

Employees out with the flu? Check your FMLA compliance



Employees who are out with the flu can chew through their no-fault attendance points quickly. And if they're out for an extended period of time, they may be entitled to FMLA leave.

A new opinion letter from the Department of Labor concluded that the suspension of accrued no-fault attendance points during an employee's FMLA leave didn't always run afoul of the law's noninterference provisions. *Note:* DOL opinion letters are intended as private advice from the DOL to the requesting party. They may be used for informational purposes only; they may not be used or cited as precedent. (*FMLA 2018-1-A*)

Frozen points. Under an employer's no-fault attendance policy, employees who were late or absent accumulated points. Employees who accrued 18 points were fired. The points remained on employees' records for 12 months of active service. Employees who took FMLA leave or, for example, workers' comp leave, didn't accrue points while they were out; but the points they accrued prior to their leave were frozen during their absence. *Result:* The points stayed on their records for longer than 12 months.

The question for the DOL was whether the frozen points violated the FMLA's prohibition against interfering with employees' leaves. The DOL answered no, provided the employer applied the policy consistently and in a non-discriminatory manner. *DOL:* The employer may unlawfully discriminate against employees who take FMLA leave if points aren't also frozen for equivalent types of leave (e.g., workers' comp leave).

WATCH CONCURRENT LEAVES: Paid sick leave laws, including the new federal tax credit for paid FMLA leave, allow or even assume that you'll run employees' paid and unpaid leave concurrently. But running two leaves concurrently can run you into the ground if these laws conflict. *Your best bet:* Take a page from the DOL and evaluate your policies against your legal obligations and apply everything consistently.