

IX. Substitution of Paid Leave

The Department requested input on three issues related to the substitution of paid leave provisions: “(1) the impact of the prohibition under section 825.207 on “applying [employers’] normal leave policies to employees substituting paid vacation and personal leave for unpaid FMLA leave[;]” (2) how the “existence of paid leave policies affect[s] the nature and type of FMLA leave used[;]” and (3) whether “employers allow employees to use paid leave such as sick leave to cover short absences from work (such as late arrivals and early departures) for FMLA covered conditions[.]”

Section 102(c) of the Act provides that FMLA leave is, as a general rule, unpaid leave. Section 102(d) addresses circumstances in which an employee may substitute (*i.e.*, use concurrently) accrued paid leave for the unpaid FMLA leave period. *See* 29 U.S.C. § 2612(d); 29 C.F.R. § 825.207(a). Under this section of the FMLA, an “employee may elect, or an employer may require, the employee to substitute” accrued paid leave for the employee’s FMLA leave. *See* 29 U.S.C. § 2612(d)(2); 29 C.F.R. § 825.207(a). That is, the law provides employees the option to take their accrued paid leave concurrently with their FMLA leave in order to mitigate their wage loss. If an employee elects not to substitute accrued paid leave, however, the employer has the right to require such substitution. Where either the employee or the employer elects to substitute accrued paid leave, the employee will be entitled to FMLA protection during the period in which paid leave is substituted.

The underlying reason for an FMLA request determines the types of available accrued paid leave that may be substituted. If the requested FMLA leave is for the birth of a child, placement of a child for adoption or foster care, or to care for a spouse, child or parent who has a serious health condition, employees may choose to—or be required by their employers to—substitute any accrued vacation, personal (including leave available under a “paid time off” plan) or family leave (subject to

limitations). *See* 29 U.S.C. §§ 2612(d)(2)(A)-(B); 29 C.F.R. §§ 825.207(b), (e).

When employees seek FMLA leave to care for their own or a qualifying family member’s “serious health condition,” accrued paid medical, sick, vacation or personal leave may be substituted. *See* 29 U.S.C. § 2612(d)(2)(B); 29 C.F.R. § 825.207(c). The substitution of accrued medical/sick leave for FMLA leave is limited to circumstances that meet the requirements of the employers’ existing medical/sick leave policies. *See* 29 U.S.C. § 2612(d)(2)(B); 29 C.F.R. § 825.207(c). Employers are not required to “provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.” 29 U.S.C. § 2612(d)(2)(B). Essentially, employers may maintain medical/sick leave policies distinct and separate from FMLA leave, and will not be required to provide paid leave where the reason for the leave is not covered by their policy (*e.g.*, if the employer’s plan allows the use of sick leave only for the employee’s own condition, the employer is not required to allow an employee taking FMLA leave to care for a child to use sick leave). As the regulations state, “an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer’s leave plan.” 29 C.F.R. § 825.207(c).

The regulations specifically prohibit employers from placing *any* restrictions or limitations on employees’ accrued vacation or personal leave, however, or any leave earned or accrued under “paid time off” plans. *See* 29 C.F.R. § 825.207(e). Additionally, the regulations provide that, if neither the employee nor the employer chooses to substitute paid leave, the employee “will remain entitled to all paid leave” previously accrued or earned. 29 C.F.R. § 825.207(f).

The regulations also address how FMLA entitlements are applied when employees qualify for both FMLA leave and payments under a non-accrued paid benefit plan, such as leave provided under a temporary disability or workers’ compensation

plan. See 29 C.F.R. § 825.207(d). Specifically, the regulations provide that when employees are on leave under a short-term disability or workers' compensation plan, the choice to substitute paid leave for unpaid FMLA leave is inapplicable, because such benefit plans already provide compensation and the leave therefore "is not unpaid." See 29 C.F.R. §§ 825.207(d)(1)-(2). To the degree that the underlying condition for which the employee is receiving workers' compensation or short-term disability pay also qualifies as a serious health condition under the FMLA, an employer may designate FMLA leave to run concurrently with the employee's workers' compensation or disability leave. See *id.*; see also *Repa v. Roadway Express, Inc.*, 477 F.3d 938, 941 (7th Cir. 2007) ("Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement."). If the requirements to qualify for disability plan payments are more stringent than those of the FMLA, the employee may either satisfy the more stringent plan standards or instead choose not to receive disability plan payments and use unpaid FMLA leave or substitute available accrued paid leave. See 29 C.F.R. § 825.207(d)(1).

