U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FMLA2025-01-A

January 14, 2025

Dear **Name***:

This letter responds to your request for an opinion regarding whether the Family and Medical Leave Act of 1993 (FMLA) regulations pertaining to substitution of paid leave in 29 CFR § 825.207(d) apply when employees take leave under state paid family leave programs in the same manner as they apply when employees take leave pursuant to paid disability plans. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for any litigation that commenced prior to your request.

BACKGROUND

As you note in your request, an increasing number of state governments have passed legislation that provides paid family and medical leave for reasons such as personal medical, family care and parental leave. Some local governments have also adopted paid sick and/or family leave programs for their municipal government employees. These plans generally provide paid leave programs for specified family and medical reasons and vary widely in their structure (including whether they are mandatory or voluntary), the scope and duration of benefits provided, and their similarity to the leave reasons covered by the FMLA. For example, many of the leave programs permit leave for circumstances which may be qualifying FMLA leave reasons as well, while some define qualifying family members more broadly than the FMLA (e.g., including grandparents or parents-in-law), some provide leave for a different set of health conditions, and some provide a leave period longer or shorter than that provided by the FMLA.[1]

GENERAL LEGAL PRINCIPLES AND ANALYSIS

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons. 29 U.S.C. § 2612(a). Additionally, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious illness or injury may take up to 26 weeks of leave during a single 12-month period to care for the servicemember. *Id*.

While the FMLA provides for unpaid leave (*id.* § 2612(c); 29 CFR § 825.207(a)), the statute also allows the employee to elect, or an employer to require the employee, to "substitute"

[1] National Council of State Legislatures, State Family and Medical Leave Laws, https://www.ncsl.org/labor-and-employment/state-family-and-medical-leave-laws (last updated Aug. 21, 2024).

accrued employer-provided paid leave (*e.g.,* paid vacation, paid sick leave, etc.) for any part of the *unpaid* FMLA entitlement period. 29 U.S.C. § 2612(d)(2); 29 CFR § 825.207(a). The term "substitute" means that either the employer or employee, on their own, can decide to have employer-provided paid leave "run concurrently with the unpaid FMLA leave." 29 CFR § 825.207(a).[2] The Department has explained that the intent of these provisions is "to allow for the specified paid leaves that have accrued but have not yet been taken by an employee to be substituted for the unpaid leave required under FMLA, in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." 60 FR 2180, 2205 (Jan. 6, 1995). This intent is reflected in the FMLA's legislative history. *See* H. R. Rep't 103-8, p. 38; S. Rep't 103-3, at 27–28.

Further, the Department's regulations and guidance explain that if an employee takes leave and receives payments under a disability benefit plan or workers' compensation program and the leave also qualifies as FMLA leave due to the employee's own serious health condition, it must be designated by the employer as FMLA leave and counted against the employee's FMLA leave entitlement. *See* 29 CFR § 825.207(d)–(e).[3]

Additionally, if the employee has *both* employer-provided paid leave *and* disability or workers' compensation benefits, the employer and the employee *may mutually agree*, where state law permits, that the employer-provided accrued paid leave will supplement such benefits, such as where a disability or workers' compensation program only provides replacement income for two-thirds of an employee's salary. *See id.* This is in keeping with the statutory mandate that the FMLA not be construed to discourage more generous leave policies voluntarily provided by employers. *See* 29 U.S.C. § 2653. However, the Department has also explained that neither the employer nor the employee can *require* substitution, under the FMLA, of employer-provided accrued paid leave during an absence for which the employee receives compensation provided by a disability or workers' compensation program. *See* 29 CFR § 825.207(d)–(e); 73 FR 67934, 67982 (Nov. 17, 2008) ("[T]he concept of 'substitution' of paid leave under the FMLA is not applicable in [the] context [of a worker taking leave and receiving benefits under a workers' compensation plan] because the employee's leave [under the plan] is not unpaid."); 60 FR at 2205–06; WHD Opinion Letter

[2] An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. For example, an employer is not obligated to allow an employee to substitute employer-provided paid sick leave for unpaid FMLA leave to care for a child with a serious health condition if the employer's normal sick leave rules allow such leave only for the employee's illness.

[3] The employer is responsible in all circumstances for designating leave as FMLA-qualifying and giving notice of the designation to the employee, including whether the employer requires paid leave to be substituted for unpaid leave or that paid leave taken under an existing leave plan be counted as FMLA leave. 29 CFR § 825.300(d)(1). *See* WHD Opinion Letter FMLA2019-3-A, 2019 WL 4324268, at *3 (Sept. 10, 2019); WHD Opinion Letter FMLA2019-1-A, 2019 WL 1514982, at *2 (Mar. 14, 2019).

