

CAN EMPLOYERS REQUIRE EMPLOYEES TO USE PAID LEAVE DURING FMLA ABSENCE?

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The debate rages on concerning the employer's ability to always require an employee to utilize paid leave (such as vacation, sick time or PTO) during an approved leave of absence under the Family and Medical Leave Act (FMLA).

Federal regulations provide that, to the extent an employee has accrued paid leave, that leave may be substituted for otherwise unpaid FMLA leave. This can be at an employee's election or at the employer's insistence. But, does the employer have the right to require this when an employee is covered under worker's disability compensation or a short-term disability plan?

The regulations state that, because such leave "**is not unpaid**, the provision for substitution of paid leave is inapplicable," although the time may still be designated as counting towards FMLA leave entitlement. 29 C.F.R. § 825.207 (emphasis added). However, there is typically a waiting period prior to eligibility for benefits (i.e., two weeks) and, after the benefit begins, the employee usually receives only a percent of his usual wages (i.e., 60 percent).

So, the more difficult issue is whether the waiting period or the uncompensated percent may be deemed *unpaid* leave under the regulations? If so, the employer may require an employee to utilize accrued paid time off to the extent the FMLA leave remains unpaid.

The commentary to the regulations states that "an employee's receipt of such payments precludes the employee from electing, and prohibits the employer from requiring, substitution of any form of accrued paid leave for **any part of the absence covered by such payments.**" Thus, the question persists: is the waiting period, or unpaid percentage a "part...covered by such payments." The answer is not clear.

Recent inquiries reveal that the answer will vary depending on who at the Department of Labor is asked the question. Even seasoned employment attorneys recently polled disagree. So, what should an employer do? Most would agree that the waiting period is fair game, since that period is not covered by such payments, even in part. The unpaid percentage is more troubling. Obviously, the safest course for an employer is to not require the substitution of paid leave to make up the unpaid percent of wages, but it is probably lawful to permit an employee to enhance their disability benefit with accrued paid leave in order to achieve full wages. Perhaps the anticipated new regulations will provide further guidance.

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