

CHAPTER 11

SUBSTITUTION OF PAID LEAVE

I. OVERVIEW

Generally, FMLA leave is unpaid. See 29 USC 2612(c) (Title I); 29 CFR 825.207(a) (same); 5 USC 6382(c) (Title II); 5 CFR 630.1205(a) (same); 2 USC 1312(a)(1) (the CAA); S. Res. 242, Cong. Rec. S3959, S3965 (April 23, 1996); 29 CFR 825.207(a) (same); 3 USC 412(a)(1) (PEOAA); see *Repa v. Roadway Express, Inc.*, 477 F.3d 938, 940-41 (7th Cir. 2007) (employer is not required to pay an employee while the employee is on FMLA leave); *Chubb v. City of Omaha, Nebraska*, 424 F.3d 831, 834 (8th Cir. 2005); *Tippens v. Airtel Systems, Inc.*, No. 2:05-CV-421, 2007 U.S. Dist. LEXIS 23808, at *15 & n.2 (S.D. Ohio March 30, 2007); *Hendricks v. Compass Group USA, Inc.*, No. 4:03CV79AS, 2006 U.S. Dist. LEXIS 64433, at *5-6 (N.D. Ind. Aug. 29, 2006); *Dortman v. ACO Hardware, Inc.*, 405 F. Supp. 2d 812, 820 (E.D. Mich. 2005); *Lines v. City of Ottawa, Kansas*, No. 02-2248-KHV, 2003 U.S. Dist. LEXIS 10203, at *15 (D. Kan. June 16, 2003) (FMLA guarantees 12 weeks of unpaid leave). However, all four federal sector FMLA statutes permit the use of paid leave in substitution for, or to run concurrently with, unpaid FMLA leave. The circumstances under which paid leave may be used in conjunction with unpaid FMLA leave, what accrued paid leave may be used, and who gets to make the election to use paid leave, however, differ depending on what federal sector FMLA statute applies.

[Section II](#) of this chapter discusses paid leave substitution, including what accrued paid leave may be used in substitution of unpaid FMLA leave, the limitations on paid leave substitution, and compensatory time off. [Section III](#) addresses temporary disability leave and workers' compensation as paid leave. [Section IV](#) will address the effect paid leave substitution has on various FMLA procedures such as notice and documentation. Finally, [Section V](#) will discuss the mixed responsibilities under the FMLA and paid leave substitution.

II. PAID LEAVE

In the federal sector, unpaid FMLA leave may run in conjunction with paid leave in two circumstances: (1) an eligible employee may substitute accrued paid leave for unpaid FMLA leave; or (2) FMLA leave may run concurrently with an absence occasioned by an eligible employee's workplace injury for which he or she is receiving workers' compensation, or pursuant to a federal employer's temporary disability benefit plan. A review of each follows.

A. SUBSTITUTION OF ACCRUED PAID LEAVE

Under certain circumstances, the FMLA permits an eligible federal employee to substitute accrued paid leave for unpaid FMLA leave. See 29 USC 2612(d) (Title I); 29 CFR 825.207(a) (same); 5 USC 6382(d) (Title II); 5 CFR 630.1205(b) (same); 2 USC 1312(a)(1) (incorporating § 102 of Title I, 29 USC 2612 (CAA); S. Res. 242, Cong. Rec. S3959, S3965 (April 23, 1996); 29 CFR 825.207(a) (same); 3 USC 412(a)(1) (incorporating § 102 of Title I, 29 USC 2612 (PEOAA)). The substitution provisions are intended to allow for the specified paid leave that has accrued but not yet been taken by an employee to be substituted for the unpaid leave required under the FMLA, in order to mitigate the financial impact of wage loss due to family and temporary medical leave. Preamble, 29 CFR 825.207.

1. Election of Paid Leave

Under Title I, Title II, the CAA and the PEOAA, an eligible employee may choose to substitute accrued paid leave for unpaid FMLA leave. See 29 USC 2612(d)(2)(A) (Title I); 29 CFR 825.207(a) (same); 5 USC 6382(d) (Title II); 5 CFR 630.1205(b) (same); 2 USC 1312(a)(1) (CAA); S. Res. 242, Cong. Rec. S3959, S3965 (April 23, 1996); 29 CFR 825.207(a) (same); 3 USC 412(a)(1) (PEOAA); see *Repa v. Roadway Express, Inc.*, 477 F.3d 938, 940-41 (7th Cir. 2007); *Bloom v. Metro heart Group of St. Louis, Inc.*, 440 F.3d 1025, at *13 (8th Cir. 2006).

