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ALLEGHENY COUNTY LABOR COUNCIL
REPORT OF LEGAL COUNSEL
January 7, 2016

THE FAMILY AND MEDICAL LEAVE ACT

The Substitution of Paid Leave for Unpaid FMLA
The problem when our employer double dips our contractual benefits!

General Rule:

The FMLA guarantees qualifying employees up to 12 weeks of unpaid medical leave each year. Even though FMLA leave is unpaid, "employees may elect, or an employer may require, the employee to substitute" accrued paid leave for the employee's FMLA leave. 29 C.F.R. § 825.207(a). Accrued paid leave includes benefits such as vacation leave, personal leave and sick leave. Simply put, 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. In this instance, the accrued paid leave and the unpaid FMLA run concurrently.

Circumstances where a CBA Governs the Bargaining Relationship

Importantly, the FLMA specifically provides that nothing in the Act "shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights than the rights established under this Act. . . . " 29 U.S.C. § 2652(a). See *Bhd. of Maint. of Way Emples. v. CSX Transp., Inc.*, 478 F.3d 814, 817 (7th Cir. 2007) (provisions in the FMLA do not allow employers to violate labor agreements under the Railway Labor Act). In *CSX Transp., Inc*, the Seventh Circuit held that a "reasonable conclusion is that, while substitution is allowed, the carriers cannot require substitution without complying with procedures set out in the RLA. Using those procedures, the carriers can bargain for substitution provisions." In short, an Employer must bargain any such change with the Union before implementing the same. A similar decision was issued under the NLRA in *Verizon North, Inc. and International Brotherhood of Electrical*

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Workers, Local 1637, 352 N.L.R.B. 1022. In *Verizon,* the parties applied negotiated contractual language to permit employees to save their FML time when they chose instead to use paid leave, and the employer was not privileged to unilaterally determine that it no longer had to abide by this practice because FMLA permitted it to do otherwise. The Board concluded that the Employer in *Verizon* violated the Act when, without first affording the Union notice and an opportunity to bargain, it began charging employees FML leave time when they opted to use paid vacation or float day leave.

What does this mean?

Anytime your employer forces you to use your accrued paid benefits earned under your CBA concurrently with your unpaid FMLA, object by challenging such action as a violation of your CBA and as a unilateral change in the terms and conditions of employment.

Respectfully submitted,

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