

Use of Leave Accruals and the FMLA

There are no US laws requiring an employer to provide paid absence leave to an employee. The FMLA requires up to 12 weeks of “paid or unpaid” leave under qualifying circumstances. Under the FLMA regulations, the employer must allow use of the leave in at least as generous a manner as it would if the absence were not covered by an FMLA event. State workers compensation laws allow paid injury leave under the right conditions.

May an employer specify in what order or how types of paid leave are to be used for an FMLA-qualifying request? Yes, so long as the FMLA leave policy restrictions are not any different or stricter than those specified in the primary leave policy applied.

Must the method and order of use for leave be the same for all employees? Yes, to avoid an increased risk of EEO claims regarding terms or conditions of employment. Since any benefit which has monetary value may be considered a term or condition of employment, it may be controlled by equal employment opportunity principals protecting employees from discrimination based on race, color, ethnicity, gender, age or disability.

May an employer require an employee to use compensatory overtime leave that has accrued as a result of overtime under the DOL regulations, for FMLA leave? No §825.207(i) of the DOL regulations for FMLA states that any compensatory time that has accrued as a result of an overtime payment is not a form of accrued paid leave that an employer can substitute for unpaid FMLA leave. The FLMA rules that if an employee opts to take compensation time, it will be in place of and in addition to any FLMA leave. This leaves the public employer with both a longer paid absence and additional liability for the full 12 weeks of unpaid leave under the FMLA. More often in Colorado, public employees work overtime under the specific understanding that they will get compensatory time accruals, not overtime pay. 29

CFR §825.207.

Under §7(o)(5) of the FLSA, employers are required to allow use of the time off within a reasonable period so long as the use does not unreasonably disrupt the operations of the agency. Under this language, a public employer may only put reasonable and necessary restrictions on an employee’s right to use overtime compensatory time.

What This Means For Counties

- Review your FLSA, paid leave and compensatory overtime leave language to make sure that your policy encourages use of compensatory overtime accruals, but does not require it. If your employees accrue more overtime than you can allow off, consider a different arrangement for encouraging more frequent use.
- Make sure your policy is consistent between the triggering events for legitimate FMLA absences and the terms and conditions of taking sick and vacation leave.
- Remind employees that if they are good performers they do not face automatic termination at the end of FMLA.
- Allow for a median range of sick or accident leave pay that hits most of your committed employees’ needs. Too generous and you will waste leave funds on uncommitted employees; too frugal and you will lose good employees to unforeseen personal or financial circumstances.
- Make sure your policy allows for BOCC review of all requests for unpaid administrative leave, for unusual or exceptional circumstances and legal consistency.

For more information, contact CTSI at 303-861-0507.