

Return to Work Issues Under the FMLA

by Jill K. Blackmer

On return from leave provided by the Family and Medical Leave Act ("FMLA"), an employee is entitled to the same position the employee held when the leave started or to an equivalent position with equivalent pay, benefits and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her job has been restructured to accommodate the employee's absence. If the employee is unable to perform an essential function of the position because of a mental or physical condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act.

An equivalent position is one that is "virtually identical" to the employee's former position in terms of pay, benefits, working conditions such as privileges, perquisites and status and entails the "same or substantially similar" duties and responsibilities. The employee must be reinstated to the same or geographically proximate worksite; however, if the original worksite has been closed, the employee should be treated as if not on leave when the worksite closed. The employee is entitled to be returned to the same shift or the same or equivalent work schedule. The employee must have the same or equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments. An employer's obligation to restore an employee returning from an FMLA leave to the same or equivalent position, however, does not extend to intangible or unmeasurable aspects of a position.

Equivalent pay includes any unconditional pay increases such as cost of living increases, but does not include pay increases based on seniority, length of service or work performed unless it is the employer's

practice to award such pay increases for other employees out on unpaid leave. Generally, an employee is entitled to be restored to a position with the same or equivalent "pay premiums" such as a shift differential or average overtime. An employee is entitled to a bonus based on job-related performance such as attendance and safety if the employee has satisfied all other requirements for these bonuses.

Equivalent benefits include group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits and pensions. Upon returning from an FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before taking the FMLA leave. To comply with this requirement, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. Benefits accrued at the time leave began, such as paid vacation, sick or personal leave, must be available to an employee upon return.

As a general rule, an employee returning to work from an FMLA leave has no greater rights than if the employee had been continuously employed during the FMLA leave period. To deny reinstatement, an employer must be able to show that an employee would not otherwise have been employed at the time of reinstatement is requested. Specific examples when reinstatement may properly be denied include when an employee is laid off during an FMLA leave, when a shift has been eliminated or overtime decreased, when an employee was hired for a specific term or to work on a particular project, when an employee gives unequivocal notice of intent not to return to work, or when the employee is a "key employee" and denial is necessary to

prevent substantial and grievous economic injury to the operations of the employer. A key employee is a salaried FMLA-eligible employee who is among the highest paid ten percent (10%) of all the employees employed by the employer within 75 miles of the employee's worksite. Employers need to be aware that there are special requirements that must be met when a key employee takes an FMLA leave.

Reinstatement after an FMLA leave raises a host of issues, only some of which have been addressed in this article. When in doubt, it is best to consult with an experienced practitioner. ■

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On return from leave provided by the Family and Medical Leave Act ("FMLA"), an employee is entitled to the same position the employee held when the leave started or to an equivalent position with equivalent pay, benefits and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her job has been restructured to accommodate the employee's absence. If the employee is unable to perform an essential function of the position because of a mental or physical condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act.

An equivalent position is one that is "virtually identical" to the employee's former position in terms of pay, benefits, working conditions such as privileges, perquisites and status, with the "same or substantially similar" duties and responsibilities which must entail "substantially equivalent" skill, effort, responsibility, and authority. The employee must be reinstated to the same or a geographically proximate worksite; however, if the original worksite has been closed, the employee should be treated as if not on leave when the worksite closed. The employee is entitled to be returned to the same shift or the same or equivalent work schedule. The employee must have the same or equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and nondiscretionary payments. An employer's obligation to restore an employee returning from an FMLA leave to the same or equivalent position, however, does not extend to intangible or unmeasurable aspects of a position.

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