

DESIGNATION OF LEAVE, PAID OR UNPAID, AS FMLA LEAVE

The Department of Labor's regulation at 29 CFR § 825 regarding The Family Medical Leave Act (FMLA) was addressed in the U.S. Court of Appeals for the Sixth Circuit, *Plant v. Morton International, Inc.* 212 F.3d 929 (2000). In so confirming the provisions of the Code, the Court stated that "...we do not believe that § 825.208 (c) is inconsistent with legislative intent merely because it creates the possibility that employees could end up receiving more than 12 weeks of leave in one 12 month period, due to an employer's failure to notify them that the clock has started to run on their allotted period of leave."

The effect of the *Plant* decision has been impliedly overruled by the United States Supreme Court in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 122 s. ct. 1155, 152 L.Ed.2d 167 (2002) as a result of the "categorical penalty" imposed by the Secretary of Labor's regulations in providing what amounted to an entitlement to additional leave without inquiry as to the actual effect of the failure to designate leave as FMLA leave by the employer. The regulation was held to be contrary to the "remedial design" of the statute.

In following *Ragsdale*, the Sixth Circuit Court of Appeals has adopted a case-by-case analysis of the actual effect of the failure to designate. Thus, an employer's violation of the notice regulations does not automatically entitle an employee to additional leave beyond the 12 weeks, or any other relief. As a result, it is incumbent upon the employee to prove that they suffered prejudice (i.e., would not have taken leave, or, would have structured the leave in a different manner) due to the failure of notice.

An employer remains responsible for designating whether leave, paid or unpaid, is FMLA-qualifying. Notice of the designation must be given to the employee. The designation is to be based solely upon information received either from the employee or the employee spokesperson (spouse, adult child, parent, doctor, etc. if the employee is incapacitated). If an employer does not have sufficient information regarding the reason for the employee use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the leave is potentially FMLA-qualifying.

The employee does have an obligation, when giving notice of the need for unpaid FMLA leave, to explain the reasons for the needed leave. Leave may be denied if the employee fails to explain the reasons. It is not necessary for an employee giving notice of need for unpaid FMLA leave to expressly assert rights under the Act or even to mention the FMLA to meet the obligation to provide notice. A qualifying reason, must, however, be stated.

While an employee using accrued paid leave is not required to assert a reason to establish an FMLA qualification, if the employer denies the request the burden of

providing sufficient FMLA qualifying information to establish entitlement to the leave falls upon the employee.

Once an employer has acquired knowledge that the leave is being taken for an FMLA purpose, the employer must notify the employee within two (2) business days that the paid leave will be designated as FMLA and counted as FMLA leave. While this notice may be either oral or in writing, any oral notification must be confirmed in writing no later than the following payday.

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, the employer must comply with the statute's notice provisions. An employer who has sufficient knowledge as to the FMLA reason for the requested leave may not retroactively designate leave as FMLA leave. However, it may be so designated prospectively, as of the date of notification to the employee of the designation.

Specific exceptions to retroactivity do exist. Notice requirements must be strictly adhered to when asserting the exceptions.

If you need information on complying with the FMLA, please contact Campbell, Hornbeck, Chilcoat & Veatch, LLC.