DOL Provides Helpful Guidance on FMLA Leave and Volunteer Work

The U.S. Department of Labor ("DOL") reinstated opinion letters in June 2017. This is a positive development for employers because of the guidance these letters provide.

An opinion letter is an official, written opinion by the Wage and Hour Division of how a law applies in specific circumstances. The letters were a division practice for more than 70 years. They stopped and were replaced by general guidance in 2010.

Recent Guidance on the Family and Medical Leave Act ("FMLA")

On March 14, 2019, the DOL issued two opinion letters. One pertained to the FMLA. The question presented to the DOL was two-fold. First, an employer asked whether it may "delay designating paid leave as FMLA leave?" The second question was whether an employer may expand its FMLA leave beyond the statutory 12-week entitlement. In both instances, the employer sought to justify these more generous, flexible treatments of FMLA leave based on 29 C.F.R. § 825.700 which provides in relevant part that "[a]n employer must observe any employment or benefit or program that provides greater family and medical leave rights to employees than the rights provided by the FMLA."

Employers May Not Delay Designating Paid Leave as FMLA Leave

Some employers voluntarily permit their employees to exhaust some or all available sick leave (or other) leave prior to designating leave as FMLA-qualifying, even when the leave is clearly FMLA-qualifying. The recent DOL opinion letter says this practice is not permitted.

The DOL opinion letter is grounded in a plain reading of the statute's regulations. 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. 29 C.F.R. § 825.220(d). There are no exceptions to this regulation. Accordingly, when an employer determines that leave is for an FMLA-qualifying reason, the qualifying leave is FMLA-protected, and it must count toward the employee's FMLA leave entitlement. 29 C.F.R. § 825.701(a). Employers have five (5) days under the FMLA to designate leave as FMLA qualifying and, absent extenuating circumstances, employers must comply with this five (5) day requirement. 29 C.F.R. § 825.3009d)(1). This is the case even if the employee would prefer that the employer delay the designation.

Employers May Not Designate More than 12 Weeks of Leave (or 26 Weeks of Military Caregiver Leave) as FMLA Leave

There is nothing in the recent DOL opinion letter that prevents employers from providing employees with paid leave or unpaid leave that is more generous than 12 weeks. However, only 12 weeks of any leave may be designated as FMLA leave. The DOL grounded this opinion in three court cases, including

one out of the 7th Circuit: 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"). Employers that want to be more generous can still be so. But they have to understand that their additional leave cannot be classified as FMLA leave.

Employers May Bonus Employees Who Provide Volunteer Services Without Fear of FLSA Repercussions.

The second DOL letter issued this March pertains to employers who provide bonuses for their employees who engage in volunteer work. The general rule is that a person is not defined as an "employee" under the FLSA if the individual volunteers without contemplation or receipt of compensation.

In the fact pattern presented to the DOL, an employer provided an optional community service program for its employees. Under this program, employees selected their own volunteer programs, and the employer compensated those employees for the time they spent on volunteer activities during working hours, although much of the volunteer time occurred off-working hours. At the end of the year, the employer rewarded the group of employees with the most volunteer activities with a bonus. No employee was required to participate in the program.

The DOL said that employers may use an employee's time spent volunteering as a factor in calculating whether to pay the employee a bonus, without incurring an obligation to treat that time as "hours worked," so long as: (1) volunteering is optional,

(2) not volunteering will have no adverse effect on the employee's working conditions or employment prospects, and (3) the employee is not guaranteed a bonus for volunteering. This is good news for employers that are civic minded and want to promote volunteerism.

Employer Takeaways

Our favorite adage is "no good deed goes unpunished." The opinion letter pertaining to the FMLA is evidence of that as it restricts employers even though they may wish to be more generous. On the other hand, the FLSA opinion letter allows more flexibility to employers who want to encourage volunteer activities. The ongoing issuance of DOL opinion letters is helpful for employers because employers want to follow the law – they just need to know what the law is.

Ross I. Molho
Clingen Callow & McLean, LLC
2300 Cabot Drive, Suite 500
Lisle, Illinois 60532
www.ccmlawyer.com
(630) 871-2614