Proskauer

DOL: Employers Cannot Mandate PTO Use with State/Local Paid Leave Benefits During FMLA

Law and the Workplace on **January 15, 2025**

The U.S. Department of Labor Wage and Hour Division ("WHD") has issued an opinion letter stating that employers cannot require employees to substitute accrued paid time off during a Family and Medical Leave Act ("FMLA") leave where the employee is also receiving benefits under a state or local paid family or medical leave program.

The opinion letter – which does not have the force of law but sets forth the agency's enforcement position – answers a longstanding open question around the interplay between the FMLA, state/local paid leave programs, and accrued paid time off.

A Quick Refresher: FMLA and State Family/Medical Leave Programs

The federal FMLA entitles eligible employees of covered employers to up to 12 weeks (or in limited cases, 26 weeks) of unpaid, job-protected leave per 12-month period for specified family and medical reasons. Covered reasons for FMLA leave include an employee's own serious health condition, caring for a parent, spouse or child with a serious health condition, and caring for a new child following birth, adoption or foster placement.

Since the FMLA's enactment in 1993, numerous states (including New York, California, Massachusetts, Connecticut, and others) have instituted family and/or medical leave programs that provide partially paid leave (usually based on a percentage of the employee's wages, up to a set cap) for personal medical, family care and/or parental leave reasons. Likewise, certain local governments have implemented paid family and medical leave programs specifically for their municipal employees. Many of these programs permit leave for reasons that are also qualifying reasons for leave under the FMLA. However, state/local paid leave programs often include benefits that differ from or exceed what the FMLA provides, such as longer leave periods or additional covered reasons for leave.

What Do the FMLA Regulations Say About Substitution of PTO?

While FMLA leave is unpaid, the governing regulations allow an employee to elect, or an employer to require the employee, to "substitute" accrued employer-provided paid time off (e.g., paid vacation, paid sick leave, etc.) for any part of an unpaid FMLA period – that is, the accrued paid time off may be used concurrently with FMLA leave to enable the employee to receive full pay during an otherwise unpaid leave period. However, the regulations further state that, during any part of an FMLA leave where an employee is receiving disability or workers' compensation benefits, *neither the employer nor the employee can require substitution of paid time off* because such leave is not unpaid. Rather, when disability or workers' compensation benefits are being received, the employer and the employee may only *mutually agree* (where state law permits) that accrued paid time off will be used to supplement such benefits.

EXAMPLE*: John tells his employer he requires 12 weeks of leave to recover from a serious back surgery. John's employer designates the 12 weeks as FMLA leave. John also applies and is approved for 12 weeks of disability benefits under his employer's short-term disability program, pursuant to which he will receive a benefit equal to two-thirds of his regular wages. John's employer cannot require John to substitute his accrued vacation time because he is receiving disability benefits and therefore his FMLA is not unpaid. However, John and his employer agree to use one-third of his available vacation time each week to supplement his disability pay so John receives 100% pay during the leave.*

How Does the Opinion Letter Impact Substitution of PTO During FMLA?

Because they have only more recently come into existence, state and local paid family or medical leave programs are not directly addressed in the FMLA regulations. However, the opinion letter now makes clear that "the same principles apply to such programs as apply to disability plans and workers compensation programs."

First, the opinion letter emphasizes that "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[.]" The opinion letter then goes on to state:

> [W]here 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. [However], 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.

The opinion letter also notes that if an employee's leave under a state or local paid family or medical leave program ends before the employee has exhausted their full FMLA leave entitlement and the leave therefore becomes unpaid, the FMLA substitution provision would then apply and the employee would be able to elect, or the employer would be able to require the employee, to substitute accrued paid time off.

***EXAMPLE**: Jane tells her employer she requires 12 weeks of leave to care for her husband while he recovers from a serious back surgery. Jane's employer designates the 12 weeks as FMLA leave. Jane also applies and is approved for 8 weeks of paid family care benefits under her state's paid family and medical leave program, pursuant to which she will receive a benefit equal to two-thirds of her regular wages. Jane's employer cannot require Jane to substitute her accrued vacation time during the 8 weeks of her FMLA leave where she is concurrently receiving state family care benefits because her FMLA during that time is not unpaid. However, Jane and her employer agree to use one-third of her available vacation time each week during the first 8 weeks to supplement her state family care benefit so Jane receives 100% pay during that time. Beginning on week 9, Jane is no longer eligible for state family care benefits and her FMLA leave is now unpaid, so pursuant to its FMLA policy Jane's employer requires her to substitute her remaining accrued vacation time during the FMLA leave until it is exhausted.*

Implications and Action Steps for Employers

The opinion letter clarifies what has been a gray area around the interplay between the FMLA, state/local paid leave programs, and accrued paid time off. For example, the regulations governing the New York Paid Family Leave Law ("NYPFL") state that "[a]n employer covered by the FMLA . . . that designates a concurrent period of family leave under [the NYPFL] may charge an employee's accrued paid time off in accordance with the provisions of the FMLA." However, it had previously been unclear whether this language in fact permitted employers to require substitution of accrued paid time off during a concurrent FMLA and NYPFL leave. It is now clear that such a requirement is impermissible, though employers and employees may agree to use paid time off to supplement NYPFL benefits.

Employers should now review their leave policies and practices to ensure that any provisions around the use of accrued paid time off during FMLA leave comport with the WHD's interpretation of the requirements of the law. To the extent that any such policies *require* employees to substitute accrued paid time off during an FMLA leave where an employee is concurrently receiving disability, workers' compensation or state/local paid family or medical leave benefits, the policies should be revised to provide that paid time off may only be used to supplement such other payments and only if both the employer and the employee agree.

However, employers are reminded that, as noted above, there may be situations where employees are eligible for benefits under state/local paid leave laws that are *not* also covered by the FMLA. As such, employers should also take note of what an applicable state/local paid family or medical leave law may permit (or not permit) around the substitution of paid time off and apply those rules during any leave period that does not run concurrently with the FMLA.

If you have questions or need assistance with your company's leave policies and benefits, please contact the authors.

Related Professionals

- **Evandro C. Gigante**
  Partner

- **Laura M. Fant**
  Special Employment Law Counsel
- **Jurate Schwartz**
  Senior Counsel
- **Arielle E. Kobetz**
  Associate