

CLIENT ALERT

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**WITHOUT DELAY, IT'S FMLA:
Neither an Employer Nor an Employee May Decline the
FMLA-Designation of FMLA-Qualifying Leave**

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The Family and Medical Leave Act (FMLA) grants eligible employees up to 12 weeks of unpaid, job-protected leave per year for certain family or medical reasons.¹ In addition to FMLA leave, many employers provide employees with paid time off (PTO) benefits, like vacation time, personal time, or sick time.

May employees choose to take PTO for an FMLA-qualifying reason, rather than designate their leave as FMLA leave? May employees extend their FMLA entitlement by taking PTO before FMLA leave kicks in or after it is exhausted?

On March 14, 2019, the United States Department of Labor's Wage and Hour Division (DOL) released an opinion letter² and answered both of these questions with a resounding No.

"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....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)

entitlement and does not expand that entitlement."

The DOL expressly noted its disagreement with a 2014 ruling of the United States Court of Appeals for the Ninth Circuit that held that an employee could take vacation time before tapping into FMLA leave.³

Despite how it sounds, the DOL's position is not "12 weeks is 12 weeks." Employers still may offer PTO and unpaid leave programs that provide greater protections than the FMLA. In fact, employers may be legally obligated to provide leave beyond 12 weeks as a reasonable accommodation under the Americans with Disabilities Act. Employers simply cannot designate more than 12 weeks as FMLA leave.

Sometimes the road to Hades is paved with good intentions. To avoid interference or retaliation claims, you may have to set some of those good intentions aside and strictly apply the FMLA requirements.

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¹ Leave can be up to 26 weeks for military caregivers.

² See FMLA2019-1-A. Opinion letters are not binding on courts, but they may assist employers in defending employees' claims.

³ Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1244 (9th Cir. 2014).