

job" (among other examples). On the other hand, payments from a State workers' compensation fund are not benefits provided by the employer, nor are they a form of "paid leave" provided by the employer for purposes of FMLA's substitution provisions. While the time absent from work can simultaneously count under both FMLA and State workers' compensation programs, payments provided by State workers' compensation funds are not considered "accrued paid medical or sick leave" within the meaning of FMLA. In addition, when an employee is receiving payments from the State workers' compensation fund, the employee may *not* elect, nor may the employer *require* the employee, to exhaust any form of paid leave provided by the employer during any portion of the absence covered by the workers' compensation payments. Payments provided under other types of plans covering temporary disabilities (whether provided voluntarily through insurance or under a self-insured plan, or required to meet State-mandated disability provisions (e.g., pregnancy disability laws)) are to be treated similarly under FMLA—the time may be charged against an employee's FMLA leave entitlement (provided employees are properly notified of the designation at the commencement of the absence and any group health benefits are maintained by the employer as if the employee had continued to work, as required by these regulations). But an employee's receipt of such payments precludes the employee from electing, and prohibits the employer from requiring, substitution of any form of accrued paid leave for any part of the absence covered by such payments.

As will be discussed in further detail in connection with § 825.702, an employer is precluded from requiring an employee to return to work prematurely in a "light duty" assignment, instead of taking FMLA leave, if the employee remains unable to perform any one or more of the essential functions of the original position and the employee has not yet exhausted his or her full FMLA leave entitlement in the 12-month period. The reference point for determining an employee's essential job functions is the position held by the employee *when the need for FMLA leave arises*, i.e., when the employee's notice of the need for leave is given or leave commences, whichever is earlier. An employer may not modify a job to eliminate essential job functions in an effort to deny an employee his or her FMLA leave rights. On the other hand, FMLA does not prevent the

continuation of lawful policies under State workers' compensation programs that discontinue wage replacement payments if and when an employee refuses to accept a medically-approved light duty assignment. In such a case, the employee may continue on FMLA leave where the employee cannot perform any one or more of the essential functions of the employee's former position, and the employee would have the right to elect to substitute appropriate paid leave, or continue on unpaid FMLA leave, until the employee has exhausted his or her 12-week FMLA leave entitlement in the 12-month period. The regulations are clarified in response to these comments to address absences covered by State workers' compensation laws.

The Chamber of Commerce of the USA stated that employers should be able to draft paid leave policies expansively or restrictively, and if an employee is unable to use paid leave, the leave will be unpaid. The National Restaurant Association similarly suggested that any substituted paid leave must be taken in accordance with the employer's paid leave policies. Fisher & Phillips considered the regulations contradictory and inconsistent with FMLA, because they allow employees to substitute paid vacation or personal leave for unpaid FMLA leave while prohibiting employers from imposing any limitations, yet also state that employees may be required to comply with requirements of the employer's leave plan. Fisher & Phillips suggested that all of an employer's normal restrictions on the use of paid leave should continue to apply when paid leave is substituted for FMLA leave, because FMLA does not require the use of paid leave. Sommer & Barnard and Fisher & Phillips also objected to § 825.207(g), which restricts an employer's ability to request notice and certification for FMLA leave where the employee substitutes paid leave and the employer's normal leave policies do not require notice or certification (the employee may only be required under the Interim Final Rule to comply with the less-stringent requirements of an employer's plan, and not any more stringent notice or certification requirements of FMLA, unless the paid leave period is followed by unpaid FMLA leave). These two commenters and United HealthCare Corporation suggested employers be allowed to deny FMLA leave unless FMLA's notice and certification requirements are met, whether the leave is unpaid or substituted paid leave, to assure employers of their statutory rights and

avoid confusion for employees. The University of California asked that DOL clarify how the employer confirms that requested time off to care for an ill family member or for personal illness qualifies as FMLA leave if the employer cannot confirm the request by asking for medical certification.

In response to the comments, this section is clarified. When paid leave is substituted for unpaid FMLA leave, and an employer has less stringent procedural requirements for taking that kind of leave than those of FMLA, only those less stringent requirements may be applied. An employee who complies with the employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee failed to comply with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. Appropriate revisions have been made in the notice and certification provisions of §§ 825.302(g), 825.305(e), and 825.306(c). An employer of course may make revisions to its leave program to require notice or certification that corresponds to FMLA requirements, or may treat paid and unpaid leave differently, provided the program is not amended in a discriminatory manner that treats employees on FMLA leave differently from other, similarly situated, employees.

The State of Nevada's Department of Personnel recommended the regulations be revised to allow substitution of compensatory time-off for unpaid FMLA leave. The Town of Normal (Illinois) suggested the employer should be able to *require* an employee to take compensatory time for FMLA leave. Montgomery County (Maryland) recommended that DOL's interpretative ruling that prohibits employers from using compensatory time as FMLA leave be included in the regulations.

The use of compensatory time off is severely restricted under the Fair Labor Standards Act (FLSA) in ways that are incompatible with FMLA's substitution provisions. First, "comp" time is not a form of accrued paid leave mentioned in the FMLA or legislative history for purposes of substitution. It is also not a benefit provided by the employer. Rather, it is an alternative form for paying public employees (only) for overtime hours worked. The public employee's "comp time bank" is not the property of the employer to control, but