

# NORRIS, MURRAY & PELOQUIN, LLC

Legal Counsel to Employers and Schools

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## SCHOOL CORNER

NMP is pleased to announce that **Melissa Murray** has been named as a 2019 Rising Star in the field of Schools and Education Law by Super Lawyers, a national rating service that identifies lawyers who have attained a high-degree of peer recognition and professional achievement.

Only 2.5% of lawyers in each state are selected to the *Rising Stars* annual list.



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## New DOL Advisory Confirms Neither Employers or Employees May Decline FMLA Protection

On September 10, 2019, the Wage and Hour Division (“WHD”) of the Department of Labor (“DOL”) issued a second opinion which further clarifies the DOL’s position on designating leave under the Family Medical Leave Act (FMLA). Specifically, the opinion confirms the March 2019 opinion (FMLA2019-1-A) that employers may NOT delay the designation of FMLA-qualifying leave “even if the employee would prefer that the employer delay the designation.” Once an employer has the information necessary to determine whether the leave is for an FMLA-qualifying reason, it must do so and notify the employee of the status of his/her leave within five (5) business days.

This latest opinion addresses the question of whether an employer may delay designating paid leave as FMLA leave if the delay complies with a collective bargaining agreement (CBA), and the employee prefers that the FMLA designation be delayed. The claim being that the CBA provides a greater benefit, and employees should be able to postpone using FMLA leave until they have exhausted their paid leave. The opinion makes clear that these leaves should run concurrently, and that neither the employee nor the employer may decline or delay FMLA protection for that leave. “This is the case, [...], even if the employer is obligated to provide job protections and other benefits equal to or greater than those required by the FMLA pursuant to a CBA or state civil service rules. See 29 U.S.C. §§ 2652-53; 29 C.F.R. § 825.700.”

What employers must remember, however, is that the entitlement to benefits (other than group health) while on FMLA leave is dependent on an employer’s policy for providing these benefits to employees on other forms of leave. Therefore if a CBA provides for the accrual of seniority when employees use CBA accrued paid leave, employers must allow employees to accrue seniority when they are substituting FMLA leave for paid leave.

## Commission Decision Vacated For Overstepping

In Town of Mansfield v. Civil Service Commission, the Superior Court concluded that the Commission overstepped its statutory role and made an error of law by applying the wrong legal standard in its review of the bypass decision. The Town argued and the Court agreed that the Commission impermissibly substituted its judgment for that of the Chief on several bases for its decision to overturn the bypass including the quality of Ms. Strano’s interview performance (which the Chief concluded as “atrocious”) and concerns about her improper associations or “bad choices” in partners (“three consecutive disastrous relationships”). The Court’s decision serves as a reminder to the Commission that its role is not to judge the qualifications of a candidate or to determine whether he or she should have been bypassed, but rather to decide whether the appointing authority had a reasonable justification for its decision after an impartial and reasonably thorough review of his or her candidacy. The Court concluded that the Town had demonstrated a reasonable justification for its bypass decision and vacated the Commission’s decision.