



FAMILY AND MEDICAL LEAVE DESIGNATIONS CAN'T BE DELAYED, DOL SAYS

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Employers can't delay designating [Family and Medical Leave Act](#) (FMLA) qualifying leave as FMLA leave, according to a recent Department of Labor (DOL) opinion letter ([FMLA 2019-1-A](#)). Once an employee communicates the need to take leave for an FMLA qualifying purpose, neither the employee nor the employer can decline FMLA protection for that leave, even if the employee would prefer a delay. After ascertaining the employee's need for qualifying leave, the employer must notify the employee of the FMLA designation within five business days.

FMLA — OVERVIEW

The FMLA entitles eligible employees to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage as if the employee had not taken leave. Eligible employees are entitled to:

- Twelve weeks of leave in a 12-month period:
 - To bond with a new child within one year of birth or placement with the employee for adoption or foster care
 - To care for the employee's spouse, child or parent who has a serious health condition
 - When an employee's own serious health condition prevents the employee from performing the essential functions of his or her job
 - For qualifying exigencies that may arise when the employee's spouse, son, daughter or parent is a covered military member on "covered active duty" or has been notified of an impending call or order to active duty
- Twenty-six weeks of leave during a 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent or next of kin

To be eligible for FMLA leave, employees must have worked with the same employer for at least 1,250 hours in the 12 months before starting the leave and must work at a location with at least 50 employees or where 50 employees work within 75 miles.

EMPLOYER PAID LEAVE PROGRAMS

Many employers provide employees with paid time off, including vacation, sick, disability, parental or caregiver leave. Leave taken under these employer programs often, but not always, runs concurrently with any available FMLA leave. While employers can offer leave benefits that are more generous than those required by the FMLA, the guidance clarifies that FMLA leave can't be deferred while other paid leave is exhausted — if the employee is FMLA eligible, then the leave qualifies under the FMLA and must count against the time available for protected leave.

STATE LAWS

Some state family and medical leave laws provide partial wage replacement for leave to bond with a new child, care for a seriously ill family member or attend to the employee's own disability or serious health condition. Not all the provisions in these law cleanly align with the FMLA. However, to the extent an employee is eligible and the leave qualifies under both state and federal laws, leave must run concurrently.

Conflicting Laws

A few state laws require employers to provide leave for circumstances not covered by the FMLA. For example, a recently enacted Maryland law ([HB 1284](#)) grants protected leave to employees who make organ or bone marrow donations, but the leave may not be taken concurrently with federal FMLA leave. California has a similar law ([Lab. §1510\(g\)](#)).

The new guidance seems to prohibit delaying FMLA in favor of the state protection if the leave would qualify under both laws. Yet final FMLA rules say the FMLA doesn't supersede or preempt provisions of state or local laws (whether substantive or procedural) that give employees greater rights than the FMLA. Employers governed by state laws that potentially conflict with the federal guidance may want to work with legal counsel to be certain of compliance.

RELATED RESOURCES

Non-Mercer Resources

- [FMLA 2019-1-A](#) (DOL, March 14, 2019)
- [HB 1284](#) (Maryland General Assembly, May 13, 2019)
- [Final FMLA Regulations](#) (Federal Register, Nov. 17, 2008)
- [Lab. §1510\(g\)](#) (California Legislature, Jan. 1, 2012)
- [Family and Medical Leave Act Overview](#) (DOL)

Mercer Law & Policy Resources

- [Massachusetts Updates Draft PFML Rules, Posts Model Notice](#) (May 3, 2019)
- [New Jersey Updates, Expands Family and Disability Benefits](#) (March 26, 2019)
- [2019 State-Mandated Short-Term Disability Contributions and Benefits](#) (Jan. 31, 2019)
- [Massachusetts Launches New Paid Family and Medical Leave Website; Contributions Begin July 1](#) (Jan. 15, 2019)

Other Mercer Resources

- [Think Globally, Comply Locally: How Employers Navigate Leave Laws](#) (Nov. 15, 2018)
- [Life, Absence & Disability](#)

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