or (503) 276-2117 and Charlotte Hodde at chodde@barran.com or (503) 276-2102.