

Leave Reinstatement Rights from A (ADA) to U (USERRA)

What are your obligations to reinstate an employee who has been on a leave of absence and is ready to work? The answer depends on the type of leave taken.

An alphabet soup of federal laws protects employees who take, and then subsequently return from, a leave of absence. The Family and Medical Leave Act (FMLA), the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), state workers' compensation laws, and military leave laws all can impact the reinstatement rights of employees returning from family, medical, pregnancy, childbirth, and military leaves of absence. These laws dictate what jobs, pay, benefits, and even perquisites returning employees get.

It's tough for any employer to keep track of all of the obligations imposed by these laws. To help sort through the intricate details and interactions, the following discussion provides an in-depth look at the requirements mandated by leave and discrimination laws.

An Overview of the FMLA's Reinstatement Requirements

The FMLA allows eligible employees to take up to 12 weeks of leave in a 12-month period for various family and medical reasons. Employers with 50 or more employees and all schools and public agencies must comply with the law. Eligible employees may take leave for the following reasons: (1) for the birth and care of a newborn child of the employee; (2) in connection with the placement with the employee of a child for adoption or foster care; (3) to care for a spouse, child, or parent who has a serious health condition; or (4) when the employee is unable to work because of the employee's own serious health condition.

Employees returning from FMLA leave must be reinstated to their former position or another position with "equivalent employment benefits, pay, and other terms and conditions of employment." In addition, the employee should be reinstated promptly, as demonstrated in *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238 (6th Cir. 2004). In that case, the employer violated the FMLA when it took a month to reinstate a worker after she said she was ready to return to work. The Sixth Circuit said that if an employee can perform the essential functions of the job, then the right to reinstatement is triggered upon the employee's timely request to return from leave.



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LEAVE REINSTATEMENT RIGHTS

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According to the FMLA regulations, an equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which require substantially equivalent skill, effort, responsibility, and authority.

For example, in *Cooper v. Olin Corp.*, 246 F.3d 1083 (8th Cir. 2001), the Eighth Circuit Court of Appeals determined that "restoration of salary, title, and benefits does not necessarily constitute restoration to the same position (as required by the FMLA) when the job duties and essential functions of the newly assigned position are materially different from those of the employee's pre-leave position."

In addition, you may not take away any previously accrued seniority and employment benefits from an employee who takes FMLA leave. At the same time, however, you are not obligated to reinstate an employee who takes leave beyond the FMLA's 12-week entitlement. But, you still must comply with the terms of your organization's leave policies, state leave laws (which may be more generous than the federal FMLA), and any federal and state pregnancy and disability protections, discussed below.

Pay Increases and Bonuses under the FMLA

A returning employee also is entitled to any unconditional pay increases that occurred during the FMLA leave period, such as cost of living increases. However, the returning employee is not entitled to pay increases based on seniority, length of service, or work performed, unless you have a policy or practice of granting those increases to employees who are on unpaid leave.

According to the regulations, bonuses that are not based on performance, such as for perfect attendance and safety, must be paid to an employee returning from FMLA leave if the employee continues to meet the eligibility requirements of the program. For example, if an employee had a perfect attendance record and took FMLA leave, the employee cannot be disqualified from the program because of the time spent on the FMLA leave.

In contrast, bonuses based on job-related performance, such as a monthly production goal, do not have to be paid to an employee who is on FMLA leave during any part of the period for which the bonus is computed, unless it is being paid to employees on other types of leave.

Denial of Reinstatement under the FMLA

According to the FMLA regulations, you may deny reinstatement at the end of an FMLA leave only in the following three situations:

1. If you can show an employee would not otherwise have been employed at the time the employee requests reinstatement, such as when an employee's position is eliminated in a workforce reduction and the employee had not been targeted because of the leave.

