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Employment Law Note

April 2019

This is the Article's Title

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The Federal Medical Leave Act provides for 12 weeks of unpaid, but job-protected, leave for employees' family and medical reasons. Employers often provide employees with other forms of leave, which are paid, to allow them to care for themselves or their family members. The issue that is often presented is whether an employee can choose whether or not to invoke their rights pursuant to the FMLA if they have other leave available.

It was common practice that employers who provided paid leave required that the unpaid FMLA leave ran concurrently with the paid time off so that employees were given an opportunity to take paid time off, but no more than mandated by the law – 12 weeks. That was until employees were given the option to opt out of taking paid time off concurrently with FMLA leave.

The Case: *Escriba v. Foster Poultry Farms, Inc.,* (9th Cir. 2014)

In *Escriba*, the Federal Court of Appeals for the Ninth Circuit held that employers can no longer require employees to take FMLA leave concurrently with other leaves they may be eligible for, such as vacation, sick, PTO, etc. Instead, employees would be allowed to choose to take their paid time off without invoking their Family Medical Leave even when the reason for the leave was FMLA qualifying. For example, if an employee has a qualifying medical condition for FMLA leave but chooses to use his or her PTO for that time, they are then eligible to take an additional 12 weeks, though unpaid, of FMLA leave for the same or different medical condition.

The 2019 DOL Advisory Letter

On March 14, 2018, the DOL issued an opinion letter in which it rejects the Ninth Circuit's holding in *Escribe*. The opinion letter explicitly prohibits employees from taking FMLA leave without exhausting some or all of their paid leave, such as vacation, PTO, sick, etc. Once an eligible employee communicates to his or her employer that they need to take leave for an FMLA-qualifying reason, the leave becomes protected and counts toward the employee's FMLA leave entitlement. Thus, as soon as the employer learns that an employee's absence qualifies for FMLA, the employer must start the clock on the employee's 12 weeks under the FMLA. Then, within five business days of the employer learning that the employee will be taking leave for a qualifying-FMLA reason, the employer must provide notice to the employee of the leave designation.

More importantly, an employer is prohibited from designating more than 12 weeks of leave as FMLA leave. If an employer provides a benefit to its employees which provides greater family or medical leave rights than those pursuant to the FMLA, then the employer must honor that. However, providing additional leave outside pursuant to an employer policy does not expand an employee's 12-week entitlement under the FMLA. Thus, if an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave counts toward his or her 12-week FMLA leave without expanding it.

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Takeaway

With the new opinion letter from the DOL, employers are encouraged to review and revise any relevant documents such as, policies and procedures, to ensure compliance with exhausting qualifying FMLA leave. This is especially critical for those employers who may have policies requiring paid leave be exhausted first prior to FMLA-leave. It is also important to remember that as it stands in Washington, until the new Paid Leave Law goes into effect in 2020, an employee is eligible for leave pursuant to FMLA and also the Washington FLA. Though an employee is now required to immediately exhaust his or her FMLA, there is no such requirement for FLA. Thus, this could provide a bank of up to 24 weeks of unpaid leave to a qualifying employee if the employee opts to not exhaust their leave pursuant to the FLA.

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