

## FLMA Questions Finally Answered

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### Can Employees Decline to Use FMLA?

A recent opinion letter from the U.S. Department of Labor Wage and Hour Division expresses unequivocally that an employer **may not** delay designating leave as FMLA leave, even where the delay is to permit the employee to exhaust available paid sick or other paid leave prior to the start of FMLA. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, **neither the employee nor the employer may decline** to classify the leave as FMLA. The employer must provide notice of the determination to the employee within five business days of determining the leave qualifies for FMLA. The U.S. Department of Labor stated that an employer may not delay designating the leave as FMLA, even if the employee would prefer that the employer delay the designation. The Department of Labor's current clear cut guidance is that: once an employer confirms that an absence qualifies for FMLA leave, the employer is absolutely obligated to designate the leave as such.

### Must FMLA Come First?

The opinion letter also advised that when an employee has multiple reasons for an FMLA absence, an employer can require the employee to use FMLA leave (until exhausted) for all of the absences and, in fact, must do so. If an employee has paid leave available, an employer may allow the employee to choose between using the paid leave concurrently with FMLA or preserving it until after their FMLA leave is exhausted, but an employer may not allow the employee to use the paid leave first and subsequently use the FMLA leave.

**Employers should be mindful that after the conclusion of an FMLA leave, there may be an obligation, if the leave is due to the employee's own disability, for additional leave under reasonable accommodation laws.**

If you are an employer with questions about FMLA or an employee leave situation, contact Tracy Armstrong or any Wilentz employment lawyer at 732-352-9858.

#### Attorney

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#### Practice

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