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A New Look at Paid Leave Under the Family and Medical Leave Act

by Jennifer Brown Shaw

The federal Family and Medical Leave Act of 1993 ("FMLA") is by now well known to employers.

In a nutshell, the FMLA provides up to 12 weeks of job-protected leave to eligible employees. Eligible employees are those who have been employed for at least a year, have 1250 hours of service with the employer, and are employed at a worksite where 50 or more employees work within a 75-mile radius. The California Family Rights Act ("CFRA") provides similar leave. In general, the laws are considered parallel. But there are significant exceptions, particularly with respect to the treatment of leave due to pregnancy disability.

The FMLA and its 1995 implementing regulations revolutionized workplace law by protecting a variety of absences that would have resulted in disciplinary action or termination of employment. The basic premise of the law is relatively simple to understand. Administering this law in accordance with the statute and regulations? Not so much. A recent decision by the U.S. Court of Appeals for the Seventh Circuit will add to employers' headaches, particularly in states such as California.

"Substitution of Paid Leave" Under the FMLA and CFRA

The FMLA and CFRA do not require employers to provide paid leave. But the FMLA statute permits employees to elect, or the employer to require, employees to use paid leave during FMLA leave. When leave is taken for childbirth or a covered relation's illness, the employer may require the use

of vacation or paid time off, paid personal leave, etc. (This rule does not apply when FMLA and pregnancy disability leave are running concurrently.) When leave is taken for the employee's own health condition, the law permits employers to require employees to use paid sick time as well. CFRA includes similar provisions.

The FMLA's regulations, however, expound on the relatively simple statutory language. To summarize, the U.S. Department of Labor ("DOL") takes the position that employers may not require employees to use vacation or other forms of paid leave when the leave is not "unpaid." The DOL's regulations cite two examples: when leave qualifies under a "temporary disability benefit plan," and when employees receive workers' compensation benefits. The DOL's rationale is that employers are not permitted to require use of vacation or sick pay unless the leave is "unpaid." The applicable regulation can be found at 29 C.F.R. section 825.207(d)(1) and (2).

This regulation is not a model of clarity. Section 825.207(d)(1) begins by discussing disability leave due to pregnancy. The second sentence, addressing temporary disability benefits, is either a non-sequitur broadly addressing temporary disability benefits, or it concerns paid benefits for pregnancy disability. Section 825.207(d)(2) is limited to workers' compensation benefits. So, is an employer generally prohibited from requiring employees to use paid leave when the employee is receiving other paid benefits, even if those other benefits do not fully replace the employees' salary? The U.S. Court

of Appeals for the Seventh Circuit considered that precise question in *Repa v. Roadway Express*, decided on February 26, 2007.

Repa v. Roadway Express, Inc.

Alice Repa worked for Roadway Express. She suffered a non-work-related injury, requiring surgery and six weeks off from work. Repa was a member of the Teamsters Union. She was eligible for short-term disability benefits under a multi-employer welfare plan.

Repa applied for and received \$300 per week under the Teamsters plan. In addition, Roadway paid her for five sick days and two weeks of vacation pay under its FMLA policy.

Although Repa received her benefits and her leave, she decided to sue Roadway. She argued that Roadway violated the FMLA by making her use sick and vacation leave. The opinion does not say what she expected in terms of a remedy. Was she going to give the sick and vacation pay back so the balance would be restored to its pre-leave level? Did she want to be paid twice? That portion of the decision is unclear.

What is clear is that the district court and the court of appeals agreed Roadway could not force Repa to use her sick or vacation leave because she received disability leave benefits under the third-party welfare plan. The court of appeals rejected Roadway's argument that the regulations prohibiting the forced use of paid time applies only to the birth of a child. The court noted that the first sentence of 29 C.F.R. section

825.207(d)(1) indeed was directed to leave for giving birth, but that the remainder of the paragraph was not so limited.

Roadway also argued that the DOL regulation is invalid. The company reasoned that the FMLA statute did not restrict employers' from mandating employees' use of vacation and sick time during FMLA for their own illnesses. Roadway relied on the U.S. Supreme Court's decision in *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002). In *Ragsdale*, the Court invalidated another of the FMLA regulations on the basis that it was an impermissible expansion of the statutory language. The Seventh Circuit declined to address this issue, however, because Roadway failed to challenge the regulation on this basis in the district court. The question whether section 825.207 is invalid therefore remains open.

Repa's Effect in California

Although *Repa* was decided in the Chicago-based Seventh Circuit, the decision significantly affects California employers subject to the FMLA or CFRA. California is one of just a few states that offer paid short-term disability benefits to nearly all workers. (The law exempts certain employees, including most government employees, railroad

workers, certain non-profit employers' employees, and certain employees claiming religious exemptions). Under the SDI program, which is administered by the Employment Development Department, employees who are unable to work because of a medical disability may apply for wage-replacement benefits. There is a seven-day waiting period, however, which means employees do not collect benefits during the first seven days of leave.

SDI benefits are available when employees themselves are disabled from working. But California also offers a "Paid Family Leave" ("PFL") benefit. Like SDI, PDL is administered by the California EDD and financed by payroll deductions. PFL benefits are available to employees who take leave to care for a new child or a covered relation's serious health condition. PFL benefits are available for a maximum of six weeks during a 12-month period. Like SDI, PFL benefits are available only after a seven-day waiting period. Interestingly, the PFL law itself permits employers to require employees to use up to two weeks of paid vacation time, even though FMLA would prohibit that under *Repa*.

The availability of PFL and SDI means that employers must carefully review their

FMLA and CFRA policies. Those policies that require employees to use vacation or sick time for FMLA-covered reasons will be invalid under FMLA to the extent that SDI and/or PFL are available. The easiest way to amend the policy is to allow employees to elect the use of vacation and sick time during covered leaves. Employers seeking to require employees to use vacation or sick leave may continue to do so when PFL and SDI are not available, such as during the seven-day elimination period applicable to both benefits. Employers also should ensure they do not require employees to use vacation or sick time during leaves when workers' compensation benefits are paid.

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