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2. 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. (Note, though, that you may have other obligations under the ADA, as discussed below.)
3. If the employee is a highly compensated “key” employee whose reinstatement is denied to prevent “substantial and grievous economic injury” to the employer’s operations. As a practical matter, this standard is very difficult to meet. Also, although a key employee may not qualify for reinstatement, the employee is still entitled to take an FMLA leave.

The PDA and Reinstatement

Employers, including those not covered by the FMLA or those that have employees who are not eligible for FMLA leave, also must comply with the requirements of the PDA. That law amended Title VII of the Civil Rights Act to cover pregnancy discrimination and applies to employers with 15 or more employees.

The PDA does not specifically require pregnancy leaves or reinstatement after these leaves. However, the law does require that you treat pregnant employees the same as other employees with temporary medical conditions. Accordingly, you must permit an employee on pregnancy leave to return to her job on the same basis as other employees returning to work from temporary sick or disability leave.

If you treat female employees returning from pregnancy disability leaves differently from employees returning from leave for other temporary medical disabilities, this treatment may be considered sex discrimination. For example, you cannot require medical certification from an employee returning from pregnancy leave if the same requirement does not apply to employees returning from other temporary disability leaves.

The ADA and Reinstatement

If your organization has 15 or more employees, you also should be aware that the ADA may apply to your reinstatement policies. Under the

ADA, covered employers may have to provide a leave as an accommodation for a disabled employee. An employee who is on leave as an ADA accommodation ordinarily is entitled to reinstatement to the *same* job since the purpose of a reasonable accommodation is to allow the employee to perform the essential functions of that particular job. Note that this requirement is more restrictive than the FMLA, which allows reinstatement to the same or an equivalent position.

If reinstatement to the same job is an undue hardship for the employer, you still may have to reinstate the employee to any available vacant position the employee is qualified to perform. Further, you may have an additional duty to accommodate a disabled employee whose medical condition has deteriorated during leave, if a reasonable accommodation is needed to enable the employee to perform the essential functions of the job.

Workers’ Compensation Statutes and Reinstatement

Most state workers’ compensation statutes do *not* specifically address reinstatement for employees who are on leave and receiving workers’ compensation benefits. Rather, these laws generally guarantee compensation and medical benefits to employees injured in the workplace. The laws also prohibit retaliation against employees who file workers’ compensation claims.

Accordingly, employees on leave for work-related injuries generally should be treated under the provisions of the FMLA, if they meet its eligibility requirements, and should be reinstated according to the FMLA’s requirements discussed above. If the employee on a workers’ compensation leave does not return to work at the end of the 12-week FMLA leave, the employer generally may terminate the employee without violating the FMLA, as long as the termination is consistent with the treatment of similarly-situated employees who have taken FMLA leave. Remember, however, an employee with a work-related injury may be considered disabled under the ADA and, therefore, may be entitled to additional leave as an accommodation.

A few state workers' compensation laws, such as Maine, New Hampshire, Oregon, Rhode Island, and West Virginia, *do* require reinstatement regardless of the length of the leave. For example, Maine's statute generally requires reinstatement to the prior position if available or to another available position. You should consult state law to determine your obligations under these laws.

Military Leave and Reinstatement

The Uniformed Services Employment and Reemployment Rights Act (USERRA), which applies to all employers regardless of size, grants most employees up to five years of military leave. The law further requires that any employee returning from military leave, who receives a certificate showing satisfactory completion of military service, must be restored to his previous employment. The type of position to which the veteran must be reinstated depends on the period of service and on the veteran's abilities at the time of reinstatement. The following criteria apply:

- Service of 90 days or less. The veteran must be reemployed in the position he would have held if he had continued in employment without interruption for military service, as long as he is qualified for that position. If the veteran would have been promoted if he had continued in employment, but cannot be qualified for that new position after reasonable efforts by the employer, he may be employed in the position he held when military service began.
- Service of 91 days or more. The veteran must be reemployed in the position he would have held except for the interruption for military service, or in a position of like seniority, status, and pay, if qualified for that position. If the veteran would have been promoted if he had continued in employment, but cannot be qualified for either that new position or an equivalent one despite the employer's reasonable efforts, he must be reemployed in the position he held when the period of service began, or in a position of like seniority, status, and pay.

