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# FMLA Semantics: You can lead employees to FMLA but you can't make them take it.

**By Ronald S. Stadler**

By now many employers have taken their turn trying to comply with the Family and Medical Leave Act ("FMLA"). One of the situations that occasionally confronts these employers is when an employee seeks leave for a situation that clearly looks to be covered as FMLA leave but the employee does not want to designate the leave as FMLA leave.

Employees may take this approach to maximize their time off from work. For example, under federal FMLA when an employee requests FMLA leave, an employer may require the employee to first exhaust paid vacation time. In such a scenario, the initial paid leave runs concurrently, counting against the paid leave and FMLA leave. Thus, an employee with four weeks of vacation would be off work for 12 weeks and would be paid for the first four weeks of that leave. On the other hand, if the employee first takes his four weeks of vacation and then requests FMLA leave, he will be off work for 16 weeks.

An employer confronted a situation similar to this in a recent case decided by the United States Court of Appeals for the Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands), *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014). In that case the employee specifically requested vacation time and disclaimed any intent to use FMLA leave even though the

reason for her leave clearly qualified as FMLA leave. Then, when the employee failed to return to work at the end of her vacation, she was fired for violating the employer's three-day no-call, no-show policy. In response, the employee claimed that the employer was legally obligated to designate her leave as FMLA leave, that she therefore had a right to 12 weeks of leave, and that her termination interfered with her right to FMLA leave. The employer argued that by declining FMLA leave at the outset, the employee had taken her absence outside of the protections of the FMLA.

The employee challenged the employer's position by claiming that she could not be viewed to have declined FMLA because declining leave is tantamount to waiving it, and the FMLA regulations provide that "[e]mployees cannot waive, nor may employers induce employees to waive their rights under FMLA." 29 C.F.R. § 825.220(d). The Court disagreed with the employee and concluded that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection." The Court reasoned that a waiver is the abandonment of a right, but that declining the present use of FMLA leave in order to preserve it for future use is not the same as relinquishing the right. The Court also noted that to conclude that an employer can force an employee to take FMLA would in itself be a potential claim that the employer is interfering with the employee's FMLA rights.

So what do we learn from *Escriba v. Foster Poultry Farms*? First, when an employee requests leave that appears to be FMLA eligible, an employer should carefully document whether the employee is accepting or declining FMLA leave. Foster Poultry Farms presumably spent tens of thousands of dollars on attorneys' fees for a trial and subsequent appeal over whether the employee did, in fact, decline FMLA leave. A simple form or even a memo to the file could prevent such disputes. The second lesson to be learned is that when an employee has a choice between types of eligible leaves including FMLA leave, an employer cannot force an employee to apply for and use FMLA leave at that time if he or she does not want to. And, lastly, we learn that when employees play the system, employers can fight back. Employees who avoid FMLA leave in order to maximize their time away from work must realize that they are not only preserving their leave for future use, but they are also pushing their procedural rights and protections off as well.

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