Under section 825.207(h), if the employer's notice or certification procedural standards for taking paid leave are less stringent than the general FMLA requirements and such paid leave is substituted for the FMLA leave, the employee may be required

²¹ "Compensatory time off" is paid time off accrued by public sector employees in lieu of "immediate cash payment" for working in excess of the applicable maximum hours standard of the FLSA. 29 C.F.R. § 553.22(a). Compensatory time must be earned at a rate of not less than "one and one-half hours for each hour of employment for which overtime compensation is required by section 7 of the FLSA." 29 C.F.R. § 553.22(b). Police, fire fighters, emergency response personnel, and employees engaged in seasonal activities may accrue up to 480 hours of compensatory time, while other public sector employees may accrue up to 240 hours. See 29 C.F.R. § 553.24.

to meet only the less stringent requirements. However, if "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." 29 C.F.R. § 825.207(h). Further, where employees comply with the applicable less stringent requirements, employers may not deny or limit FMLA leave. *Id.* Nevertheless, as the preamble to the 1995 Final Rule noted, employers may revise any such less stringent notice or certification requirements so that their paid leave programs correspond to the FMLA requirements, or may treat paid and unpaid leave differently. See 60 Fed. Reg. 2180, 2206 (January 6, 1995). Comments regarding the effects of these regulatory provisions on employers' paid leave policies are also discussed in Chapter IX.B.1.

Lastly, the regulations provide that compensatory time off, available to state and local government employees under section 7(o) of the Fair Labor Standards Act ("FLSA"), is not considered a "form of accrued paid leave." See 29 C.F.R. § 825.207(i). Employees may request to take accrued compensatory time in lieu of FMLA leave, but employers may not require its substitution.²¹ If compensatory time is used in lieu of FMLA leave, employers may not count it against employees' FMLA entitlement. *Id.*

In response to the RFI, the Department received many comments related to the general impact of the substitution of paid leave provisions. The RFI also generated comments on how these provisions interact with employer policies regarding paid leave and other workplace benefits, such as temporary or short-term disability leave, leave under workers' compensation plans, and collectively bargained leave benefits. Some commenters also addressed the impact of the substitution of leave provisions on the requirements of certain other state and federal laws.

A. General Impact of the Substitution of Paid Leave Provisions

Several employee advocacy groups noted that the ability to substitute paid leave for an otherwise unpaid FMLA leave period is a critical factor in employees being able to utilize FMLA leave. According to these commenters, the substitution of paid leave provisions are “essential to workers’ ability to exercise their rights under the law. Few workers can afford to take extended periods of leave without pay.” *See* Faculty & Staff Federation of Community College of Philadelphia, Local 2026 of the American Federation of Teachers, Doc. 10242A, at 4. *See also* Center for Law and Social Policy, Doc. 10053A, at 3 (same); Service Employees International Union, Local 668 Pennsylvania Social Services Union, Doc. FL105, at 3 (“Permitting workers to use their accrued paid leave as wage replacement . . . makes it possible for them to take time off to address critical family and medical issues.”).

The AFL-CIO also noted that the lack of paid leave “presents a significant obstacle for those who cannot afford to take FMLA leave,” as shown by the 2000 Westat Report, which found that the most commonly noted reason for not taking leave was inability to afford it. Doc. R329A, at 28-29. The Coalition of Labor Union Women similarly noted that “a disturbing number of workers are unable to take advantage of FMLA leave because it is not paid and they cannot afford to lose time away from paying jobs.” Doc. R352A, at 4. Allowing the substitution of paid leave has “helped many employees cope with personal and family health emergencies,” without which they “would have faced a terrible choice between their health needs and their job security,” while allowing such flexibility “promotes worker morale and productivity.” *Id.* *See also* International Association of Machinists and Aerospace Workers, Doc. 10269A, at 2; 9to5, National Association of Working Women, Doc. 10210A at 3; National Partnership for Women & Families, Doc. 10204A, at 9-10; Families USA, Doc. 10327A, at 3-4. Moreover,

the Coalition of Labor Union Women made the point that, because paid leave is available only when already provided by employers, the employers have already determined that such paid leave “will not have an adverse impact on their business . . . and does not create undue hardships for the employer.” *See* Doc. R352A, at 4.