If an eligible employee does not choose to substitute accrued paid leave, under Title I, the CAA and the PEOAA, the employer may require the employee to substitute accrued paid leave for FMLA leave. See 29 USC 2612(d)(2)(A) (Title I);

29 CFR 825.207(a) (same); 2 USC 1312(a)(1) (CAA); S. Res. 242, Cong. Rec. S3959, S3965 (April 23, 1996); 29 CFR 825.207(a) (same); 3 USC 412(a)(1) (PEOAA); *see also Repa v. Roadway Express, Inc.*, 477 F.3d 938, 940-41 (7th Cir. 2007); *Stentz v. City of Republic, Missouri*, 448 F.3d 1008, 1010 (8th Cir. 2006) (FMLA grants an employer the power to require an employee to substitute any accrued sick leave for FMLA leave); *Bloom v. Metro heart Group of St. Louis, Inc.*, 440 F.3d 1025 (8th Cir. 2006); *Dortman v. ACO Hardware, Inc.*, 405 F. Supp. 2d 812, 820 (E.D. Mich. 2005).

If the employer elects to give the employee paid leave in lieu of unpaid leave, the employee is not entitled to an additional period of unpaid leave after exhausting the 12-week period of paid leave. 29 USC 2612(d)(2)(B); *see Lines v. City of Ottawa, Kansas*, No. 02-2248-KHV, 2003 U.S. Dist. LEXIS 10203, at n.9 (D. Kan. June 16, 2003); *see also Miller v. Personal-Touch of Virginia, Inc.*, 342 F. Supp. 2d 499, 511 (E.D. Va. 2004) (an employer may require the employee to substitute any period of accrued vacation, sick, or other leave for any part of the 12-week period of FMLA leave); *Pellegrino v. County of Orange*, 313 F. Supp. 2d 303, 319, n.9 (S.D.N.Y. 2004) (FMLA permits employers to require their employees to exhaust FMLA leave before taking any other leave to which they might be statutorily or contractually entitled); *Strykowski v. Rush North Shore Medical Center*, No. 02 C 0778, 2003 U.S. Dist. LEXIS 13206, at *15 (N.D. Ill. July 30, 2003) (FMLA permits employers to require employees to substitute any accrued paid vacation leave for FMLA leave).

The only decision of consequence regarding the substitution of paid leave since the publication of the *FMLA Guide* is *Miller v. Personal-Touch of Virginia, Inc.*, 342 F. Supp. 2d 499, 511 (E.D. Va. 2004). That case turned on whether plaintiff could elect to take accrued paid leave first and then take unpaid FMLA leave for the same FMLA-qualifying reason. The court held that plaintiff could not stack unpaid FMLA leave on top of paid leave for the same FMLA-qualifying reason so that she received more than 12 weeks of leave, at least where the employee was provided with adequate written notice that the employer considers the leave as FMLA-qualifying. In that circumstance, if an employee decides to use any accrued paid leave for the same reason during that period, such decision constitutes an employee election to substitute paid leave that will run concurrently with unpaid FMLA leave, whether or not that was the intention of the employee.

Plaintiff Yolanda Miller was employed as a private duty nurse supervisor for Personal-Touch. At all relevant times to the events at issue in the case, Miller was eligible for unpaid FMLA leave and accrued 144 hours of paid leave in the form of vacation, sick leave, floating holidays, and personal days. In March 2002, Miller learned that she was pregnant with an expected due date of November 27, 2002. Miller subsequently informed her employer on August 1, 2002, of her need to take leave due to her pregnancy and the birth of her child.

On September 24, 2002, Miller met with a representative of Personal-Touch where she completed a request for FMLA leave. At this meeting the parties discussed the substitution of accrued paid leave for unpaid FMLA leave. Miller came away from the meeting with the belief that she could decline to substitute accrued paid leave for unpaid FMLA leave and instead run the two forms of leave consecutively. Personal-Touch contended that before, during, and after that meeting it advised plaintiff that if she elected to substitute paid leave for unpaid FMLA leave, the paid leave would run concurrent with the 12 weeks of FMLA leave. On September 24, 2002, plaintiff signed and submitted the FMLA request form with the start and end dates left blank.

On September 26, 2002, plaintiff informed Personal-Touch that her doctor placed her on bed rest for the last two months of her pregnancy. The FMLA request form was completed with FMLA leave set to begin September 26, 2002, and end December 19, 2002. Again, plaintiff insisted that she was advised that she could first use accrued paid leave and then, and only then, would FMLA leave begin. She claimed that no one ever advised her when her FMLA leave would begin. Personal-Touch claimed that Miller was given a copy of the completed FMLA Request Form.

