

SUBSTITUTION OF PAID LEAVE

DOL Topic: D¹

PART ONE OF THIS MEMORANDUM PROVIDES A SUMMARY OF QUESTIONS ASKED AND COMMENTS SUBMITTED IN RESPONSE TO THE DOL REQUEST FOR INFORMATION (“RFI”) ABOUT THE SUBSTITUTION OF PAID LEAVE FOR FMLA LEAVE.²

PART TWO OF THIS MEMORANDUM CONTAINS THE RELEVANT STATUTORY AND REGULATORY TEXT. PART TWO ALSO LISTS OTHER SOURCES CITED IN THE COMMENTS ABOUT THIS TOPIC.

PART ONE

The DOL requested information about the impact of 29 C.F.R. § 825.207, which governs the substitution of paid leave for unpaid FMLA leave. The FMLA authorizes employees to elect or employers to require the substitution of paid leave for unpaid FMLA leave.³ However, if an employee takes leave for a reason permitted under the FMLA but not permitted under the employer’s paid sick/medical leave policy, the employee may not substitute paid leave for unpaid FMLA leave without the employer’s permission.⁴ In contrast, employers may not limit employees’ substitution of paid vacation or personal leave for FMLA leave.⁵

With respect to substituting paid leave, the DOL asked for comments about three topics:

- The impact of prohibiting the application of employers’ normal leave policies to FMLA leave
- The impact of paid leave on FMLA leave
- The use of paid leave to cover short-term absences from work

¹ This topic is discussed in the Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request For Information, 72 Fed. Reg. 35550 (June 28, 2007), *available at* <http://www.dol.gov/esa/whd/FMLA2007FederalRegisterNotice/07-3102.pdf>, primarily in Chapter IX.

² The comments reviewed herein are from employers, employer organizations, employees, employee organizations, health care providers, and health care provider organizations. They reflect all comments posted on regulations.gov or available via a Google search as of May 8, 2007. More detailed descriptions of these comments are found in the “Digest of Comments Submitted in Response to the Department of Labor’s Request for Information on the Family and Medical Leave Act,” *available at* <http://www.law.georgetown.edu/workplaceflexibility2010/law/fmla.cfm>.

³ 29 U.S.C. § 2612(d)(2).

⁴ *Id.* at § 2612(d)(2)(B); 29 C.F.R. § 825.207(b), (c).

⁵ *Id.* at § 825.207(e).

ISSUE: The Impact of Prohibiting the Application of Employers' Normal Leave Policies to FMLA Leave

- **The RFI asked: What is the impact of 29 C.F.R. § 825.207, which bars the application of an employer's normal leave policies to the substitution of paid vacation or personal leave?** The FMLA specifically states that an employee may not substitute paid *sick* or *medical* leave where the employer's existing sick leave policies would not permit leave. However, the statute contains no similar prohibition for *vacation* or *personal* leave. The regulation allows employees with accrued vacation or personal leave to substitute that leave for any FMLA-qualifying absence. Unlike the restrictions on "family" leave and medical/sick leave, which allow employers to retain some level of control over substitution, § 825.207(e) grants employees full discretion over any substitution of vacation or personal leave. Does giving employees the ability to use paid vacation or personal leave for chronic serious health conditions remove a significant obstacle to preventing employee abuse – namely, that their absences would otherwise be unpaid?

ISSUE: The Impact of Paid Leave on FMLA Leave

- **The RFI asked: Does the existence of paid leave affect the nature and type of FMLA leave used?** The DOL sought comments about whether 29 C.F.R. §825.207 influences the nature of FMLA leave used by employees. The RFI provided the following example: an employee with paid sick leave could request intermittent leave and slowly use paid sick leave over the duration of treatment, rather than staying home on a full-time basis, which would quickly deplete the employee's sick leave benefit.

ISSUE: The Use of Paid Leave to Cover Short Absences from Work

- **The RFI asked: Do employers allow employees to use paid leave "such as sick leave" to cover brief absences from work for FMLA-qualified conditions?** What is the scope of abuse, if any, by employees who arrive late to work or leave early?

EMPLOYER-SIDE COMMENTS

Each bold-faced heading below sets forth a particular subject of commentary from employers or employer organizations, and is followed by explanatory text describing the comment in more detail.

- **Employers' Objections to Employees' Total Discretion Over the Substitution of Paid Vacation or Personal Leave**
 - Employers state that the policies governing an employee's use of normal vacation or personal leave should apply when such paid leave is substituted for FMLA leave. Employers report that the DOL's guidance on this subject has been inconsistent and confusing. Employers object to the current regulations, which they describe as penalizing employers who provide paid time off for any purpose (rather than separating out "sick" days and "vacation" days), as that time off is treated as vacation or personal leave under the regulations, and thus can be substituted for any FMLA leave without following the policies governing the employer-provided leave.
 - A few employers express the view that employees should not be able to substitute any paid leave for FMLA leave.
 - Employers' Suggested Changes: (1) Modify 29 C.F.R. § 825.207 to allow employers to apply their normal leave policies when paid vacation or personal leave is substituted for unpaid FMLA leave. (2) Clarify that those employers who provide greater benefits – either voluntarily or pursuant to state or local law – will not be penalized, and that FMLA protections do not extend beyond 12 weeks, even if an employer offers more than 12 weeks of leave.
- **The Impact of Paid Leave on FMLA Leave**
 - The National Coalition to Protect Family Leave ("Coalition") notes that permitting the unfettered substitution of vacation or personal leave enables abuse of FMLA leave by removing a significant economic disincentive to abuse – *i.e.*, lost pay.
 - Some individual employers note that requests for FMLA leave frequently decline once paid leave is exhausted, and suggest that this decline is evidence of prior abuse.
- **Use of Paid Leave to Cover Short-term Absences**
 - The Coalition states that most of its members do not allow sick leave to cover short-term absences. By contrast, a small number of individual employers note that their sick leave policies do cover short-term absences.