The National Business Group on Health similarly stated that allowing paid leave and FMLA leave to run simultaneously both “protects employees’ incomes during periods of serious illness and maximizes the flexibility in the design of employer leave policies.” Doc. 10268A, at 7. The Maine Department of Labor asserted that allowing substitution helps everyone: employees living paycheck-to-paycheck, who “cannot afford to take unpaid leave without risking the loss of housing, heat, food[;]” employers, who would suffer lost productivity if employees continued to work while ill; the public sector, because employees otherwise would have “to rely more and more on public resources to cope[;]” and the health care system, because employees otherwise would work until their condition became worse and more expensive to treat. Doc. 10215A, at 3.

Not all commenters uniformly supported the substitution of paid leave, however. Some employers commented that the substitution of leave provisions contribute to increased FMLA leave at otherwise popular vacation or personal leave times. Another commenter noted that it is not just holidays or high demand periods but that the “employee is more likely to use FMLA leave for the employee’s own serious health condition when the employee is receiving a paid sick or disability benefit. . . . without a financial impact, some employees have little to no incentive to work and actually have an incentive not to work, since the employer cannot discipline them for using job protected FMLA leave[.]” Exelon, Doc. 10146A, at 6. The substitution provisions can thus leave an employer in a quandary: “While some may think the solution is to reduce or eliminate paid

sick or disability benefits or to make the standards for receiving such benefits more stringent to avoid FMLA leave abuse, doing so penalizes the vast majority of employees who use sick days or disability benefits only when they are truly unable to work due to illness or injury.” *Id.*

As noted in other chapters of this Report, many commenters discussed the idea that the different treatment experienced by employees based on the type of leave requested may have a substantial effect on employee morale and productivity. A comment from the Indiana State Personnel Department noted that problems arise when employers require substitution of paid leave for FMLA leave. *See* Doc. 10244C, at 2 (employees who saved and maintained leave balances become angry when forced to use accrued leave as employees “feel they are being penalized for working overtime without taking leave”). While not directly addressing morale concerns, the Ohio Department of Administrative Services noted in a similar vein that some state agencies reported that employees take advantage of FMLA leave only when they had exhausted all of their accrued paid leave and were in jeopardy of disciplinary action. *See* Doc. 10205A, at 3. Thus, according to the comment, FMLA was used as a last resort when employees no longer had paid time off. In response to the problem, the Ohio Department of Administrative Services adjusted its leave policies to allow individual state agencies to require substitution of paid leave. *Id.*

B. Effect on Workplace Benefits and Policies

Responses to the RFI indicated a variety of workplace benefits are affected by substitution of paid leave. Employers’ policies pertaining to employer-provided paid leave plans are impacted, as are benefit plans such as workers’ compensation and short term disability, as well as existing collective bargaining agreements. Some government employers also commented on the impact of the

inability to substitute compensatory time off for FMLA leave.

1. Effect on Employer Policies

Many employers commented that the regulations force employers to treat employees seeking to use accrued paid leave concurrently with FMLA leave more favorably than those who use their accrued paid leave for other reasons. The Madison Gas and Electric Company, for example, stated that “during ‘peak’ or ‘high demand’ vacation periods, employees may request FMLA leave causing the employer to deny *other employees their scheduled leaves* due to staffing level concerns based on business needs.” Madison Gas and Electric Company, Doc. 10288A, at 1 (emphasis added). The United Parcel Service concurred: “The applicable DOL regulation . . . states that no limitation may be placed by the employer on substitution of paid vacation or personal leave for FMLA leave. . . . Indeed, as written, this regulation would even trump vacation picks conducted according to collectively bargained seniority provisions; an employee with little seniority could, if on FMLA leave during a ‘plum’ vacation week, substitute otherwise unavailable paid vacation time for his or her unpaid FMLA leave.” Doc. 10276A, at 3-4 (citation and quotation marks omitted). Some employers provided specific examples of this phenomenon:

Deer hunting, if you happen to work for someone, usually calls for the individual to request and receive approval to use vacation and or personal leaves of absences during the Deer Hunting season. These requests escalate geometrically during the deer hunting season. Usually approvals for these days off are made using some kind of seniority provisions. Employees who can not get approval can circumvent the “written in cement” policies by securing a Family doctor to provide FMLA documentation for [a serious health condition].

Roger Bong, Doc. 6A, at 3. Another employer stated, “We have had an employee request a week of vacation during the holidays and the request was denied because we had so many other employees off. Then the employee just called off for the entire week using FMLA, and then went on her vacation to Florida.” Vicki Spaulding, Akers Packaging Service, Inc., Doc. 5121, at 1. *See also* National Coalition to Protect Family Leave, Doc. 10172A, at 5 (“The Department has . . . established preferential rights to employees taking FMLA leave by effectively mandating that employers waive normal vacation and personal leave policies. In fact, nothing in the Act requires preferential treatment for FMLA leave users.”); Temple University, Doc. 10084A, at 5.

As previously noted, section 825.207(e) provides that accrued paid vacation or personal leave may be substituted for any FMLA leave, and an employer may not place any limitations on this substitution right. The preamble to the 1995 Final Rule stated, for example, that an employer could not limit the timing during the year in which paid vacation leave could be substituted, or require an employee to use such leave in full day increments or a week at a time, even if it normally restricted paid vacation in such ways. *See* 60 Fed. Reg. 2180, 2205 (January 6, 1995). Opinion letters relating to the substitution of paid vacation or personal leave have clarified that such leave is “accrued” and thus available for substitution only when the employee has earned it and is fully vested in the right to use it during the leave period. *See* Wage and Hour Opinion Letters FMLA-81 (June 18, 1996); FMLA-75 (Nov. 14, 1995); and FMLA-61 (May 12, 1995). In contrast to vacation leave, the regulations clarify that substitution of paid sick or medical leave is authorized only “to the extent the circumstances meet the usual requirements for the use of sick/medical leave.” 29 C.F.R. § 825.207(c).

The College and University Professional Association of Human Resources suggested employers should be allowed to apply their normal leave policies to all types of paid leave,

including vacation and personal leave, in order to ease administrative and paperwork burdens and to eliminate the preferential treatment it believes is afforded to employees seeking FMLA leave over employees requesting vacation or personal leave. Doc. 10238A, at 6. *See also* Ohio Public Employer Labor Relations Association, Doc. FL93, at 5; Temple University, Doc. 10084A, at 5.

The National Retail Federation suggested clarifying the meaning of “personal leave” under section 825.207. Doc. 10186A, at 8. The Miami Valley Human Resource Association requested clearer guidelines that instruct employers as to when they are allowed to deny employees’ substitution of paid leave, if they fail to follow employers’ leave notification policies. Doc. 10156A, at 4.

The National Coalition to Protect Family Leave commented that many employers are providing general paid time off (“PTO”) benefits to employees—which are provided in a single amount of paid leave to be used for any reason—instead of the more traditional paid leave policies for vacation and medical/sick leave. *See* Doc. 10172A, at 23. The comment noted that the regulations still speak in terms of paid personal or vacation leave, thus prohibiting employers from applying “their normal leave rules to the substitution of such leave for unpaid FMLA leave, even when using PTO in connection with an illness.” *Id.* PTO plans generally allow for employees to take paid leave for any reason, as long as company procedures are satisfied.

