New Enforcement Guidance on “No-Fault” Attendance Policies and FMLA Leave

September 10, 2018

The U.S. Department of Labor’s Wage and Hour Division (WHD) released a new opinion letter concerning the Family and Medical Leave Act (FMLA) and “no-fault” attendance policies on August 28, 2018. Employers may want to consider this opinion letter when drafting or reviewing their attendance policies.

Employers frequently use no-fault attendance policies as a means to track and control absenteeism and tardiness. However, employers are more often running into issues with no-fault attendance policies given the increasing number of federal, state, and local laws that may supersede a no-fault attendance policy. For example, state and local paid sick leave laws generally override accrual of attendance points under such a policy. No-fault attendance policies have long been a matter of discussion in the FMLA context. The WHD’s recent opinion letter addresses FMLA-related concerns about these policies.

The employer’s policy at issue resulted in accrual of attendance points for tardiness and absenteeism comparable to other no-fault attendance policies. The less usual aspect of this policy was that attendance points remained on an employee’s record for 12 months of “active service” and that the policy essentially froze an employee’s attendance points while he or she was out on a leave of absence. Accordingly, employees on FMLA leave, or other leaves, would maintain attendance points for the full 12-month period, plus the duration of any leave or period of “inactive service.”

The WHD considered this policy in the context of the FMLA prohibition against “interfering with, restraining, or denying” employees’ FMLA rights. While the WHD has previously opined that no-fault attendance policies may be lawful, that was only subject to an assumption that attendance points would not be assessed during FMLA-qualifying leave. But the concern in this context was the fact that employees on FMLA leave would have attendance points on their records for longer than other employees not on FMLA leave. Appropriately, the WHD noted the FMLA does not entitle employees to “superior benefits or position” merely due to his or her FMLA leave. As such, the WHD upheld the employer’s no-fault policy. The WHD noted that if an employer counted other types of leave as “active service” and thereby caused employees on FMLA leave to have attendance points for longer periods than employees on equivalent types of leave, the policy may be unlawfully discriminatory.

The opinion letter addressed a continuous leave scenario only. The WHD did not address a points-based policy in an intermittent leave or partial return-to-work scenario. But it stands to reason that a points-based system can likely be applied to an intermittent leave or partial return-to-work scenario upon the same conditions as with continuous leave.
In light of this opinion letter, employers may want to consider the lawfulness of their attendance policies in the context of the FMLA. Employers may also want to consider whether their no-fault attendance policies are in conflict with other laws providing for protected leaves of absence. In addition, when employers run certain leaves concurrent with FMLA but not others, they may strive to ensure that they maintain consistent application of attendance rules without creating a disparate impact with regard to those who are on FMLA leave. Finally, as noted by the WHD, as long as a similar policy is applied in a nondiscriminatory manner, it would not violate the FMLA. The WHD appears to instruct employers to focus on consistency in approach and application when it comes to maintaining no-fault attendance policies and ensuring lawful interaction with the FMLA.