

## U.S. DOL Confirms That Employees Are Not Entitled To Refuse FMLA Leave

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*Pete Gillespie*  
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As seasoned Human Resource professionals have likely experienced, employees who have anticipated medical needs sometimes ask to decline leave available under the Family and Medical Leave Act (FMLA), for the purpose of claiming a later absence as FMLA-protected.

Little guidance had been available to address whether employers were required to allow employees to refuse to use FMLA leave when the employee had a qualifying condition. Arguably, allowing an employee to “refuse” FMLA can create a problem if the employer decides to make an adverse employment decision while an employee is technically on leave that qualifies for FMLA protection, even if the employee declined to use FMLA leave.

Recently, the U.S. Department of Labor (DOL) clarified that employees cannot refuse FMLA leave. Employers in states subject to the decisions of the Ninth Circuit Court of Appeals (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) should understand that the DOL and the Ninth Circuit have taken conflicting positions, with the Court having previously held in a 2014 case that employees *may refuse* FMLA leave.

Employers that are subject to collective bargaining agreements should also confirm whether they have more generous policies than what the FMLA provides. Employers are obviously allowed to do more than what the FMLA requires, but, based on the DOL’s Opinion Letter, employers need to

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Peter J. Gillespie

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recognize that certain absences will be covered by the FMLA whether or not the employee wants them to be covered.