A law firm commented that “substitution of paid leave should not nullify an employer’s right to require medical certification” where the employer maintains a PTO plan. Fisher & Phillips LLP, Doc. 10262A, at 6. Section 825.207(h) states that if “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.” 29 C.F.R. § 825.207(h). PTO plans, however, do

not distinguish between sick pay and vacation pay and generally have no “sick leave” medical documentation requirement. Thus, according to Fisher & Phillips, an employer should not be prohibited from requiring a medical certification form to determine whether the leave qualifies as FMLA leave “simply because its paid time off program does not require it.” *Id.* The firm further stated:

Essentially, employers with more generous leave programs are often disadvantaged by that generosity, as their employees are more likely to use leave if it is paid. Again, that generosity should not impose an obstacle to employer efforts to determine whether the absence qualifies for FMLA to begin with, or to enforce its paid time off programs consistently.

Id. at 7. The National Coalition to Protect Family Leave agreed that employers with generous PTO plans are restricted by the regulations and suggested such treatment could result in employers reducing paid leave. *See* Doc. 10172A, at 23.

A comment from a law firm stated that, in terms of tracking FMLA leave, a double standard exists under the regulations. Spencer Fane Britt & Browne LLP, Doc. 10133C, at 50. Many employers allow employees to take non-FMLA leave only in increments that are longer than the time periods used for pay purposes. *Id.* The firm expressed a concern, however, that such a policy may constitute “retaliation” under the FMLA regulations, even though it is allowable for non-FMLA leave. For example, an employer may normally only allow employees to use paid leave in four-hour increments, but if the employee is only away from work for 1.5 hours for an FMLA reason, there is a question as to how much time the employer may charge against the employee’s paid leave balance. *Id.* The comment concludes, “[i]t is inherently unfair to provide employees with FMLA absences with greater benefits than they would otherwise have.” *Id.*

On the other hand, the AFL-CIO commented that Congress placed no limitations on an employee’s right to substitute paid vacation or personal leave, noting that “the Department specifically rejected proposals to limit employees’ substitution rights” when promulgating the FMLA final rules, based on the statutory language. *See* American Federation of Labor and Congress of Industrial Organizations, Doc. R329A, at 27-28. The AFL-CIO also noted that the prohibition on employer limitations applies only to vacation and personal leave, and that employers remain free to apply their normal rules to the substitution of paid sick leave.

2. Benefit Plans: Short-term Disability and Workers’ Compensation

As indicated above, the choice to substitute accrued paid leave is inapplicable when employees receive payments from a benefit plan that replaces all or part of employees’ income. *See* 29 C.F.R. § 825.207(d). As the preamble to the 1995 Final Rule explained, if an employee suffers a work-related injury or illness, the employee may receive workers’ compensation benefits or paid leave from the employer, but not both. 60 Fed. Reg. 2180, 2205 (January 6, 1995). Thus, when such an injury or illness also qualifies under the FMLA and the employee is receiving workers’ compensation benefits, the employer may not require the employee to substitute paid vacation or sick leave, nor may the employee elect to receive both payments. *See id.* However, the time the employee is absent from work counts against the employee’s FMLA entitlement. *See* 60 Fed. Reg. at 2205-06. *See also* Wage and Hour Opinion Letter FMLA2002-3 (July 19, 2002) (allowing FMLA leave to run concurrently with workers’ compensation is expressly allowed under the regulations, but receipt of workers’ compensation payments prohibits the substitution of other accrued paid leave).

One Employee Relations Manager noted a similar rule applicable under some employers’ disability leave policies, pursuant to which “the employees’ use

of vacation and other earned time with pay to cover a personal illness may exclude them from qualifying for paid short-term disability benefits offered by the employer.” Cindy S. Jackson, Employee Relations/Labor Relations Manager, Cingular, Doc. 5480, at 1. A case manager from St. Elizabeth Medical Center, in Edgewood, Kentucky, indicated employees who take FMLA leave for their own serious health condition often qualify for short term disability payments after using a required amount of paid time off. *See* Doc. 10071A, at 3-4. Another employer from Huntington, Indiana said many of its employees on FMLA leave eventually qualify for short term disability, resulting in payments during leave. Bendix Commercial Vehicle Systems LLC, Doc. 10079A, at 3. According to this commenter, “if FMLA were required to be paid by the employer, you would see a lot more use of the intermittent, specifically abuse of FMLA.” *Id.* An HR manager agreed, commenting that an employee who took FMLA leave concurrently with short-term disability leave “allegedly for a painful and permanent spinal condition, is now heading up the company baseball team.” *See* Debra Hughes, HR Manager, Doc. 2627A, at 2; *see also* Roger Bong, Doc. 6A, at 3.