- Veterans who cannot be qualified for the job. If the veteran cannot be qualified for the job he would have held, or the position he formerly held after the employer's reasonable efforts, and his inability to qualify is not related to a service-incurred or aggravated disability (see below), he must be reemployed in any position of lower status and pay for which he is qualified, but with full seniority.
- Disabled veterans. A disabled veteran whose disability was incurred or aggravated by military service, and who cannot perform the job he would have held even after reasonable accommodation by the employer, must be reemployed in: (1) any other position of equivalent seniority, status, and pay for which he is qualified or could become qualified through the employer's reasonable efforts; or (2) in the nearest approximation to an equivalent position consistent with the veteran's circumstances.

Note that USERRA requires that returning veterans be "promptly reemployed." What is considered "prompt" generally depends on the circumstances of the case and how long the employee has been on military leave.

USERRA also obliges you to abide by its "escalator principle," which requires that the veteran receive any change in position or benefits to which he would have been entitled had he remained continuously employed. In addition, the law specifies certain limited circumstances under which you are relieved of the obligation to reemploy veterans returning from military service, such as when reemployment is "unreasonable or impossible" because of a change in the employer's circumstances.

Five Steps to Leave Reinstatement

As the above discussion shows, you may have reinstatement obligations under several federal leave and discrimination laws. Unfortunately, the complexities of these laws can create opportunities to make mistakes. You can prevent compliance problems, however, if you develop and apply a systematic approach to analyzing each employee's reinstatement rights. To facilitate your compliance efforts, you should:

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1. **Identify the leave laws protecting the employee when the leave begins and make sure you understand and comply with their requirements.** So, if the employee takes leave for pregnancy, then the FMLA and PDA both may apply. Or, if the employee takes leave for a work-related injury, the FMLA and state workers' compensation laws may apply.
2. **When the employee requests to return to work, if the employee was on leave for a serious health condition or disability ask for medical return-to-work certification.** This certification can help you determine if the employee can be reinstated to his regular job or if you have further obligations under the ADA (see below).
3. **In the case of FMLA leaves, determine if the employee is returning within the 12-week time frame.** If so, be prepared to reinstate to the same or an equivalent position. If not, you may be able to deny reinstatement, unless the ADA, workers' compensation laws, or state leave law require additional leave or accommodation (see below).
4. **In the case of military leaves, be prepared to reinstate the returning veteran in most circumstances.** USERRA gives employees up to five years of military leave and grants many more rights, as a way of supporting the volunteer army, than any other leave law. (Although this leave may seem lengthy, as a practical matter, many employers have found that veterans returning from post 9/11 duty have gained valuable experience and job-enhancing skills.)
5. **If an employee is unable to return to work at the end of a leave because of a continuing medical condition, determine if the employee is disabled under the ADA and entitled to further leave as a reasonable accommodation.** In addition, if the employee's medical condition is work-related, check state workers' compensation law for additional leave and reinstatement requirements.

The real key in all of this process is to take quick action to analyze the nature of each leave, determine which laws apply, and then give the employee proper guidance on reinstatement rights. If you follow these steps consistently, you will help make sure your employees get all of their rights under the various leave and discrimination laws and, at the same time, greatly reduce your chances of making mistakes. ♦

FOR MORE INFORMATION

Leave reinstatement requirements, *LEAVES OF ABSENCE*, Chapter 703, notes 42 and 45.

Subscribers to the *Personnel Policy Manual Service* in print or cd format - just look to Chapter 703 for additional information. Otherwise, you may purchase Chapter 703, *Leaves of Absence*, policy, plus documentation notes and decisionmaking checklist for \$29.95 by going to: www.hrpolicyanswers.com/Leave

COURT TRENDS

Harassment Policy Update

Recent court cases reinforce that employers can be liable for all forms of harassment, not just sexual harassment. Make sure your anti-harassment policy measures up to the evolving legal standards.

