is seeking leave under [FMLA for birth or adoption of a child, or for the serious health condition of an immediate family member] * * *'' (emphasis added). Based on this legislative history, the regulations similarly included a limitation that family leave may only be substituted ''under circumstances permitted by the employer's family leave plan'' (§ 825.207(b)).

In addition, the employee may elect, or the employer may require the employee, to substitute any of the employee's accrued paid *vacation* leave, *personal* leave, or *medical* or *sick* leave for FMLA leave taken for the serious health condition of an immediate family member (spouse, child, or parent) or for the employee's own serious health condition that makes the employee unable to work, *except that* an employer is not required to provide paid *sick* leave or paid *medical* leave ''in any situation in which the employer would not normally provide any such paid leave.'' (FMLA § § 102(d) (2) (A) & (B).)

These substitution provisions are intended to allow for the specified paid leaves that have accrued but have not yet been taken by an employee to be substituted for the unpaid leave required under FMLA, in order to mitigate the financial impact of wage loss due to family and temporary medical leaves. The substitution provisions assure that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by FMLA on an unpaid basis.

The State of Oregon's Bureau of Labor and Industries asked for clarification of whether the employee or the employer had the prerogative or control over the decision to substitute paid leave for FMLA leave. Sommer & Barnard suggested additional guidance was needed on employee substitution where the employer does not require it. The California Department of Fair Employment and Housing recommended the rule clearly state that employees have the right to substitute paid vacation during FMLA leave, and suggested further amendments to allow employers to require certification for FMLA leave where an employee desires to use paid vacation leave. The California Teamsters Public Affairs Council opposed permitting an employer to force an employee to use paid vacation or personal leave during FMLA leave absent a specific request from the employee to substitute such paid leave. The Equal Employment Advisory Council suggested the regulations allow employers to restrict substitution of paid vacation if the employer policy normally restricts vacations to certain times during the year. Chevron and the American Apparel Manufacturers Association, Inc. stated that paid leave should only be permitted at the employer's option (or discretion). Cincinnati Gas & Electric Company suggested that paid leave should be available for substitution only under the rules of the plan which established the paid time off.

FMLA's substitution language provides that ''* * * an eligible employee may elect, or an employer may require the employee, to substitute any of the * * *'' appropriate paid leave for any part of the 12-week period of FMLA leave. Under these terms, if an employee does not elect to substitute appropriate paid leave when requesting FMLA leave, the employer has the right to require that the employee do so. An employee always has the right to request, in the first instance, that appropriate paid leave be substituted. There are no limitations, however, on the employee's right to elect to substitute accrued paid *vacation* or *personal* leave for qualifying FMLA leave, and the employer may not limit the timing during the year in which paid vacation may be substituted for FMLA-qualifying absences or impose other limitations. If the employee does not initially request substitution of appropriate paid leave, the employer retains the right to require it. 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 (*e.g.*, minimum of full days or weeks at a time, *etc.* ). At the same time, in the absence of other limiting factors (such as a State law or an applicable collective bargaining agreement), where an employee does not elect substitution of appropriate paid leave, the employee must nevertheless accept the employer's decision to require it, even where the employee would desire a different result. The regulations have been clarified to address these principles.

The Women's Legal Defense Fund, 9 to 5, National Association of Working Women, AFL–CIO, Food & Allied Service Trades, International Brotherhood of Teamsters, and Service Employees International Union opposed what they perceived as unwarranted regulatory restrictions on the ability to substitute paid ''family leave'' under FMLA, and recommended deletion of the restrictive language. We have revised the language in § 825.207(b) to track the language of the legislative history, which explains the meaning of ''family leave'' in this context. The effect of the revision, however, is the same result as under the terms of the Interim Final Rule.

Sixteen comments raised concerns over the relationship and interaction between FMLA leave and absences caused by on-the-job, workers' compensation injuries, and requested further guidance. The Women Employed Institute and the Women's Legal Defense Fund argued that workers' compensation cannot be substituted as paid leave for FMLA leave, even if such payments are proxies for lost wages. Many employer commenters argued alternatively that employers should not only be allowed to count the workers' compensation absence as FMLA leave, but they should continue to be allowed to exercise their rights under workers' compensation laws to require an employee to return to work at restricted or ''light'' duty. The Employers Association of Western Massachusetts, Inc. requested clarification of whether insured disability plans and self-insured disability plans are similarly considered a form of ''accrued paid leave'' under FMLA.

An employee who incurs a work-related illness or injury elects whether to receive paid leave from the employer or worker's compensation benefits. An employee cannot receive both. Therefore, where a work-related illness or injury also causes a ''serious health condition that makes the employee unable to perform the functions of the position of such employee'' within the meaning of FMLA, and the employee has elected to receive worker's compensation benefits, an employer cannot require the employee to substitute, under FMLA, any paid vacation or other leave during the absence that is covered by payments from the State workers' compensation fund. Similarly, an employee cannot elect to receive both worker's compensation and paid leave benefits. Such an absence can count, however, against an employee's FMLA leave entitlement if it is properly designated at the beginning of the absence as required by these regulations. Neither the statute nor its legislative history suggests that time absent from work for work-related accidents should not run concurrently for purposes of FMLA and the State workers' compensation laws (provided the illness or injury also meets FMLA's definition of ''serious health condition''). Indeed, FMLA's legislative history suggests that the Congress contemplated this result—in describing the intended meaning of ''serious health condition,'' the Committee reports refer to ''injuries caused by serious accidents on or off the