

# FMLA FREQUENTLY ASKED QUESTIONS Part II

## DESIGNATING/COUNTING EMPLOYEES FMLA

1. **An employee goes off on sick leave for four weeks and doesn't request the time as FMLA leave within two days of returning to work. Human Resources doesn't find out until one week later that the employee was off. Is it correct the four weeks cannot be counted as FMLA leave?**

Yes. Either the employee or the employer can designate leave as FMLA but it has to take place within two days of when the employee returns to work.

See 29CFR825.302:

Where the employer was not made aware that an employee was absent for FMLA reasons and the employee or the employer want the leave counted as FMLA leave, timely notice (generally within **two business days** of returning to work) that leave was taken for an FMLA-qualifying reason.

See 29CFR825.208:

- (e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

- (1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within **two business days** of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.
- (2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee

or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

- 2. If an employee is substituting paid sick and annual leave for their unpaid FMLA leave, then requests to use BLT for part of the FMLA qualifying absence, and subsequently returns to using sick and annual leave, does the FMLA leave counter stop during the period of BLT and then restart when sick and annual leave are used?**

Yes, if the employee decides to change to BLT then the time on BLT would not count against their FMLA entitlement and they would not be under the protection of FMLA. Some departments may require the exhaustion of accrued leave credits before use of BLT for an FMLA qualifying reason.

- 3. If the employer does not provide notice designating the leave as FMLA within two business days following the employee's notice of a leave for an FMLA-qualifying event, can the employer still charge the time?**

Not if the employee provided sufficient information for the employer to make a designation, in which case, the employer cannot charge the time against the employee's FMLA entitlement until notice is given to the employee that the leave is designated as FMLA leave. However, the employee's absence prior to the designation may still be FMLA-protected.

See 29CFR825.208:

(b)(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be oral or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. **If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee**

**either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.**

- 4. If the employee uses sick leave for 5 days and the employer does not know the reason for the leave and does not ask anything about FMLA during the employee's absence, can the employer then give the paperwork to the employee upon their return to work to see if the time should be designated as FMLA leave?**

Yes, if one of the following exceptions applies.

See 29CFR825.208:

- (e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

- (1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason but the employer was not aware of the reason, and the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work of the reason for the leave. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.
- (2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the

absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

**5. An employee is on paid annual leave for 5 weeks. Human Resources finds out through the “grapevine” that the leave usage was for medical purposes and immediately enters the leave under FMLA. Is this acceptable?**

No. If the employer has reason to believe the employee is off work for an FMLA qualifying reason, they may send the employee the Medical Certification form and request the employee provide them information. However, “[t]he employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult, child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave).”

See 29CFR825.208:

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. **The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave).** In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

**6. An employee has the right to use annual leave for any reason without telling the employer where they are going or what they are doing on their annual leave. Where in the FMLA (citation please) is the right given to employer to charge this leave against the employee's FMLA entitlement?**

Assuming the employee, or the employee's spokesperson, has not told the employer the reason for the annual leave, the employer does not have the right to charge the leave against the employee's entitlement. However, if the employer has been told the reason for the annual leave is FMLA-qualifying, the employer may charge the annual leave against the employee's FMLA entitlement in the following circumstances:

See 29CFR825.208:

(a)(2) “... an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

- (b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.
- (d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (e.g., bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.”

**7. Do state holidays occurring during FMLA leave count as FMLA time used?**

Most of the time.

See 29CFR825.200 and 29CFR825.205:

- (f) For purposes of determining the amount of leave used by an employee, **the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave.** However, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (e.g., a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in Sec. 825.205.

**8. Some collective bargaining agreements permit an employee to certify the need to use up to two weeks of sick leave, upon the birth of their child, prior to the beginning of any parental leave. Does this time count against the 12 weeks of FMLA?**

Yes. An eligible employee is entitled to a total of 12 weeks of FMLA leave in a 12-month period. The two weeks of sick leave are deemed to be due to the serious health condition of the employee's spouse or newborn child and are attributable to family care leave under the FMLA.

**9. An employee is on FMLA leave when their position is put on seasonal layoff. Would the time an employee is on a seasonal layoff be counted against their FMLA entitlement?**

No, the time off due to the seasonal layoff does not count against the employee's FMLA entitlement. If the employee is later recalled from seasonal layoff but is unable to return and provides the appropriate medical certification, the employee's absence would be counted against their remaining FMLA entitlement, assuming the employee still met the eligibility criteria.

If an employee is put on seasonal lay off during an FMLA leave, the employer can stop paying for the employee's health insurance benefits.

See 29CFR825.200, f and 29CFR825.312, d.

**10. An employee calls their supervisor and says they need to be off a few days due to illness. No medical documentation is submitted at that time. On the 4<sup>th</sup> day of absence, the employee calls Human Resources and says they'll return on the 5<sup>th</sup> or 6<sup>th</sup> day with a medical note. Can Human Resources give verbal provisional notice the time is designated as FMLA based on the telephone call and make a final determination when medical certification is received?**

Yes.

See 29CFR825.208, e, 1:

- (e)(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

## **USE OF PAID LEAVE**

- 11. May an employee represented by the UAW use annual leave instead of sick leave to be absent from work while their spouse recovers from surgery?**

Yes.

See 29CFR825.207:

- (e) Paid vacation or personal leave, including leave earned or accrued under plans allowing "paid time off," may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

## **BLT/COMPENSATION/DEFERRED HOURS FOR FMLA QUALIFYING PURPOSE**

- 12. If an employee requests to use compensatory time, BLT or deferred hours for a qualifying FMLA reason, must the employer approve that leave?**

No. Compensatory time, BLT, and deferred hours are not a form of paid leave that can be substituted for unpaid FMLA leave. The employer would follow whatever their normal practice is for approving these types of leave.

See 29CFR825.207(i).

- 13. Please elaborate on use of compensatory time when someone has a serious health condition. At least two state departments deny usage of compensatory time under such circumstances.**

Compensatory time is not a form of paid leave that can be substituted for unpaid FMLA leave. Use of compensatory time must be done in accordance with the department policies or an applicable collective bargaining agreement. In general, compensatory time is subject to prior approval in the same manner as annual leave and, based upon operational needs, a state department may deny usage of compensatory time regardless of the reason requested, including a serious health condition.

See 29CFR825.207(i).

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