

**WARNING: RECENT FMLA CASE MAY LIMIT EMPLOYER'S RIGHT TO
SUBSTITUTE PAID LEAVE BENEFITS DURING FMLA LEAVE**

The Seventh Circuit U.S. Court of Appeals has taken yet another step to define rights pursuant to the Family and Medical Leave Act (FMLA) for both employers and employees. Specifically, the Court's decision in *Repa v. Roadway Express, Inc.*, No. 06-2360 (Feb. 26, 2007) dealt with the issue of whether an employer could force the substitution of sick and vacation leave benefits while an employee was on federal FMLA and using paid disability benefits. These facts are most interesting to note, because the Court decided against the employer and granted Summary Judgment for the employee.

It should be noted that the employee in this case, Repa, was an employee of Roadway Express, Inc., a commercial trucking company in Wisconsin. It should also be noted that Repa was a union member and thus a party to a collective bargaining agreement. Repa suffered a non-work related injury that required surgery and a six week leave of absence for recovery. Repa received paid short term disability benefits through the union's health fund. Repa also requested FMLA for this same leave period. Roadway, the employer, accepted this request for leave but also notified Repa at the same time that she was required to substitute any accrued paid leave during her FMLA leave. Thus, when Repa returned to work, Roadway informed her that she had been required to use up her five sick days and two weeks of paid vacation, for which she received pay in addition to her weekly disability benefits. Needless to say, Repa sued Roadway under the federal FMLA.

As a refresher, under the federal FMLA, a qualified employee is entitled to 12 weeks of unpaid medical leave per year. During an FMLA leave, an employer is not required to pay an employee for leave, but an employee may elect or the employer may require the employee to substitute any accrued paid time off provided by the employer for any otherwise unpaid FMLA. 29 C.F.R. sec. 825.207(c). Usually this means under federal law, that an employer can require an employee to use paid benefits in our State for any duration that is not also overlapping with Wisconsin Family and Medical Leave Act leave.

I will note at this time that this employer was also in error under the Wisconsin Family and Medical Leave Act which specifically states that an employer cannot force the substitution of paid benefits for any period overlapping with Wisconsin FMLA. In this case, that would have encompassed the first two weeks of this leave. However, this lawsuit was not pursued under a State claim but under a Federal claim.

In the case of Repa, she argued that because she was receiving paid time off through her short term disability plan, that she could not be forced to substitute other paid leave benefits because this leave was no longer unpaid. She cited to the FMLA: "Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of

permitted leave under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable." 29 C.F.R. sec. 825.207(d)(1). The Company attempted to argue that this language strictly applied to the birth of a child. This argument was promptly rejected by the Court of Appeals. The Court of Appeals also rejected the employer's attempt to argue that they did not provide the disability plan, the union did and thus they could still force the use of paid benefits.

The most compelling argument raised by the Employer was that allowing Repa to not have to use up paid leave benefits, would grant her leave beyond the 12 weeks legislated and would alter the statutory framework provided to employers. While this argument may have had some merit, the Court of Appeals found that the employer waived their right to make this argument on appeal because it did not challenge the validity of the lower court's decision on this point. The Court of Appeals therefore, left that issue open to another case and another day.

What does all of this mean? At this point employers cannot force the substitution of paid leave benefits during an FMLA leave that is covered under a short term disability benefit package provided by either the employer or some third party entity. Whether an employer can possibly substitute paid leave for any difference between the disability leave payments and what the employee would have been paid if they had been working (assuming there is a difference) was not decided.

Remember, as an employer you must always first calculate the Wisconsin FMLA duration because no paid leave substitution can be forced during this leave (6 weeks for birth or adoption, 2 weeks for serious health condition of employee and/or family member). If the Court clarifies this issue further, I promise to report in. Have a great month of August!!!