Plaintiff was absent from work on full bed rest until she delivered her son on November 25, 2002. Personal-Touch called plaintiff on December 11, 2002, and advised Miller that her FMLA leave would end on December 19, 2002, and that if she could not return to work her job could not be guaranteed. Personal-Touch followed up this telephone conversation with a letter of confirmation the following day. Plaintiff was released to return to work by her doctor on January 6, 2003. By that time, Personal-Touch had already terminated her.

Plaintiff filed suit alleging that her termination violated the FMLA. She claimed that had her paid leave been used in addition to, and not in place of, her unpaid FMLA leave, she could have remained on leave until January 20, 2003. Alternatively, plaintiff argued that Personal-Touch permitted her to take unpaid FMLA leave intermittently with her accrued paid leave. Under either the substitution or the intermittent leave argument, plaintiff concluded that Personal-Touch wrongfully substituted her accrued paid leave for unpaid FMLA leave.

The court initially found that Personal-Touch properly notified Miller that her FMLA leave commenced at the start of her bed rest, not sometime later after she exhausted her paid leave. In pertinent part, the FMLA request form she signed on September 24, 2002, specifically provided that “the requested leave will be counted against your annual FMLA leave entitlement.” *Id.* at 507. Because it gave proper written notice to Miller that it would count all of the leave taken due to her pregnancy toward her FMLA entitlement, Personal-Touch was permitted to consider all such leave as FMLA leave, regardless of whether it was paid. According to the court, in this case plaintiff admitted that she elected to use paid leave during the period covered by FMLA leave. The interspersed of paid and unpaid leave periods for her pregnancy, the court found, completely undermined plaintiff’s professed belief that she used all of her paid leave first and then, and only then, would she be permitted to use her 12 weeks of FMLA leave.

The court concluded that “substitution of paid leave under the FMLA is not intended to extend the total leave period beyond the [12] weeks guaranteed under the FMLA.” *Id.* at. 512. “The court concludes that the taking of any leave for an FMLA qualifying reason, when the employee has notice that the leave is being taken for this reason and decides to use paid leave during this period, constitutes an elected substitution of paid leave, in spite of the plaintiff’s belief to the contrary.” *Id.* Title II prohibits an employer from requiring an employee to substitute paid leave for any or all of the period covered by unpaid FMLA leave. 5 CFR 630.1205(d); see *AFGE, Council of Marine Corps Locals Council 240 and US Dept. of Navy*, 51 FLRA 49, 51 (FLRA Aug. 29, 2005).

a. Order of Election

The FMLA statutes that allow either an eligible employee or employer to elect to substitute an employee’s accrued paid leave (Title I, the CAA, and the PEOAA), do not prioritize who, the employee or the employer, has the initial right to elect substitution of paid leave for unpaid FMLA leave. Rather, the statutes merely provide that an “eligible employee may elect, or an employer may require the employee, to substitute” any accrued paid leave for any part of the 12-week unpaid FMLA leave entitlement. 29 USC 2612(d)(2); see 2 USC 1312(a)(1) (incorporating § 102 of the FMLA, 29 USC 2612); 3 USC 412 (a)(1) (same).

The regulations implementing the FMLA clarify the order election. In the first instance, an eligible employee gets to choose whether he or she wishes to substitute paid leave for unpaid FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer has the right to require the employee to substitute accrued paid leave for FMLA leave. 29 CFR 825.207(a) (Title I); S. Res. 242, Cong. Rec. S3959–S3997 (April 23, 1996); 29 CFR 825.207(a) (CAA). An employee always has the right to request, in the first instance, that appropriate paid leave be substituted. Preamble, 29 CFR 825.207. If the employee does not initially request substitution of available paid leave, the employer retains the right to require it. *Id.* Of course, because an employer *may* require paid leave substitution does not mean that an employer *must* require paid leave substitution. If the employer elects not to require paid leave substitution, the employee retains the paid leave for use in the future.

An employer may not override an employee’s initial election to substitute appropriate paid leave for FMLA leave, nor place any other limitations on its use. For example, an employer could not require that an employee who has elected to substitute available paid leave for FMLA leave use that paid leave only in full day increments. Preamble, 29 CFR 825.207. At the same time, in the absence of other limiting factors (such as more generous leave terms pursuant to employer policy or a collective bargaining agreement), where an employee does not initially elect substitution of available paid leave, the employee must accept the employer’s decision to require substitution, even where the employee opposes the employer’s imposition of paid leave substitution. *Id.*

Note that an employee’s affirmative decision not to elect to substitute paid leave for unpaid leave is not protected from being overridden by an employer. Quite the opposite. If an eligible employee fails to elect to substitute paid leave for unpaid FMLA leave, the employer may require the employee to substitute available paid leave, the employee’s wishes or objections notwithstanding.