FMLA2003-5, 2003 WL 25739623, at *1 (December 17, 2003); WHD Opinion Letter FMLA-92, 1997 WL 1169955, at *1 (December 12, 1997).

OPINION

While state or local paid family or medical leave programs are not directly addressed in 29 CFR § 825.207 (d) or (e), the same principles apply to such programs as apply to disability plans and workers compensation programs.

First, where an employee takes leave under a state or local paid family or medical leave program, if the leave is covered by the FMLA, it must be designated as FMLA leave and the employee must be given notice of the designation, which should include the amount of leave to be counted against the employee's FMLA leave entitlement. Second, where an employee, during leave covered by the FMLA, receives compensation from a state or local family or medical leave program, the FMLA substitution provision does not apply to the portion of leave that is compensated. Because the substitution provision does not apply, neither the employee nor the employer may use the FMLA substitution provision to unilaterally require the concurrent use of employer-provided paid leave during the portion of the leave that is compensated by the state or local program. Finally, if the employee is receiving compensation through state or local paid family or medical leave that does not fully compensate the employee for their FMLA covered leave, and the employee also has available employer-provided paid leave, the employer and the employee *may agree*, where state law permits, to use the employee's employer-provided accrued paid leave to supplement the payments under a state or local leave program. Such an arrangement may be used, for example, where a state paid leave program provides replacement income for only part of an employee's salary.

Further, if an employee uses a state or local paid family and medical leave program under circumstances which do *not* qualify as FMLA leave, the employer may not count the leave against the employee's FMLA leave entitlement. For example, if a state paid family leave law allows for paid leave to care for a family member with a medical condition that is not an FMLA-qualifying serious health condition or serious injury or illness, leave taken under such circumstances does not count against the employee's FMLA leave entitlement.

Additionally, as with workers' compensation benefits, if an employee's leave under a state or local paid family or medical leave program ends before the employee has exhausted the full FMLA leave entitlement, the employee is still entitled to the protections of the FMLA. Therefore, if the leave becomes unpaid leave for purposes of the state or local paid family or medical leave program, then the FMLA substitution provision would apply and the employee would be able to elect, or the employer would be able to require the employee, to substitute employer-provided accrued paid leave consistent with 29 CFR § 825.207(a) and (e).

These principles may be illustrated by the following example:

> *Yvette takes eight weeks of continuous FMLA leave to care for her mother following her mother's inpatient surgery. Yvette's employer notifies her that the eight weeks are designated as FMLA leave. Caring for a parent with a serious health condition is also a qualifying reason under her state's family leave program, and she applies for and receives benefits that replace two-thirds of her normal income each week that she is on leave, for up to six weeks.*
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> *During the six weeks that Yvette is receiving paid leave benefits under the state program, under the FMLA, her employer cannot require, and she cannot unilaterally elect, to substitute her accrued vacation under her employer's leave plan and thereby receive full pay from her employer in addition to the state-paid benefit. However, if Yvette's state permits an employee to use accrued paid leave concurrently with the state's paid leave, the FMLA permits Yvette and her employer to agree that Yvette will use one-third of a week of her vacation time each week to supplement the portion of her full pay that is not provided by the state's paid leave benefit.*
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> *During the final two weeks of Yvette's FMLA leave, she will have exhausted her state program's paid leave. At that point, her leave becomes unpaid leave, and the FMLA substitution provision applies. Yvette elects to use her employer-provided accrued paid vacation time to receive pay during the final two weeks of her FMLA leave.*

In summary, the principles of 29 CFR § 825.207(d) and (e) apply to leave under a state or local paid family or medical leave program that is also FMLA-qualifying. As such, the employer must designate the leave as FMLA leave, and where state law permits, the employer and employee may agree to use the employee's accrued paid leave from the employer to supplement the state or local payments. However, because leave under such programs is not unpaid, the FMLA's substitution provision does not apply, and thus, neither the employer nor the employee may unilaterally require that employer-provided accrued paid leave run concurrently with the paid state or local family or medical leave. Other than the substitution provision, all of the protections of the FMLA, including its anti-retaliation provisions, apply during the time the state or local paid leave and the FMLA leave run concurrently. Additionally, the substitution provision would apply for any remaining FMLA leave once the state or local paid leave is exhausted.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our

consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein.

We trust that this letter is responsive to your inquiry.

Sincerely,

Jessica Looman

Jessica Looman
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**