

# **Key Employee - If I Take FMLA, I'm Fired???**

*HR Daily Advisor:* Monday, January 09, 2012 by Steve Bruce

*If you are a designated key employee, you may not be able to return to work after FMLA leave, but your leave can't be denied, says attorney Stacie Caraway, who covered key FMLA topics at BLR's Advanced Employment Issues Symposium, held recently in Las Vegas.*

While you can deny return from leave to key employees, don't mistake that to mean that key employees can be denied leave—that's not the case, says Caraway. Since FMLA is unpaid, why would key employees want leave status if they can't return to work? Employees on leave retain benefits, notes Caraway, who is a member of Miller & Martin PLLC in Chattanooga, Tennessee.

If you want to designate key employees and deny them return to work, there are hoops to jump through. First, the employee has to meet the three prongs of the definition of key employee:

- The employee is salaried and FMLA-eligible
- The employee is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite
- Restoring the employee would cause "substantial and grievous" economic injury to the employer's operations.

Once you determine that an employee is a "key employee" and you are able to show that substantial and grievous economic injury would result from reinstating the employee, you must give notice to him or her via Certified Mail that the company intends to deny reinstatement at the end of the FMLA leave and you must explain the basis for this determination.

If the employee has already started the leave, you must give him or her a reasonable amount of time to return to work, thus eliminating the grievous harm and allowing the employee to stay employed.

You must also allow key employees to seek reinstatement at the end of their leaves, and if you still intend to deny the leave, you must send another notice denying the reinstatement, also sent by Certified Mail, says Caraway.

## **Return When No Longer Qualified for Same Position**

The right to job restoration following FMLA leave is contingent upon the employee's continued ability to perform all of the essential functions of the job. An employee who returns to work but is no longer qualified for the position, because a course hasn't been attended, a license renewed, etc., during the leave, must be provided a reasonable opportunity to fulfill the job requirements after returning to work.

## **Unable to Perform the Work**

If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the ADA, state leave laws, or workers' compensation laws.

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