EMPLOYEE-SIDE COMMENTS

Most substantive employee-side comments about substitution of paid leave are from organizations; notably, the overwhelming majority of individual employee comments note the need for paid sick leave. Each bold-faced heading below sets forth a particular subject of commentary from employee organizations, and is followed by explanatory text describing the comments about this subject in more detail.

- **Employee Discretion over Substitution of Paid Leave**

- Employee organizations state that there is insufficient data to analyze the impact of 29 C.F.R. § 825.207. The National Partnership for Women and Families (“Partnership”) defends the existing regulation because it grants employees the flexibility to narrowly tailor their use of accrued paid leave to meet their particular family and personal care needs.
- The AFL-CIO opposes any changes that would govern the substitution of paid leave for unpaid FMLA leave in the collective bargaining context. Under the Railway Labor Act, employers cannot require employees to substitute paid leave for FMLA leave if doing so would contradict an existing collective bargaining agreement.

- **The Impact of Paid Leave on FMLA Leave**

- Employees state that permitting employees to substitute paid leave for FMLA leave makes leave possible for many employees who otherwise could not afford to take leave. The Partnership encourages the DOL to conduct additional research on the effects of paid leave on FMLA use.
- The American Association of University Professors (“AAUP”) and a number of individual commenters (including faculty members associated with the AAUP) argue that FMLA leave should not run concurrently with pregnancy disability leave.
- Some employees report that their employers require them to take all of their paid leave before taking any unpaid FMLA leave and that such policies discourage employees from taking FMLA leave. Employees express the view that they should not be required to exhaust all of their vacation and personal days as a prerequisite to taking unpaid FMLA leave. Employees explain that when employers require them to use paid leave for FMLA purposes, FMLA leave-takers lose any ability to take vacation or leave for non-FMLA purposes.

EMPLOYEE-SIDE COMMENTS

- Employees' Suggested Change: Modify the regulations to allow only employees to substitute paid leave for FMLA leave.
- **Use of Paid Leave to Cover Short-term Absences**
 - Employees report that studies have shown that almost half of American employees do not have paid sick leave, which suggests that many employees do not have the option to use paid sick days to cover short-term absences.

PART TWO

THE APPLICABLE STATUTORY SECTIONS AND REGULATORY PROVISIONS RELATED TO TOPIC D HAVE BEEN EXCERPTED BELOW. THESE PROVISIONS WERE NOT NECESSARILY CITED IN THE RFI.

STATUTE

29 U.S.C. § 2612

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title,⁶ an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee. . . .

(d) Relationship to paid leave

(1) Unpaid leave

If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

⁶ 29 U.S.C. § 2613 governs medical certification requirements, which are a condition for obtaining leave when requested by an employer.

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

REGULATION

29 C.F.R. § 825.207

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, **FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for FMLA leave.**

(b) Where an employee has earned or accrued paid **vacation, personal or family leave**, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to **birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition**. The term "family leave" as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, **if the employer's leave plan allows use of**

family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued **vacation, personal, or medical/sick leave** may be made for any (otherwise) unpaid FMLA leave needed to **care for a family member or the employee's own serious health condition**. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. **An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave.** An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan

(e) **Paid vacation or personal leave**, including leave earned or accrued under plans allowing "paid time off," may be substituted, at either the employee's or the employer's option, for **any qualified FMLA leave**. **No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.**

(f) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (e.g., notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. See §§ 825.302(g), 825.305(e) and 825.306(c).

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(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. . . **Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason.** If the employer permits the accrual to be used in compliance with regulations, 29 CFR 553.25, the absence which is paid from the employee's accrued compensatory time "account" may not be counted against the employee's FMLA leave entitlement.

MATERIALS CITED IN COMMENTS RESPONDING TO THE RFI⁷

Cases

- *Santosuosso v. NovaCare Rehab.*, 462 F. Supp. 2d 590 (D.N.J. 2006).
- *Brotherhood of Maint. of Way Employees v. CSX Transp., Inc.*, No. 03C9419, 2005 U.S. Dist. LEXIS 37950 (N.D. Ill, Dec. 28, 2005), *aff'd*, 478 F.3d 814 (7th Cir. 2007).
- *Solovey v. Wy. Valley Health Care Sys.*, 396 F. Supp. 2d 534 (M.D. Pa. 2005).

DOL Opinion Letters & Guidance

- Dep't of Labor Opinion Letter, FMLA-81 (June 18, 1996),
<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-81.htm>.
- Dep't Of Labor Opinion Letter, FMLA-61 (May 12, 1995),
<http://www.dol.gov/esa/whd/opinion/FMLA/prior2002/FMLA-61.htm>.

⁷ Cases and materials cited in the RFI are excluded from this list. This list does not include surveys cited in reviewed comments.