

New Family and Medical Leave Act Opinion Letters Posted by the Department of Labor

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Since 2004, the Department of Labor (DOL) has not issued any guidance on how employers should handle FMLA issues, until now! Two Opinion letters were recently released which favor employers on the FMLA.

In the opinion letter dated October 4, 2004, the DOL opined that an employer who offered its employees enhanced sick leave benefits may require: (1) additional information from the employee verifying the basis for the requested leave beyond that required under FMLA, and (2) the enhanced policy will not discriminate against individuals taking FMLA qualifying leave versus other types of leave in requesting such information. Note that an enhanced sick leave policy adds additional benefits for sick leave which adds to FMLA benefits that an employee is entitled to under federal law. This does not apply to all FMLA policies.

The enhanced sick leave benefits under this employer's sick leave policy allows employees to receive paid sick leave. If an employee shows "proof of illness," they are entitled to this additional benefit. While proof of illness is not typically required for FMLA leave, if the supervisor believes that the employee is not too sick to work or if taking time off is a trend with the employee, the supervisor can request this additional "proof of illness."

Also, under the employer's policy, an absence can be paid sick leave, even though not FMLA qualifying, and visa-a-versa. Consequently, employees who take FMLA qualifying leave for their own serious health conditions, but fail to provide proof of illness when requested, receive FMLA protected unpaid leave, but are not eligible for paid sick leave. Further, an employee can substitute paid vacation for FMLA leave without showing "proof of illness."

The FMLA states that an employer may limit the use of paid sick or medical leave to circumstances that meet the employer's usual requirements for such leave. Therefore, under the enhanced sick leave benefits policy, the employer can maintain such a policy if it is applied uniformly to absences caused by illness regardless of whether the absences are FMLA qualifying. As to the "proof of illness" policy, under the FMLA, an employer can request recertification of an illness if the employer has information that casts doubt on the employee's stated reason for the absence. As a result, an employer can require greater information than required by the FMLA as long as the unpaid FMLA leave is not jeopardized.

The second opinion letter issued by the DOL on October 25, 2004, on FMLA states that an employee returning from FMLA leave can be required to submit to a drug test. Under the FMLA, employees returning from FMLA leave can be required to submit to a "fitness for duty" test if the employer has a uniformly applied policy or practice that

requires all similarly situated employees who take leave for their own serious health conditions to obtain and present certification from their health care providers. Consequently, nothing in the FMLA prohibits an employer from drug testing employees who are returning to work after FMLA leave.

Before taking any action that may result in a violation of the Family and Medical Leave Act or any other federal or state law, we encourage employers to consult with an experienced labor and employment attorney.