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## Recent DOL Opinion Letter Clarifies Employer FMLA Requirements

The U.S. Department of Labor (DOL) recently issued an [Opinion Letter](#) clarifying that under the Family and Medical Leave Act (FMLA), employers should not (1) delay the designation of FMLA-qualifying leave, even if the employee requests a delay, or (2) designate more than 12 weeks (or 26 weeks if military caregiver leave) as FMLA leave.

Some employers have struggled with how to apply FMLA where paid leave is also available under employer policies or where the requested leave is due to a workers compensation injury. Some employees may seek to use paid leave to cover the absence, while “saving” FMLA for a later time, even though the reason for the leave is clearly FMLA qualifying. The Opinion Letter clarifies that not only are employers permitted to designate FMLA leave and run it concurrently with non-FMLA leave (such as employer-provided PTO), employers have a legal obligation to do so.

The Opinion Letter notes that it conflicts with a decision by the Ninth Circuit Court of Appeals, *Escriva v. Foster Poultry Farms*, which held that employees could preserve FMLA leave by taking non-FMLA leave (such as paid PTO) for an FMLA-qualifying reason.

In certain cases, an employee seeking to defer FMLA usage while using other forms of leave may refuse to complete the FMLA medical certification even though the reason for the leave is clearly FMLA qualifying. While the Opinion Letter does not specifically address this situation, the Letter states that if, even without the medical certification, the employer has enough information to determine the leave is FMLA qualifying, the employer can and must designate the time off as FMLA leave.

Employers should review their FMLA and other leave policies and practices to take into account the DOL’s position and inform employees that FMLA leave will run concurrently with other forms of leave if the reason for the leave is FMLA qualifying. This decision also reinforces the need for employers to train supervisors and managers, who often receive the first notice of an employee’s need for leave, about the FMLA.

To read the full Opinion Letter visit: US Department of Labor, FMLA Requirement Letter [https://www.dol.gov/whd/opinion/FMLA/2019/2019\\_03\\_14\\_1A\\_FMLA.pdf](https://www.dol.gov/whd/opinion/FMLA/2019/2019_03_14_1A_FMLA.pdf) (accessed April 4<sup>th</sup>, 2019)

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