



May 12, 1995

FMLA-61

Dear *Name*\*,

This is in response to your letter requesting an interpretation of the Family and Medical Leave Act of 1993 (FMLA) regarding substitution of an employee's accrued paid leave for unpaid FMLA leave. Specifically, one of your members has been told by his employer that he must substitute vacation leave that he would otherwise not yet be entitled to use for a part of his FMLA leave. Under the employer's vacation leave plan, an employee who has worked 800 hours in the current vacation year earns paid vacation that may not be used until the next vacation year.

Section 102(d)(2) of FMLA (29 U.S.C. 2612(d)(2)) provides generally that an employee may elect, or an employer may require the employee, to substitute certain of the accrued paid vacation leave, personal leave, family leave, or sick or medical leave of the employee for the unpaid leave provided under the Act. The legislative history indicates that the purpose of this section was "to provide that specified paid leave which has accrued but has not yet been taken, may be substituted for the unpaid leave under this act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves." (House Report 103-8, Feb. 2, 1993, p. 38) The Department interprets these provisions to mean that the employee has both earned the leave and is able to use that leave during the FMLA leave period. Consequently, in the particular situation that you describe, the employer could not require the employee to substitute leave that is not yet available to the employee to use under the terms of the employer's leave plan.

The foregoing would neither prevent an employer from voluntarily advancing paid leave to an employee nor an employee from voluntarily accepting such leave during an FMLA absence. Section 403 of FMLA (29 U.S.C. 2653) specifically states that "[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act."

The above is intended as general guidance only and assumes that no other compliance questions are at issue. Please contact this office directly should the above not fully address your concerns.

Sincerely,

Daniel F. Sweeney  
Deputy Assistant Administrator

*\* Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*