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NO MORE DECLINING FMLA LEAVE DESIGNATION, THE DOL PROVIDES CLARITY

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The Department of Labor (DOL) recently issued an opinion letter providing guidance to employers on when to designate qualifying leave under the Family Medical Leave Act (FMLA). The designation of leave for FMLA purposes has often been frustrating for employers, despite the federal code of regulation providing the employer's responsibilities when designating qualified leave under 29 C.F.R. 825.301(a).

The DOL's recent opinion letter empathically provides that it's the employer's responsibility to immediately designate qualifying leave as FMLA leave. As with any FMLA situation, an employer must first obtain enough information from their employee to determine if the requested leave qualifies under FMLA. Once determined, the employer must notify the employee of the FMLA designation. Regardless of the employee's desire or request not to designate the leave as FMLA, *the DOL's opinion letter makes it clear* that the employer must designate the qualifying FMLA leave immediately. Although an employee may want to extend their leave by exhausting any earned PTO, vacation time or other employer leave policy prior to the 12 weeks allowed under the FMLA, the DOL's opinion letter eliminates that option. The DOL opinion letter further states:

> "[a]n employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Once an eligible employee communicates the need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave."

The DOL clearly places the onus on the employer to make the designation and neither the employer nor the employee can delay that designation. Therefore, once the employer obtains enough information that the employee is requesting FMLA leave, the employer must designate that leave as FMLA qualifying leave.

The DOL opinion letter puts the Ninth Circuit in the spotlight again, by specifically citing the Ninth Circuit decision in *Escriba v. Foster Poultry Farms, Inc*., where the Ninth Circuit held that an employee can decline the designation of qualifying leave under FMLA. Since the Ninth Circuit does not need to follow a DOL opinion letter, employers in California will want to discuss their specific situation with an employment lawyer, and expect a court fight over this issue in the years to come.

Sean F. Darke is a Partner at Litchfield Cavo's Chicago office. Sean focuses his practice on labor and employment issues and successfully defends businesses in all areas of employment and labor law, including wage and hour laws in both State and Federal court. Sean has been named as an Illinois Leading Lawyer annually since 2018 by peers in the practice area of employment and labor law, and had been named to the Super Lawyers® list of Illinois Rising Stars by peers in the practice area of employment and labor. Sean can be contacted at **Darke@LitchfieldCavo.com** or **312. 781.6554**.