

# U.S. DOL Issues First FMLA Opinion Letters In Nearly A Decade

## Labor & Employment Law Update

on August 31, 2018

Constantly evolving employment risk, often brought on by a change of administration (federal or state), is one of the most difficult aspects of running a successful business. Overnight, a lawful employment practice might be interpreted as unlawful, necessitating change to avoid charges of discrimination, unfair labor practice charges, agency scrutiny, and other issues related to running the business.

Agency opinion letters – guidance on how an agency interprets a fact-specific situation under the laws it enforces – are one useful tool to stay abreast of these developments. On August 28, 2018, the U.S. DOL issued FMLA opinion letters FMLA2018-1-A and FMLA2018-2-A. The last FMLA opinion letter was issued in January 2009.

### FMLA2018-1-A – Organ Donor Leave

In FMLA2018-1-A, the DOL opined that an otherwise healthy employee that chooses to donate an organ may be entitled to FMLA leave because the resulting recovery generally is a serious health condition requiring one (or more) night's stay in the hospital. As a result, an employee's organ donation may be protected by both state and federal mandated leave laws, requiring case-by-case analysis.

### FMLA2018-2-A – Application of Points Systems to Employees on FMLA Leave

FMLA2018-2-A is likely to impact many more employers. Here, the DOL issued guidance on the appropriateness of a no-fault attendance policy that have features that suspend attendance point accumulation and also suspend attendance point dissipation during a period of FMLA leave. The DOL found such policies do not violate the FMLA, if applied in a nondiscriminatory manner. Point reduction is a reward for working, and thus a benefit to which an employee on FMLA leave might not be entitled – as long as employees on other types of leave are treated the same.

FMLA2018-2-A is significant. Under such a policy, an employee who has accumulated attendance points and is getting close to disciplinary action (or termination) cannot “game the system” by taking FMLA leave, because the employee's point total will remain frozen (and not automatically reduced by

operation of time) during the period of the leave, up to 12 weeks.

*But, proceed with caution!* FMLA2018-2-A does not embody the EEOC's interpretation or enforcement of the Americans with Disabilities Act, nor any other agencies' enforcement of similar laws. Of course, no points may be accumulated as a result of taking FMLA leave.

### **Best Practices**

Policies must be applied in a nondiscriminatory fashion – including treating employees on FMLA in the same fashion as employees on other types of leave. For example, if there would be no “freeze” of the points policy for an employee taking a 2-week vacation or intermittent personal days, then an employee taking a 2-week FMLA leave or using intermittent FMLA should be treated the same.

Experienced counsel should review attendance and leave policies in conjunction with other conduct policies to ensure a cohesive and comprehensive scheme.

Similarly, careful analysis of the specific facts of a particular issue may help avoid legal complications down the road.

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