Another commenter felt that the regulations “created a substantial, unintended burden by prohibiting the substitution of accrued, paid leave” during an FMLA leave period that ran concurrently with paid leave taken under a workers’ compensation or a state-mandated disability plan. *See* Employers Association of New Jersey, Doc. 10119A, at 3. This commenter also suggested that employers requiring substitution of paid leave could run afoul of the regulations when employees qualify under a state’s mandatory, non-occupational, temporary disability plan; it also pointed out that many employees actively seek the substitution of their accrued paid leave because temporary disability plans only pay a portion of their salary. *Id.* at 4.

The United Steelworkers also commented on the relationship between short-term or other disability

leave and leave under the FMLA, stating that some employers may incorrectly “tell their employees they cannot receive income replacement under the [short term disability] plan and be on FMLA-protected leave at the same time” and thus incorrectly advise employees that they waive their FMLA protections by going on paid disability leave. *See* Doc. 10237A, at 3. To avoid this confusion, the United Steel Workers recommended that the Department “use the rulemaking process to clarify that employers must treat family/medical leave and short-term disability as separate and independent sources of protection.” *Id.*

Some comments also found difficulties in the way substitution of paid leave provisions are carried out by employers or objected to substitution more generally. The United Transportation Union, Florida State Legislative Board commented that the problem with the substitution of paid leave is that employers can force employees to use their hard-earned vacation and personal leave. *See* Doc. 10022A, at 2. The commenter labeled it an “unfair and burdensome practice.” *Id.*

3. Collective Bargaining Agreements

The substitution of paid leave provisions also interact with existing collective bargaining agreements (“CBAs”). One union commented that employers attempt to circumvent collective bargaining agreements by relying on their statutory right to substitute paid leave, while ignoring their contractual obligations. *See* United Transportation Union, Florida State Legislative Board, Doc. 10022A, at 2. A law firm representing several train and rail unions also noted such a trend: “Notwithstanding the CBAs’ unequivocal mandate that employees are entitled to use their paid leave at the time they choose and not at a time chosen by the carriers, the carriers in 2004 began to, and now routinely, require employees to use their paid leave whenever they exercise their statutory right to FMLA leave – thus usurping the employees’ collectively-bargained right to choose when and for what purpose to use

paid leave.” Zwerdling, Paul, Kahn & Wolly, P.C., Doc. 10163A, at 2. The comment concluded that “the statute may not be used as a tool to avoid compliance” with the parties’ prior agreements. *Id.*

Another commenter raised the same issue, noting that this dispute has arisen in the railroad context where several railroad employers have claimed that FMLA gives them the authority to diminish the rights afforded to employees under their existing contracts to decide when and in what manner to use their paid leave. *See* Guerrieri, Edmond, Clayman & Bartos, P.C. (on behalf of several labor unions in the railroad, airline, bus, and other industries), Doc. 10235A, at 2.²² This commenter also noted that the Department considered and addressed the issue of collective bargaining agreements in the preamble to the 1995 regulations: “At the same time, *in the absence of other limiting factors (such as a State law or 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.” *Id.* at 3 (citation omitted).

This law firm also noted that a 1994 Wage and Hour opinion letter further clarifies “that a collective bargaining agreement [can] limit an employer’s ability to require use of paid leave in conjunction with FMLA leave.” *Id.* at 3. *See* Wage and Hour Opinion Letter FMLA-33 (March 29, 1994) (“With reference to your constituent’s concerns pertaining to paid vacation and sick leave, an employer may require an eligible employee to use all accrued paid vacation or sick leave for the family and medical leave purposes indicated above before making unpaid leave available. However, section 402 of FMLA does not preclude the union’s right to collectively bargain greater benefits than those

²² *See also* Jeanne M. Vonhof & Martin H. Malin, *What a Mess! The FMLA, Collective Bargaining and Attendance Control Plans*, 21 Ill. Pub. Employee Relations Rep. 1 (Fall 2004) (discussing FMLA and collective bargaining agreements from perspective of labor arbitrators, noting that regulations allow parties to bargain for specific rights, especially option to manage when substitution of paid leave is permitted).

provided under the Act. In this instant case, the subject union could negotiate that substitution of accrued paid leave is an election of the employee *only.*” (emphasis in original)).