If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave as permitted, the employee remains entitled to all the paid leave which is earned or accrued under the terms of the employer’s paid leave policies. 29 CFR 825.207(f) (Title I); S. Res. 242, Cong. Rec. S3959, S3966 (April 23, 1996); 29 CFR 825.207(f) (CAA); see *Stentz v. City of Republic, Missouri*, 448 F.3d 1008, 1010 (8th Cir. 2006). This suggests that unpaid FMLA leave is the default where neither the employee nor the employer elects substitution of paid leave for unpaid FMLA leave.

Generally speaking, to reduce absenteeism, it is in the interest of an employer to limit the amount of leave available to an employee. In the FMLA context, where an absence meets the requirements of both the FMLA and available paid leave, an employer is well advised to exercise its option, if available, and elect to have the paid leave substituted for the unpaid FMLA leave. The unwanted depletion of an employee's paid leave balance for FMLA leave may also deter or limit marginal requests for FMLA leave. Employees generally dislike depleting their vacation leave, especially when required to and against their wishes.

By the same token, because an employer cannot override an employee's election that paid leave not be substituted for unpaid FMLA leave, it is incumbent on employees and their representatives to clearly notify the employer of their wishes regarding paid leave substitution. Absent clear instructions by the employee on paid leave substitution, the employer decides the issue. Absent controlling employer policy, the employee's subsequent objections will not defeat an employer's election to substitute the employee's accrued paid leave for unpaid FMLA leave. In practical terms, if an employee fails to notify the employer that he or she does not wish to have the paid leave substituted, an employer can require that the available employee's annual leave be used for the absence.

b. Choice Among Paid Leave Balances

For purposes of election, the FMLA does not specifically address whether the right of an employee or employer to substitute available paid leave includes the right to select a specific paid leave balance over others that may be available. For example, an employee with both an available sick leave balance and annual leave balance may elect to substitute annual leave for unpaid FMLA leave for planned surgery resulting in an overnight stay in a hospital. While sick leave would appear more appropriate given the reason for the absence, the employee may wish to use annual leave because, in this example, the end of the leave year is approaching and the employee needs to use his annual leave or lose it. Again, there is nothing specific in the regulations that would require the employee to use the available leave that sounds most appropriate given the reason for the absence. The only requirement in the regulations is that the leave be earned or accrued and that the employee must meet the usual requirements of the paid leave plan. See 29 CFR 825.207(a)–(c).

The prohibition against an employer placing limitations on the use of the paid leave initially elected by the employee would appear to bar an employer from switching an employee's explicit election of one type of available paid leave for another. Preamble, 29 CFR 825.207. *But see Haggard v. Farmers Ins. Exchange*, 1996 U.S. Dist. LEXIS 4078 (D. Or. March 26, 1996) (employer did not violate the FMLA by substituting unpaid FMLA leave with paid leave from accrued vacation time rather than from her paid sick leave balance as requested).

Similarly, an employer would appear able to require an employee to use one type of available paid leave over others, where the employee initially fails to make an election on paid leave substitution. For example, an employer could require an employee needing hospitalization to use available annual leave rather than available sick leave if the employee initially failed to elect to substitute paid leave for unpaid FMLA. The fact that the employee would prefer that the employer use her available sick leave rather than her more precious annual leave is immaterial. See, e.g., Preamble, 29 CFR 825.207 (employee must accept employer's decision to elect paid leave substitution, even though the employee would desire a different result).

Of course, like the employee, the employer would have to elect a paid leave balance that is available in accordance with employer policy. See 29 CFR 825.207(a)–(c). By policy or collective bargaining agreement, an employer may limit its ability to elect paid leave in substitution for unpaid FMLA leave. For example, an employer may have a collective bargaining agreement that provides that only an employee can elect to use annual leave in substitution for FMLA leave.

Another limitation is the prohibitions against interference with FMLA rights or discrimination for exercising the same. That is, an employer that elects to substitute the use of annual leave rather than the sick leave preferred by the employee should not be doing so in order to punish the employee for exercising his or her rights under the FMLA. One way to avoid this is for an employer to have a consistently applied policy identifying the order in which it will draw on accrued leave balances when the employer elects to substitute paid leave for unpaid FMLA leave.

