

DOL Issues New FMLA, FLSA Guidance to Employers



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DOL Issues New FMLA, FLSA Guidance to Employers

Written by [Erik J. Kennelly](#) [John L. Litchfield](#) – 3/18/19

Last week, the Department of Labor (DOL) Wage and Hour Division (WHD) issued its first three opinion letters of 2019 concerning the Family Medical Leave Act (FMLA) and Fair Labor Standards Act (FLSA). These opinion letters are a helpful tool for employers to understand their rights and responsibilities under the law. Employers may even rely upon DOL opinion letters as a good faith defense to wage claims arising under the FLSA. Accordingly, paying close attention to the latest guidance the WHD has to offer is an easy way to limit risks and reduce potential liabilities.

FMLA: 12 Weeks Means 12 Weeks!

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons.^[1] But life is full of the unexpected and 12 is not always enough. So it comes as no surprise that covered employees have often looked for loopholes in order to expand the period of leave available. [The latest DOL opinion letter](#) closes two such loopholes:

Delay

Some employers permit employees to use accrued paid leave prior to officially designating leave as FMLA-qualifying, even

when the leave is clearly FMLA-qualifying. This would ostensibly allow the employee to lengthen leave time by taking paid leave at the outset and then invoking FMLA leave consecutively thereafter. According to the opinion letter, “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. . . . Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation.” (emphasis added).

Substitution

Other employers have permitted employees to substitute accrued paid leave for unpaid FMLA leave, presumably either to preserve remaining FMLA leave in the case of future emergencies, or else to mitigate lost wages during unpaid FMLA leave. According to the opinion letter, however, this is not permissible under the FMLA: “[I]f an employee substitutes paid leave for unpaid FMLA leave, the employee’s paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement.” For employers that currently allow employees to decide whether to use accrued paid leave during otherwise unpaid FMLA leave, it may be time to consider a revision to policies requiring use of accrued paid leave during FMLA leave to avoid offending this new interpretation of the law.

When Laws Disagree: Residential Janitors, the FLSA, and
Minimum Wage Laws

[In its next opinion letter](#), the DOL addresses whether and to what extent the FLSA applies when it conflicts with state and local wage and hour laws. Using New York law – which specifically excludes residential janitors from state minimum wage and overtime requirements – as an example, the opinion letter addresses which law applies when the FLSA does not have a similar exemption.

Which laws apply?

When a federal, state, or local minimum wage or overtime law differs from the FLSA, the employer must comply with *both* laws and meet the standard of whichever law gives the employee the greatest protection. Thus, in its example, although New York requirements do not cover residential janitors, the FLSA does. The New York employer therefore must adhere to the FLSA's minimum wage and overtime requirements or else face the possibility of liquidated damages for FLSA noncompliance. Compliance with state law no longer excuses noncompliance with the FLSA.

Reliance on State Law as a Good Faith Defense?

In a significant development, the DOL expressly stated that it “does not believe that relying on a state law exemption from state law minimum wage and overtime requirements is a good faith defense to noncompliance with the FLSA.” Employers that are found to be in violation of the FLSA, yet relied on a state law in their pay practices, have traditionally utilized a “good faith” defense, arguing that reliance on state or local wage and hour

laws was “reasonable grounds for believing” they were not violating the FLSA. Notwithstanding the DOL’s recent pronouncement, courts still retain discretion to deny liquidated damages against the employer. Employers should, however, take time to re-examine their pay practices to ensure they are following the most favorable practice (when it comes to state versus federal law) for employees.

Employer-Sponsored Volunteering: Employers Beware!

[In its final opinion letter](#), the DOL addressed proper compensation practices for employers that permit employees to participate in employer-sponsored volunteer programs. The FLSA is intended to “prevent manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to ‘volunteer’ their services.” Unsurprisingly, employer-sponsored volunteer programs are subject to great scrutiny to ensure that “employer-sponsored volunteer” hours are not a guise for exploitation in the form of uncompensated and unprotected hours. In its letter, the DOL affirmed that volunteer programs that are both charitable and truly voluntary are noncompensable. Programs that are required or over which an employer directs or controls the volunteer work, however, are not truly charitable and voluntary, and therefore must be compensated.

With this in mind, an employer that sponsors a volunteer program should keep the following points in mind to avoid violating the FLSA’s minimum wage and overtime requirements:

- Employee participation in the program must be truly charitable and completely voluntary, meaning that employees who do not participate in a program should not be disciplined, or conversely, provided fewer benefits than employees who do participate;
- An employer may not require or unduly pressure participation in the program, nor should it control or direct volunteer work;
- Employees must not suffer adverse consequences in working conditions or employment prospects if they do not participate in the volunteer activities;
- While an employer may offer a monetary bonus for community impact generated from the volunteer work, the bonus must not be guaranteed; and
- An employer may track participating volunteers' hours for the purpose of determining community impact, but such tracking must not be used as a tool to direct or control employees' volunteer activities.

[\[1\]](#) The FMLA also entitles employees to 26 weeks of military caregiver leave. Assume, for the purposes of this article, that anything said about 12-week leave also applies to 26-week military caregiver leave.

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