

Can FMLA Reinstatement Be Denied?

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Question:

Your PEO's human resources department fields a telephone call from a client who has granted leave to a worksite employee under the Family and Medical Leave Act (FMLA), but he insists he will not hold any job open for any employee. Does your HR department know the limited situations under which an employer can refuse to reinstate an employee who has taken FMLA leave?

Answer:

The Act's primary purpose is to ensure that employees are reinstated to the same or equivalent positions held at the commencement of the leave. Moreover, it is probably fair to say that the U.S. Department of Labor and most courts lean strongly in favor of the employee's right to reinstatement when there is a dispute. However, there are some limited circumstances in which an employer may deny job restoration to otherwise protected employees:

- **Key employees**—An employer may deny reinstatement, but not leave, to “key employees.” A key employee is a salaried employee who is compensated within the top 10 percent of the employees working within a 75-mile radius of the employee's worksite. 29 CFR §825.217.¹ To deny job restoration to a “key employee,” the employer must be able to show that the employee's restoration, not leave, would cause “substantial and grievous economic injury” to the employer's operations. In addition, the employer must have informed the employee, in writing, of his status as a “key employee” prior to the commencement of the FMLA leave. 29 CFR §825.216(c).
- **Layoffs**—An employer may deny reinstatement to an employee whose job

was eliminated due to a reduction in force, but only when the employer can demonstrate that the employee's job would have been eliminated even if the employee had not been on FMLA-protected leave. 29 CFR §825.216(a)(1).

- **Specific term or project**—Some employees are hired for a specific term or to perform a specific function. If the term expires or the function ends while the employee is on FMLA leave, the right to job restoration ends as well. 29 CFR §825.216(b).

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- **Employee notice**—In rare circumstances, an employee taking FMLA leave will tell the employer that he will not be returning to work. Pursuant to the Act's regulations, an employer's obligation to restore an employee to work ceases if the employee provides the employer with “unequivocal notice” that he will not return to work. However, the regulations also make it clear that an employee does not forfeit his right to reinstatement when the employee states that he may not be able to return to work, but would like to do so. 29 CFR §825.309(b)
- **Fitness for duty**—Sometimes an employer has concerns about an

employee's ability to resume all previous job duties and wants to delay or eventually deny an employee's release until a “fitness for duty” certification is obtained. This is permissible only if the employer notified the employee in writing prior to the leave that a fitness for duty certificate will be required to return to work and the employee fails to present such documentation. 29 CFR §825.216(c).

- **Other considerations**—In determining whether an employee who is on leave due to an illness or injury is entitled to job reinstatement, an employer should not ignore state and local family and medical leave laws and the Americans with Disabilities Act (ADA). If the employee was injured at work, state workers' compensation laws may govern.

In short, PEOs should educate clients about FMLA requirements at the outset of the relationship. Moreover, no decision to deny job restoration can be taken lightly and clients should be strongly encouraged to consult with their PEO's HR professionals prior to any decision involving the job status of someone who has been on FMLA-protected leave. ●

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¹ The court in *Harbert v. Healthcare Service Group, Inc.*, 391 F.3d 1140 (10th Cir. 2004), cert. denied, 126 S.Ct. 356 (2006), concluded that in “joint employer” situations in which the employee has a fixed job site, the term “worksite” is the site to which the employee is assigned.

² The Department of Labor (DOL), in a December 1, 2006, Federal Register notice, published a request for information soliciting comments on the FMLA. The comments were due on February 16, 2007, and will be used by the DOL in a possible overhaul of the FMLA regulations.