In the past, many employers have focused mainly on sexual harassment since it receives the most legal and media attention. However, any form of harassment undermines your operations and is prohibited by discrimination laws.

The trend in recent court decisions reinforces the fact that federal civil rights laws prohibit harassment and work environments that are abusive to employees because of their race, gender, religion, national origin, age, and disability. While the most common harassment claims do involve allegations of sexual harassment, you should be aware that the same legal analysis

applies for other offensive behavior against any protected class.

Below, you'll learn about how these legal decisions highlight the prohibition on all forms of harassment and then find out the six topics your policy should address.

Recent Cases Prohibiting Harassment

The Equal Employment Opportunity Commission (EEOC) takes the position that: (1) conduct constituting harassment of any of the protected classes covered by Title VII is unlawful as a discriminatory term or condition of employment;

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and (2) that the same analysis should be applied to hostile environment cases involving age or disability discrimination.

The following court cases show how hostile environment claims may arise from any status protected under Title VII and the Americans with Disabilities Act (ADA).

- **Racial harassment.** In *Spriggs v. Diamond Auto Glass*, 242 F.3d 179 (4th Cir. 2001), a supervisor's repeated use of racial slurs to describe African Americans constituted a hostile work environment in violation of Title VII. Similarly, in *McCowan v. All Star Maintenance*, 273 F.3d 917 (10th Cir. 2001), the court determined that three Mexican-American employees could claim they were subjected to illegal harassment in a racially hostile work environment. They were called by racial epithets and were told about epithets directed at them.
- **Harassment based upon gender.** In *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75 (1998), the Supreme Court determined that Title VII prohibits conduct that is motivated by gender and that is so offensive to a reasonable person that it alters the workplace environment.

Further, courts have penalized employers for not specifically including gender harassment in their policies. In *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000), the court determined that the employer's harassment policy was deficient because it recognized only harassment based on sexual advances and propositions, and not harassment based on gender.

- **Religious harassment.** In *Abramson v. William Paterson College*, 260 F.3d 265 (3d Cir. 2001), the court found that an Orthodox Jewish professor had a claim for hostile environment based upon religion. Her supervisor criticized and berated her for her lack of availability during the Sabbath, scheduled meetings on Jewish holidays and refused to change them so that she could attend, charged her with a sick day on a Jewish holiday when she was not scheduled to teach, and made derogatory statements to her about her faith.
- **National or ethnic origin harassment.** In *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002), the court allowed a Mexican-American employee to pursue a claim for hostile work environment because his coworkers and supervisor regularly referred to him using ethnically derogatory terms.
- **Disability harassment.** In *Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001), the court allowed an ADA hostile environment claim by an employee whose supervisor taunted him about his disability,

required him to do tasks beyond his physical limitations, and called him various derogatory names related to his disability.

Six Topics to Include in Your Harassment Policy

The above court cases clearly show that to protect against liability your policy should specifically prohibit all forms of harassment, not just sexual harassment.

At a minimum, your policy should include the following elements:

1. **A statement prohibiting all forms of harassment in the workplace.** Specifically, you should prohibit sexual harassment and also harassment based on race, gender, national origin, religion, disability, pregnancy, age, and military status. In addition, you should include any other categories protected by your state's equal opportunity laws, such as sexual orientation in California.
2. **A definition of harassment and, in particular, sexual harassment.** This section should include the EEOC's legal definition of both "quid pro quo" and "hostile environment" sexual harassment.
3. **An explanation of what conduct is prohibited.** Your policy should prohibit at least the following conduct:
 - quid pro quo threats or promises by a supervisor (loss of job or promise of job, promotion, or other employment benefit);
 - offensive touching;
 - verbal harassment (lewd comments, sexual jokes or references, offensive or inappropriate personal questions, or negative comments based on the person's protected class status);
 - "girlie" or other offensive pictures displayed in the workplace; and
 - offensive or inappropriate written materials (letters, email messages, or graffiti).

