Published on *The National Law Review* https://natlawreview.com

DOL Clarifies That FMLA Paid Leave Substitution Rules Apply When Employees Receive State or Local Paid Leave Benefits

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As more states implement paid family leave programs, employers increasingly are faced with questions about how these state programs interact with Family Medical Leave Act of 1993 (FMLA) regulations. A recent opinion letter from the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) provides important guidance on this issue.

In an opinion letter dated January 14, 2025, the WHD clarified whether FMLA regulations on the "substitution of paid leave in 29 C.F.R. § 825.207(d) apply when employees take leave under state paid family leave programs."

Quick Hits

- The DOL's Wage and Hour Division clarified that in the same way employers cannot require the substitution of accrued employer-provided paid leave benefits when employees receive compensation from disability plans and workers' compensation programs, employers may not unilaterally require employees to substitute accrued employer-provided paid leave benefits when employees receive compensation from state or local paid family or medical leave programs.
- The Wage and Hour Division also reiterated that the substitution provision would apply that if an employee's FMLA-qualifying leave is unpaid.

The DOL Opinion Letter

On January 14, 2025, the WHD issued an opinion letter regarding the FMLA "substitution rule" applicability when employees are receiving state paid family leave benefits. The WHD concluded that the substitution rule did apply and that employers could not require employees to use accrued paid leave when employees were receiving paid family leave benefits. The WHD recognized in its opinion that FMLA regulations did not address the issue directly.

The FMLA provides unpaid job-protected leave for eligible employees for qualifying reasons like childbirth, personal health conditions, or caregiving for a sick family member. Under the FMLA

substitution regulation, an employee may elect or an employer may require the employee to "substitute" accrued employer-provided paid leave benefits for any part of the *unpaid* FMLA leave. Allowing an employee to substitute accrued paid leave helps mitigate an employee's wage loss.

The WHD consistently has taken the position that neither the employer nor the employee unilaterally can require or elect substitution of employer-provided accrued paid leave during a FMLA absence in which the employee receives disability or workers' compensation benefits because the employee is on paid, not unpaid, leave. However, an employee and employer *mutually* may agree, subject to state law requirements, that employees may supplement or "top off" benefits from a disability or workers' compensation program so that employees receive up to 100 percent of their normal wages.

Because the FMLA only provides unpaid leave, several states have implemented their own paid family and medical leave programs. These programs vary from state to state, but generally provide employees with partial income replacement benefits during their leave for qualifying reasons that often overlap with the qualifying reasons for leave pursuant to the FMLA.

The WHD drew a parallel between paid family leave programs and employer-provided disability and workers' compensation programs. The opinion letter explained that the FMLA substitution provision does not apply for compensated leave designated as FMLA-qualifying leave regardless of whether an employee receives compensation from either an employer-provided disability or workers' compensation program, or a state or local family and medical leave program. Accordingly, an employer cannot require that employees use accrued employer-provided paid leave benefits during a FMLA leave when the employee is receiving state or local family and medical leave program benefits.

The WHD's position is consistent with many states' approaches to the required substitution issue. For example, California prohibits employers from forcing employees to use PTO/vacation when receiving California Paid Family Leave benefits. Similarly, the Colorado Paid Family and Medical Leave Insurance (FAMLI) program prohibits employers from requiring employees to use or exhaust any accrued vacation leave, sick leave, or other paid time off prior to or while receiving FAMLI benefits, although they mutually may agree to do so. In Massachusetts, employers must allow, but may not require, employees receiving Paid Family and Medical Leave (PFML) benefits to supplement or "top off" their PFML benefits with available employer-provided accrued paid leave.

National Law Review, Volume XV, Number 17