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Labor & Employment Alert

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Substituting Paid Time Off during FMLA Leave: What are the options?

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The DOL provides updated guidance on the interplay between FMLA, disability and worker's compensation benefits and state-provided paid FML benefits.



What's the impact?

- This opinion letter clarifies an employer's rights with respect to requiring employees to utilize their PTO while also receiving some form of benefit.
- When paid state or local paid leave runs concurrently with FMLA leave, the protections of FMLA, including the anti-retaliation and job protection provisions, apply.

On January 14, 2025,¹ the US Department of Labor (DOL) Wage and Hour Division issued an [opinion letter](#) outlining the rules regarding the substitution of employer-provided paid time off while on Family Medical Leave Act (FMLA) leave and how these rules are impacted by disability

¹ We note that this letter was issued under the prior administration and may be subject to change under the new administration.

benefit plan or worker's compensation program benefits and by family and medical leave programs and paid disability programs. In this guidance, the DOL reiterates that for eligible employees FMLA provides for up to 12 weeks of unpaid, job-protected leave per year for specified family and medical reasons and up to 26 weeks of leave during a single 12-month period to care for the servicemember. The guidance clarifies that under the Act's "substitution" regulations, employees may elect—if permitted under the terms and conditions of the employer's paid time off policy(ies)—*or employers may require employees* to substitute accrued employer provided paid time off (i.e., vacation, personal days, sick leave, etc.) for any part of the **unpaid** FMLA leave. In such instances, such employer-provided paid time off would run concurrently with the FMLA leave.

However, this is not the case when an employee takes leave due to the employee's own serious health condition *and* also receives payments under a disability benefit plan or worker's compensation program. The leave can run concurrently and be counted against the employee's FMLA leave entitlement only if the employer designates the leave as FMLA leave. Employers must also notify employees of the FMLA designation.

But the crux of this opinion letter clarifies an employer's rights with respect to requiring employees to utilize their PTO while also receiving some form of benefit. When the employee receives payments under a disability benefit plan or worker's compensation program while on FMLA leave, employers cannot require employees to substitute accrued employer-provided paid time off in the way they can if the FMLA leave is unpaid. Similarly, employees cannot demand that employers allow them to use this time while on FMLA leave. However, the employer and employee can mutually agree, if state law permits, to supplement the benefits with employer-provided paid time off to bring the employee up to full pay during the period of the leave.

Applying the same principles applicable to disability benefit plan or worker's compensation program benefits, the DOL explained that when an employee takes leave under a state or local paid family or medical leave program for reasons which also qualify for FMLA leave, employers must designate that the leave runs concurrently with the employee's FMLA leave entitlement and provide notice to the employee of this designation. However, if an employee takes leave under a state or local paid family or medical leave program for reasons which qualify for that leave, but not for FMLA leave, then the leave may not be designated as FMLA leave or count against the employee's FMLA leave entitlement.

Similar to the rules while receiving payment from a disability benefit plan or worker's compensation program, employers may not require that employees use accrued paid time off while on leave under a paid state or local paid family or medical leave program, but the employee and employers may agree to allow the employee to use such time to top off the benefit payment, as permitted under the state or local law, to allow the employee to be paid in full during leave.

Circling back to the FMLA substitution rules, if the employee is entitled to benefits under a disability benefit plan or worker's compensation program or takes leave under a state or local paid family or medical leave program and the benefits end before the employee has exhausted their FMLA leave entitlement, then the employee may still use FMLA leave if the reason for leave qualifies under FMLA. At that point the leave would again be unpaid leave, and the employer could require the use of accrued employer paid time off.

Finally, the DOL reminded employers that when paid state or local paid leave runs concurrently with FMLA leave, the protections of FMLA, including the anti-retaliation and job protection provisions, apply.

Because it is possible for the nature of an employee's leave to change over the course of the leave (paid, unpaid, partially subsidized through third-party benefits), it is especially important for employers to understand these nuances and ensure that they are in compliance with the law.

Nixon Peabody has employment law attorneys throughout New England and the country who can help advise employers on FMLA and state and local family medical leave laws and on implementing leave policies across multiple work locations to address your company's specific needs.

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