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DOL Clarifies That Leave Taken Under State Paid Family Leave Programs May Run Concurrently with FMLA Leave

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On January 14, 2025, the U.S. Department of Labor (DOL) issued an opinion letter (FMLA2025-01-A) clarifying when an employer may count an employee's leave taken under a state paid family leave program against that employee's leave entitlement under the Family and Medical Leave Act (FMLA).

In recent years, states and local governments have implemented mandatory paid family leave benefit programs, which generally provide paid leave for employees and specified family members to seek and/or provide medical care. For example, in 2020 Colorado voters approved the paid Family and Medical Leave Insurance (FAMLI) program, and its benefits officially became available to Colorado workers in 2024. Other states that have enacted similar laws include, but are not limited to, California, Connecticut, Massachusetts, New Jersey, New York, Oregon, and Washington. The paid leave benefits under such laws are provided through a state agency, are funded at least in part by employee payroll contributions, and often provide benefits that are less than an employee's regularly weekly pay, especially for higher paid employees. Thus, these paid family leave laws differ with respect to funding, administration, and the benefits provided as compared to state and local laws requiring employers to provide a minimum amount of paid sick leave, for example.

The interplay between the FMLA and these state and local paid family leave laws has led to confusion as to whether—and if so, to what extent—employers may require an employee to use state or local leave concurrently with accrued FMLA and/or employer-provided paid leave.

Under the FMLA, eligible employees of covered employers may take up to twelve (12) weeks of unpaid, job-protected leave per year for specific family and medical reasons affecting the employee or a specified family member. However, as set forth in set forth in 29 C.F.R. § 825.207, there are two primary situations when (i) an employee's FMLA leave may run concurrently with other types of leave, and (ii) the employee may receive supplemental pay during periods of FMLA leave that would otherwise be unpaid:

1. An employer *may* require (or an employee *may* elect) that an employee on FMLA leave concurrently utilize all available employer-provided paid leave (e.g., paid time off, paid vacation, and paid sick leave) during that leave; or

2. An employee taking leave under a disability benefit plan or a workers' compensation plan *must* apply that leave towards their FMLA leave entitlement if such leave would otherwise qualify for FMLA; in this scenario, if the disability or workers' compensation benefits do not fully cover the employee's regular salary, the employee and employer *may mutually* agree to supplement the benefits with any available employer-provided paid leave.

The question for the DOL was whether the same rules that apply to disability plans and workers' compensation plans (*see* 29 C.F.R. § 825.207(e)-(d)) also apply to leave taken under a state or local paid family leave program (which are not explicitly discussed in the regulations).

The DOL said yes. The DOL explained that if an employee takes leave under a state or local paid family or medical leave program which would otherwise be covered by the FMLA, it must be designated as such and counted against the employee's FMLA leave entitlement. On the other hand, if the employee uses paid state or local paid leave under

circumstances that do *not* qualify as FMLA leave, the employer may not count that leave against the employee's FMLA leave entitlement.

Additionally, as with disability or workers' compensation benefits, the employer and employee may mutually agree to allow the employee to use any employer-provided paid leave to supplement any portion of the employee's pay that is not covered by the state or local paid medical or family leave program—provided, of course, that such supplementation is permitted under applicable state or local law. Neither the employer nor the employee, however, may require the concurrent use of employer-paid leave during the portion of any leave that is compensated through the state or local program.

The DOL further clarified 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, the employee is still entitled to take the remainder of their FMLA leave. In that case, an employer may then require that the employee use any available employer-provided paid leave concurrently with their remaining FMLA leave entitlement.

To illustrate its position, the DOL provided the following helpful example:

> *Yvette takes eight weeks of continuous FMLA leave to care for her mother following her mother's inpatient surgery. Yvette's employer notifies her that the eight weeks are designated as FMLA leave. Caring for a parent with a serious health condition is also a qualifying reason under her state's family leave program, and she applies for and receives benefits that replace two-thirds of her normal income each week that she is on leave, for up to six weeks.*
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> *During the six weeks that Yvette is receiving paid leave benefits under the state program, under the FMLA, her employer cannot require, and she cannot unilaterally elect, to substitute her accrued vacation under her employer's leave plan and thereby receive full pay from her employer in addition to the state-paid benefit. However, if Yvette's state permits an employee to use accrued paid leave concurrently with the state's paid leave, the FMLA permits Yvette and her employer to agree that Yvette will use one-third of a week of her vacation time each week to supplement the portion of her full pay that is not provided by the state's paid leave benefit.*
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> *During the final two weeks of Yvette's FMLA leave, she will have exhausted her state program's paid leave. At that point, her leave becomes unpaid leave, and the FMLA substitution provision applies. Yvette elects to use her employer-provided accrued paid vacation time to receive pay during the final two weeks of her FMLA leave.*

FMLA and other benefit issues are becoming increasingly complicated at the federal, state, and local levels. Accordingly, before making any paid leave or other benefit-related decision that may affect your workforce, we recommend you consult with **Thomas G. Hancuch**, thancuch@vedderprice.com, **James P. Looby**, jlooby@vedderprice.com, **Ellen M. Hemminger**, ehemminger@vedderprice.com, **Peyton Demith**, pdemith@vedderprice.com, or any Vedder Price attorney with whom you have worked.

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