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Employment Law Note

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To Leave – or Not to Leave . . .

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The Federal Medical Leave Act (FMLA) provides for 12 weeks of unpaid, but job-protected, leave for employees' family and medical reasons. Employers often provide employees with other forms of paid leave that they can also use to care for themselves or their family members. Prior to 2014, employers would often require that paid and unpaid leave run concurrently so that the employee was limited to taking no more than 12 weeks off. That did not always sit well with employees who wanted to save their FMLA leave – and the job restoration protection that came with it – until they were out of paid leave. Enter the Federal Court of Appeals for the Ninth Circuit.

The Case: *Escriba v. Foster Poultry Farms, Inc.,* (9th Cir. 2014)

In *Escriba*, the Ninth Circuit held that employers can no longer require employees to take unpaid FMLA leave concurrently with other leaves they may be eligible for, such as vacation, sick, PTO, etc. Instead, employees must be allowed to choose to take their paid time off without invoking their rights under the FMLA, even when the reason for the leave is FMLA qualifying. Under the Ninth Circuit's reasoning, if an employee has a qualifying medical condition for FMLA leave but chooses to use his or her PTO for that time, they are then eligible to take an additional 12 weeks of unpaid FMLA leave for the same or different medical condition. For example, an employee with four weeks of accrued PTO could extend a leave of absence to 16 weeks by combining paid and unpaid leave.

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That is, if the employee works in the Ninth Circuit. On March 14, 2018, the federal Department of Labor (DOL) issued an opinion letter rejecting the Ninth Circuit's holding in *Escriba*. According to the DOL, once an eligible employee communicates to his or her employer that they need to take leave for an FMLA-qualifying reason, the leave becomes protected and counts toward the employee's FMLA leave entitlement *even if the employee does not want to take FMLA leave*. Thus, as soon as the employer learns that an employee's absence qualifies for FMLA, the employer must start the clock on the employee's 12 weeks under the FMLA. Then, within five business days of the employer learning that the employee will be taking leave for a qualifying-FMLA reason, the employer must provide notice to the employee of the leave designation.

More importantly, according to the DOL, an employer is prohibited from designating more than 12 weeks of leave as FMLA leave. This makes sense: an employer does not have the power to unilaterally extend a federal benefit. But if an employer provides a benefit to its employees that provides greater family or medical leave rights than the FMLA, then the employer may be legally bound by its promise to do so under common law.

Takeaway

So, who's right? For employers in the Ninth Circuit, the answer is *the Ninth Circuit*, of course. The Circuit Court will at times defer to a federal agency, but it is not likely to do so in this instance. Until the issue is ultimately resolved by the United States Supreme Court, employees who operate inside and outside of the Ninth Circuit should be mindful of these conflicting interpretations of the law and err on the side of applying the rule in the way that is most beneficial to the employee.

The legal landscape will get even more interesting for Washington employers when the new Paid Leave Law goes into effect in 2020. Then, an employee will be eligible for paid FMLA under state law and unpaid FMLA under federal law. According to the Employment Security Department (ESD), rules about the interaction of Paid Family and Medical Leave and other leave programs, including FMLA, are under development and are expected to be rolled out in August. In the meantime, employers are encouraged to review their leave policies – paid and unpaid – with counsel to look for landmines and ensure compliance with this web of state and federal leave laws.

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