Further, the commenter referred to the ongoing litigation on this issue and urged that any regulatory action taken by the Department be consistent with this position. Guerrieri, Edmond, Clayman & Bartos, P.C. (on behalf of several labor unions in the railroad, airline, bus, and other industries), Doc. 10235A, at 3-4. *See B’hd of Maintenance of Way Employees v. CSX Transp., Inc.*, 478 F.3d 814 (7th Cir. 2007). In CSX, a group of rail carriers required employees to substitute accrued paid leave for family or medical leave covered by the FMLA, relying upon their FMLA right to do so. The carriers required substitution for intermittent leave for the employee’s own condition, but they did not require substitution when an employee used a block of FMLA leave for his or her own serious health condition. The plaintiffs, a collection of rail unions, challenged the action on the grounds that an existing CBA precluded involuntary substitution of paid leave. They claimed that when a CBA gives employees greater rights than the FMLA, the Act does not supersede such contractual rights. The court held that while employers generally are permitted to require substitution of paid leave, the FMLA does not authorize rail carriers that are subject to the Railway Labor Act (RLA) to do so when that would violate a CBA and the RLA’s prohibition against making unilateral changes in working conditions.

The AFL-CIO—in addition to adopting the comments of other unions on this issue—asserted that employers cannot require employees to substitute paid leave for FMLA leave in a manner that contravenes existing CBAs, whether those agreements are subject to the RLA or the National Labor Relations Act. *See* Doc. R329A, at 29. The AFL-CIO stated that “the Department should make no changes in its regulations governing substitution of paid leave for FMLA leave in the collective-bargaining context.” *Id.*

On the other hand, the Union Pacific Railroad Company noted that its Train and Engine Service employees have an FMLA leave rate that is five times higher than its other employees. *See* Doc. 10148A, at 2-3. The employer stated that there is no obvious reason for this disparity, such as a higher injury rate. “The only significant differences between the Train and Engine Service employee populations and all others are: 1) the schedules or lack thereof (most T&E employees have no set schedule but rather work on call . . .); and 2) Union Pacific does not require T&E employees to substitute paid leave for FMLA absences of less than 12 hours because paid leave cannot be granted to these employees in smaller increments under their collective bargaining agreements.” *Id.* at 2. Union Pacific explained, for example, that when a T&E employee who is called to duty states that s/he has a migraine and cannot report for two hours, no paid leave is substituted. Employees working under other collective bargaining agreements where Union Pacific can require substitution for less than full day increments are more reluctant to use FMLA leave unless absolutely necessary, because they do not want to decrease their accrued paid leave. *See id.* Three years of employer-collected data show that a “disproportionately high number of FMLA absences among Train and Engine Service employees are in increments of less than 12 hours.” *Id.*

4. Compensatory Time Off

As noted above, subject to the provisions of section 7(o) of the FLSA, state and local government employers may provide employees with compensatory time off at time and one half for each hour worked in lieu of paying cash for overtime. The FMLA regulations at 29 C.F.R. § 825.207(i) specifically prohibit employers from counting compensatory time off against an employee’s FMLA entitlement.

One commenter noted the inconsistency in the regulations regarding the use of compensatory time off, stating “[w]hile an employer cannot compel the use of compensatory time, if an employee asks to use

it to cover a FMLA absence, the time off should count against the FMLA entitlement. If compensatory time is allowed to be taken in lieu of FMLA leave, the regulations should require employees to take the compensatory time at either the beginning or end of the leave.” *City of Portland*, Doc. 10161A, at 4. *See also* *Washington Metropolitan Area Transit Authority*, Doc. 10147A, at 3 (regulation “discourages employers from working with employees to minimize the negative financial impact of unpaid leave at times when employees are most in need”).