

Limitations on When Employers May Require Employees to Substitute Paid Leave During FMLA Leave

The Family and Medical Leave Act (FMLA) entitles qualified employees to up to 12 weeks of unpaid leave in a 12 month period for certain family and medical situations. While FMLA leave is unpaid, many employers require employees to use accrued paid sick days and vacation days during their FMLA leave. (This is referred to as requiring “substitution” of paid leave.) While this is generally permissible (and the recommended best practice), employers should be aware that they cannot, in every situation, require employees to use paid leave while on FMLA leave.

The general rule is that an employer may require an employee to substitute paid leave (i.e., use up the employee’s paid sick and vacation benefits or paid time off) during an *unpaid* FMLA leave of absence. When, however, an FMLA leave of absence is paid (e.g., by temporary disability benefits), the FMLA provision permitting an employer to require substitution of paid leave is inapplicable.

The issue of employer-required substitution of accrued paid leave during FMLA leave was at the center of a recent Seventh Circuit Court of Appeals decision. In *Repa v. Roadway Express, Inc.*, 477 F.3d 938 (7th Cir., Feb. 26, 2007), the court held that an individual who was receiving disability benefits from a third party was not obligated to substitute her paid vacation and sick leave during her FMLA leave.

The case involved Alice Repa, a Roadway Express employee, who suffered a non-work-related injury that required surgery and a six week absence from work. Repa applied for and was granted disability benefits in the amount of \$300 per week for six weeks from a multi-employer health and welfare fund. Repa also was placed on FMLA leave during her six week absence, and Roadway required Repa substitute her accrued paid leave during her FMLA leave.

Repa filed suit challenging Roadway’s requirement that she use paid sick and

vacation leave while she was receiving disability benefits during her FMLA leave, asserting that such a practice violated Department of Labor regulation 29 C.F.R. § 825.207(d)(1), which sets out the general rule on mandatory substitution of paid leave that is described above (i.e. an employer cannot require substitution unless FMLA leave is unpaid). To understand Roadway’s defense, it is important to look at this section of the regulations as a whole. It states:

Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify

for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

In defending its action, Roadway asserted that the quoted provision only applies to disability leave for the birth of a child, and because Repa's injury was not related to childbirth, this section did not apply to her leave. Therefore, the FMLA's general rule permitting an employer to require an employee to substitute paid leave for unpaid FMLA leave applied.

The court disagreed with Roadway's interpretation, and ruled that the quoted provision was not limited solely to disability FMLA leaves relating to childbirth. Instead, the provision applies in a broader fashion to paid leaves, whether from temporary disability plans (regardless of the type of disability) or workers' compensation benefits.

Simply put, an employer may require an employee to substitute accrued paid leave for an *unpaid* FMLA leave of absence, but not in a situation where an employee is receiving disability benefits. Therefore, Roadway could not require substitution of paid leave as it could if Repa were on unpaid FMLA leave. It should be noted that the court held that the same conclusion would apply regardless of whether benefits were paid under an employer-sponsored disability plan or a third-party plan.

While the *Repa* decision is limited to the Seventh Circuit, which consists of Illinois, Indiana and Wisconsin, all employers should take note of this ruling when administering FMLA, as other courts may consider *Repa* as persuasive authority in a similar case. The FMLA regulations are very complex and the *Repa* case underscores how important it is that employers understand the FMLA.

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