

# Employee Benefit Plan Review

## U.S. Department of Labor Advises That Employers Cannot Require Use of Paid Time Off When Employees Are on Leave Under the Family and Medical Leave Act and Receiving Paid Statutory Benefits

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**O**n January 14, just days before the change in administration, the U.S. Department of Labor (DOL) issued an opinion letter regarding the Family and Medical Leave Act (FMLA) substitution rule, clarifying that employers cannot require the substitution of accrued paid time off (PTO) – such as paid vacation, sick time or personal leave – when an employee is also receiving state or local paid family and/or medical leave benefits.

### FMLA AND THE “SUBSTITUTION” RULE

The FMLA generally provides eligible employees of covered employers with up to 12 weeks of unpaid, job-protected leave in a 12-month period for qualifying family and medical reasons, which include the birth or adoption of a child, an employee’s own serious health condition, or caring for a family member with a serious health condition.

Because FMLA leave is unpaid, the regulations note that employers may require, or an employee may elect, to “substitute” an employee’s accrued PTO for the unpaid FMLA leave. In other words, employers can mandate, or allow employees to choose, use of available PTO concurrently with FMLA leave so employees can receive compensation while they are out of work on unpaid FMLA leave.

The FMLA regulations also state that if an employee takes leave and is receiving disability or workers’ compensation benefits, and that leave also qualifies as FMLA leave due to the employee’s own serious health condition, the employer must designate the leave as FMLA leave. However, in this instance, the employer cannot mandate, and the employee cannot unilaterally elect, use of available PTO – the employee may only use available PTO to supplement the disability or workers’ compensation benefits (i.e., to bring the employee up to full pay) if both the employer and the employee mutually agree and state law permits substitution.

## **DOL OPINION LETTER**

Currently, 13 states and the District of Columbia have implemented paid family and medical leave programs providing partial compensation to employees who take leave for the birth or adoption of a child, for an employee's own serious health condition, or to care for a family member with a serious health condition, which overlap with the FMLA. These state programs also often permit paid leave for reasons that are not covered by the FMLA. However, the FMLA and its regulations and guidance do not address these state paid family and medical leave programs.

Addressing this gap in guidance, the DOL's opinion letter sets forth the DOL's position on the interplay between state paid family and medical leave programs and the FMLA's substitution rule. In its opinion letter, the DOL clarifies how the FMLA's substitution rule applies to such paid family and medical leave programs.

Specifically, if an employee takes leave and is receiving paid family or medical leave benefits, and that leave also qualifies as FMLA leave, the employer must designate the leave as FMLA leave. Additionally, the employer cannot mandate, and the employee cannot unilaterally elect, use of available PTO. Rather, the employee may only use available PTO to supplement partial payments from paid family and medical leave programs to bring them up to full pay if both the employer and the employee mutually agree and applicable law permits substitution.

However, if the employee exhausts available statutory family and/or medical leave benefits before the employee's FMLA leave ends, the substitution rule permits the employer to require, or the employee to elect, substitution of available PTO for the remainder of the FMLA leave.

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## **The FMLA and state or local family and medical leave programs are complex, and many employers have unique paid leave policies.**

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### **NEXT STEPS FOR EMPLOYERS**

The FMLA and state or local family and medical leave programs are complex, and many employers have unique paid leave policies. Now, the DOL's opinion letter has added another variable to the equation. Consequently, employers should review their FMLA, paid family and medical leave, and other leave policies, and consult with counsel to determine whether such policies need to be revised to comply with the DOL's interpretation of the substitution rule. Any policies that currently require employees to use accrued PTO concurrently with FMLA leave when the employee is also receiving paid family and/

or medical leave benefits under a state or local program should be revised to explain that PTO may be used to supplement an employee's pay from a state family or medical leave program if the employer and employee agree and state law permits substitution.

A final consideration for employers is the current political landscape. The DOL's opinion letter was issued before President Trump entered office, and while the Trump administration has not indicated whether the opinion letter will be withdrawn, it is not binding law and the current DOL may interpret the FMLA and its regulations differently.

### **IN SUMMARY**

- When employees are on FMLA leave and are receiving compensation through a state or local paid family and medical leave program, employers cannot require employees to use their accrued paid time off and employees cannot unilaterally elect to do so.
- However, employers and employees can mutually agree that, if permitted by applicable law, the employee may use available accrued paid time off to supplement paid family and/or medical leave benefits during FMLA-qualifying leave. 🌟

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