rather belongs to the employee. If a public employee terminates employment, any unused comp time must be "cashed out." Thus, FMLA's provisions allowing an employer to unilaterally require substitution would conflict with FLSA's rules on public employees' use of comp time only pursuant to an agreement or understanding between the employer and the employee (or the employee's representative) reached *before* the performance of the work. A public employee who has accrued comp time off must also be permitted to use the time "within a reasonable period after making the request if the use of compensatory time does not unduly disrupt the operations of the public agency" (FLSA § 7(o), emphasis added). To the extent that the conditions under which an employee may take comp time off are contained in an agreement or understanding, the terms of the agreement or understanding govern the meaning of "reasonable period" (29 CFR § 553.25). An agency may turn down an employee's request for comp time off under FLSA if it would be unduly disruptive to the agency's operations. The employer's right to control an employee's use of comp time, including authority to decline a request for its use, would simply be inconsistent with FMLA's provision authorizing the employee to elect to substitute paid leave (without qualification as to whether the time taken would be unduly disruptive). While a public employee may certainly request the use of comp time under FLSA for an FMLAqualifying absence, the employer may not simultaneously charge the FLSA comp time hours taken against the employee's separate FMLA leave entitlement. To do so would amount to charging (debiting) two separate entitlements for a single absence. Accordingly, public employers may not use their employee's FLSA "comp time" banks as a form of "accrued paid leave" for purposes of substitution under FMLA, and this section is so revised.

Designating Paid Leave as FMLA Leave (§ 825.208)

This section of the Interim Final Rule placed responsibility on the employer to designate all FMLA leave taken, whether paid or unpaid, as FMLA-qualifying, based on information obtained directly from the employee. Because employees may not spontaneously explain the reasons for taking their accrued paid vacation or personal leave, the regulations allowed employees to request to use their paid leave without necessarily stating that it was for an FMLA purpose, and if the

employer rejected the request under its normal leave policies, the eligible employee would be expected to come forward in response to the employer's further inquiry with additional information to enable the employer to determine that it is FMLA leave (which could not be denied). Employers are required to determine and designate "up front" before leave starts whether any paid leave to be taken counts toward an employee's FMLA leave entitlement, and so notify the employee "immediately" upon learning that it qualifies as FMLA leave (in accordance with the employer's "specific notice to employees" obligations under §825.301(c)). Only where leave had already begun and the employer had insufficient information to determine whether it qualified under FMLA could it be retroactively designated as FMLA leave under the Interim Final Rule. Employers were precluded in all cases from retroactively designating any paid leave taken as FMLA leave once the leave had ended and the employee had returned to work.

This section was intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted "after the fact" disputes. The regulations expected disputes to be resolved through discussions between the employee and the employer at the beginning of the leave rather than at the end. Because of the possible "stacking" of unpaid FMLA leave entitlements in addition to an employer's pre-existing leave plan, it appears that some employers that wished to mitigate their exposure to extended leaves by employees have been motivated by the provisions in the Interim Final Rule to try to determine and count all possible FMLA-qualifying absences as FMLA leave (by whatever means, including through overly-intrusive inquiries of employees when they request to use their accrued paid leave).

The Commission on the Status of Women, Equal Rights Advocates, and Gwen Moore, Majority Whip, California Legislature objected to an employer's ability to inquire into the purposes of the employee's paid vacation or personal leave to determine if it qualifies under FMLA, because it allows the employer unfettered discretion to invade the employee's privacy. Federated Investors and Michigan Consolidated Gas Company noted that extracting the reason for an employee's need to be away from work could violate the Americans With Disabilities Act. Many employer groups, in contrast, felt that the employer should be permitted to conduct a reasonable

investigation to determine if leave qualifies as FMLA leave (including inquiring of persons other than the employee for purposes of verification, such as the employee's physician).

Blue Cross and Blue Shield of Texas, Inc. and LaMotte Company pointed out that circumstances could arise where the unduly restrictive structure of the regulations disadvantages employees, such as where an employee is about to be disciplined for attendance problems and time previously missed and is precluded, due to the bar against retroactive designation of FMLA leave, for asserting FMLA leave as a defense. Burroughs Wellcome Company, Massmutual Life Insurance Company, and several others noted the restrictive structure was inconsistent with other regulatory provisions that allow up to 15 days from employees to furnish medical certification to substantiate FMLA leaves—where leave is unplanned and of relatively short duration or if the employee or health care provider delay processing the certification, the employee could be back at work before the employer had sufficient information to confirm that the leave qualified under FMLA and the employee would lose FMLA's benefits and protections. Several commenters (including the Texas Department of Human Services) suggested that employers be allowed to designate FMLA leaves immediately upon the employee's return to work. William M. Mercer, Inc. suggested permitting an employer to designate leave as qualifying under FMLA after it has ended if the inability to designate it during the leave resulted from the employee refusing to give needed information, or providing wrong information. The Chamber of Commerce of the USA suggested that employees be required to declare their intention to take FMLA leave at the beginning of an FMLA-qualifying period, and that employers be allowed to consider information from third parties and be allowed to designate leave as FMLAqualifying within 90 days following the end of a leave period. The Equal **Employment Advisory Council** suggested similar approaches with related rationales, noting in particular that inquiring into the reasons for employee leave requests for vacation and personal days was having a negative impact on employer-employee relations. EEAC recommended that employees be required to give notice of FMLA leave, and an employer's request for medical certification should be deemed a provisional designation of FMLA leave