There is an argument that the substituted leave selected by an employee or employer must be related to the reason for the leave. In the preamble to the final regulations implementing Title I, 29 CFR 825.207, the Department of Labor repeatedly used the term "appropriate paid leave" when describing an employee and employer's right of substitution. The final regulations themselves refer to "earned or accrued" paid leave. See 29 CFR 825.207(a)–(c). Because the term

“appropriate” does not necessarily have the same meaning as earned or accrued, the argument could be made that “appropriate paid leave” limits what paid leave can be drawn upon to the most obvious type of leave available given the nature of the reason for the absence. For example, an employee absent due to illness covered by the employer’s sick leave policy might be limited to using the sick leave policy in substitution for unpaid FMLA leave rather than annual leave. This is because sick leave is the more appropriate type of paid leave, given the nature of the request.

Given the plain language of the regulations, it is not recommended that arguments be made relying on the use of the term “appropriate” in the Preamble to the final regulations implementing Title I. The difference in terms suggests that an argument could be made.

c. Who Makes the Election?

The issue here is whether the right to make an election is limited to the employee or employer, or whether others may make the election. This is likely to arise in a situation where others are attempting to act on the employee’s behalf. It does not appear that others may make the election to substitute paid leave for unpaid FMLA leave.

Under Title I, the CAA, and the PEOAA, the right to elect to substitute paid leave rests initially with an eligible employee and, under certain circumstances, with the employer. *See* 29 CFR 825.207(a); S. Res. 242, Cong. Rec. S3959, S3965 (April 23, 1996); 29 CFR 825.207(f) (CAA). Under Title I, the right to elect to substitute available paid leave for unpaid FMLA leave rests exclusively with the employee. 5 CFR 630.1205(b), (d). The terms “employee” and “employer” are specifically defined in the respective statutes and implementing regulations. *See* 29 USC 2611(2) (eligible employee), § 2611(4) (employer defined); 29 CFR 825.108 (public agency employer defined); 825.800 (eligible employee); 5 USC 6381(1) (employee defined); 5 CFR 630.1201(b)(l) (employee defined); 2 USC 1301(3)–(9) (employee and employer defined); S. Res. 242, Cong. Rec. S3959, S3961 (April 23, 1996); 29 CFR 825.110 (eligible employees); 3 USC 401(a)(3) (employee defined), § 401(a)(4) (employing office defined).

For further discussion of who are covered employees and employers under the federal sector FMLA statutes, see Chapters 2 through 4.

Nowhere in these definitions does the term “employee” include anyone acting on behalf of the employee. In contrast, some of the federal sector FMLA statutes allow a spokesperson for the employee to notify the employer of the employee’s need for FMLA leave. 29 CFR 825.208(a) (Title I); S. Res. 242, Cong. Rec. S3959, S3966 (April 23, 1996); 29 CFR 825.208(a) (CAA). Title I does not appear to have a similar provision. Specifically, the regulation, 29 CFR 208(a), provides:

The employer’s designation decision must be based only on information received from the employee or the employee’s spokesperson (e.g., if the employee is incapacitated, the employee’s spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave).

The quoted provision is contained in the section of the implementing regulations addressing the employer’s obligation to designate leave, paid or unpaid, as FMLA–qualifying. The immediate problem is that the employer is supposed to designate leave, paid or unpaid, based on information obtained from the employee or the employee’s spokesperson regarding the need to take leave. Whether an employee needs to take FMLA leave is not the same as whether an employee needing FMLA leave wants to substitute available paid leave for unpaid FMLA leave. Further, only the employee or employer can make an election to substitute paid leave for unpaid FMLA leave, not an employee’s spokesperson.

In the absence of specific direction, it is unclear what an employer should do when faced with a request by a spokesperson for an employee electing to substitute paid leave for unpaid FMLA leave. Similarly, if an employer accedes to a spokesperson’s representation that the employee wants to substitute paid leave, it is unclear what effect an employee’s subsequent rescission of that request would have.

Undoubtedly, there will be courts that will read 29 CFR 208(a) to encompass the right of an employer to rely on the representations of a spokesperson for an employee regarding the election to substitute paid leave for unpaid FMLA leave. They will argue in favor of allowing spokespersons to make substitution elections for incapacitated employees based on the regulatory language, its placement in 29 CFR 825.208 governing employer designation of leave as paid or unpaid, as well as fairness. Here, the argument is that in the absence of a spokesperson being permitted to elect for an incapacitated employee, the employer, by operation of 29 CFR 825.207(a), is authorized to make the election. Some courts will feel that it is unfair for an incapacitated employee to lose his or her right to make an election because he or