

SEPTEMBER 7, 2018 | WAGE & HOUR COMPLIANCE

US DOL Issues FMLA Opinion Letters Clarifying No Fault Attendance Policy Rules and...Organ Donation

By: [Aaron R. Gelb](#)

Until last week, the US Department of Labor (the "DOL") had not issued an Opinion Letter regarding the Family and Medical Leave Act (the "FMLA") since George W. Bush was packing up and preparing to leave the White House in January 2009. On August 28, 2018, Bryan Jarrett, the Acting Administrator of the DOL's Wage and Hour Division (the "WHD") issued two Opinion Letters—one addressing an important consideration facing employers with no-fault attendance policies and another that addresses whether organ donation surgery can qualify as a "serious health condition" under the FMLA for the purposes of taking leave. While the answer to the latter question will likely not surprise anyone who regularly deals with employee requests for leave under the FMLA, the WHD's opinion regarding whether and how points should be removed from an individual's record while they are on protected leave does indeed provide much needed clarity on that topic. 

But first, a bit of background regarding why the mere issuance of these letters is significant. An opinion letter is an official, written opinion issued by the Wage and Hour Division of the DOL explaining how a certain law applies in specific circumstances described by an employer, employee, or other entity requesting the opinion. The DOL noted in a June 2017 press release that the Wage and Hour Division had been issuing opinion letters for more than 70 years until the Obama administration replaced them with general guidance memoranda in 2010. "Reinstating opinion letters will benefit employees and employers as they provide a means by which both can develop a clearer understanding of the Fair Labor Standards Act and other statutes," said Secretary Acosta in the press release. "The U.S. Department of Labor is committed to helping employers and employees clearly understand their labor responsibilities," said Secretary Acosta, explaining that such letters would enable employers to "concentrate on doing what they do best: growing their businesses and creating jobs."

Turning to the two opinion letters issued on August 28, 2018, we will first address the leave for organ donation, then consider no-fault attendance policy rules.

[Surgery for organ donation \(FMLA2018-2-A\)](#). You may be asking yourself why would the WHD issue an opinion letter regarding leave in connection with organ donation surgery given the host of challenging questions employers confront every day while attempting to comply with the FMLA? That question is not answered in the Opinion Letter, nor do we know the identity of the party that posed the question(s) that prompted WHD to issue the letter. We do know, however, that the requesting party asked whether an employee who donates an organ

can qualify for FMLA leave even if the donor is in good health before the surgery and chooses to donate the organ solely to improve the recipient's health. The requesting party also inquired whether the donor can use FMLA leave for post-operative treatment.

Not surprisingly, WHD answered both questions affirmatively, opining that organ donation surgery can qualify as a serious health condition as can the post-surgery recovery. WHD, in reaching this conclusion, explained that organ donation can qualify as a serious health condition when it involves inpatient care under Sec. 825.114 or continuing treatment under Sec. 825.115. Acknowledging in a footnote that donors—according to UNOS, the United Network for Organ Sharing—typically spend 4 to 7 days in the hospital after surgery, WHD advises that “an organ donation would qualify as a serious medical condition whenever it results in an overnight stay in a hospital.” While most employers would—we hope—readily approve an eligible employee's request for FMLA leave so that he or she can donate an organ to someone in need, this Opinion Letter removes any doubt that the donor's pre-surgery health has no bearing on the analysis.

No-Fault Attendance Polices (FMLA2018-1-A). Addressing a far more complicated issue in the other Opinion Letter, WHD responded to an inquiry about the legality of a no-fault attendance policy that freezes the number of attendance points an employee accrued before taking leave. Under the policy at issue, employees accrue points for tardiness and absences (not for FMLA-protected absences, mind you) until they reach 18 points, at which time they are discharged. Points remain on an employee's record for 12 months of “active service” after accrual, but the policy does not define what constitutes active service. Employees taking FMLA leave thus return with the same number of points on their record that they had when their leave began; in other words, points do not fall off or expire while an employee is on FMLA leave. Analyzing the policy in question, the WHD notes that “[r]emoval of absenteeism points is a reward for working and therefore an employment benefit under the FMLA.” While points do not fall off under the policy while an employee is on leave, WHD emphasized that employees who take leave do not lose benefits accrued prior to taking leave pursuant to the FMLA, nor do they accrue benefits to which they would otherwise be entitled. Affirming its “longstanding position” that such practices do not violate the law if employees on equivalent types of leave receive the same treatment, WHD concluded that the point freezing policy did not violate the FMLA, provided the employer did not count equivalent types of leave as active service under the no-fault attendance policy. As we discussed in [a prior post](#), no-fault attendance policies can be tricky to implement, particularly pursuant to the Equal Employment Opportunity Commission's guidance, but according to the WHD this policy likely passes muster, at least under the FMLA.

Employer Takeaways. First, beyond obtaining the appropriate documentation confirming that an employee is indeed undergoing surgery so that s/he can donate an organ, don't think too long or hard about whether to approve your employee's request for leave. Just do it. Second, and more importantly, take the time now to review your policies and procedures to ensure that employees who take leave pursuant to the FMLA are treated no differently than employees who take other types of leave. This includes all manner of policies, not only no-fault attendance policies. If you are concerned that one or more of your policies result in employees taking FMLA leave being treated worse than employees absent for other reasons, or if you would like to explore revising your no-fault attendance policy so that it freezes point totals, give us a call.