Note that some of the prohibited conduct included above may not technically be considered illegal harassment by a court or agency, but it still warrants disciplinary action since it can have a negative effect on your workplace environment. For example, you can discipline an employee who uses obscene language or tells off-color jokes, even though that conduct generally would not be considered illegal harassment unless the employee engaged in it on an ongoing basis.
4. **A complaint and resolution procedure.** This procedure should include a bypass mechanism so that an employee does not have to complain to a

supervisor or other person who may be involved in the harassment. It also should provide for an investigative process and a specific time frame for resolving complaints. If you already have a complaint procedure in place, you can use that as long as it includes these safeguards.

5. **Specific disciplinary procedures.** The policy should make clear the consequences for any violations. For example, it should specify that discipline, up to and including termination, may be imposed depending on the nature and severity of the situation and the number of occurrences.
6. **A “no retaliation” statement.** This reassurance helps employees trust the policy and believe that they will be protected if they make a complaint or cooperate in an investigation.

Training, Implementation, and Enforcement

The courts are regularly churning out decisions that find fault with employer harassment policies and set new compliance standards. As a group, these cases clearly demonstrate that having a well-written policy is not enough. You must go further to train your employees on its application and procedures for filing a complaint. And, as always, you need to implement the policy consistently, making sure that all complaints are taken seriously and resolved quickly and fairly. Also, as a final safeguard, you (and your legal counsel) should review your policy on a regular basis to ensure that it continues to meet evolving legal standards. ♦

HR NEWS BRIEFS

Here’s a fact that should concern small employers everywhere. Large, Fortune 500 companies are not the only ones at risk for employment-related lawsuits. According to a recent survey of privately held companies, more than one-fourth (26%) reported that their organizations or their board of directors had been sued by current or former employees during the last few years. And, 22% of the respondents indicated that an employee had filed a discrimination or harassment complaint with the Equal Employment Opportunity Commission (EEOC) or similar state agency. The *Chubb 2004 Private Company Risk Survey* questioned executives at 300 private companies ranging in size from fewer than 100 employees to more than 1000 employees and with a range of revenues from less than \$10 million to more than \$1 billion.

These lawsuits can be expensive. Forty-five percent of the respondents estimated the costs of the employment lawsuits would be up to \$100,000, while 36% thought the cost would be between \$100,000 and \$500,000. Nineteen percent predicted that a lawsuit would actually exceed \$500,000.

These executives were even more pessimistic about the potential for future employment claims. Half (50%) responded that they expected employees to file a complaint with the EEOC or a state agency in 2004, and 44% predicted they

would be sued directly by employees or former employees. Yet, even with the prospect of expensive lawsuits looming, over half of those surveyed (56%) indicated that employment decisions will be made without the input of their human resources professionals.

Fortunately, the surveyed organizations are taking some steps to protect against these employment claims. Seventy-two percent stated that they do have written policies prohibiting employment discrimination and sexual harassment, and 52% reported that they provide training on these issues. However, smaller companies (defined as those with less than \$10 million in revenues) were less likely to have formal policies (53%) and provide training (only 23%).

Clearly, the survey results indicate that employers of all sizes have a growing exposure to employment litigation and need to take preventative action. Chubb, as could be expected, advocates insuring against these risks with employment practices liability insurance (EPLI). Policies against discrimination and harassment, training, and HR review of adverse employment decisions (such as termination and discipline) also can help prevent these lawsuits. (For more information about the survey, visit Chubb’s Web site at www.chubb.com/news/EPLExecutiveSummary2004.pdf.) ♦



Extra Compensation for Exempt Employees

Can we pay our exempt employees additional compensation, for example, when they work more time than usual or complete a special project?

As a general rule, you are not required to pay exempt employees extra for additional work since these employees are “exempt” from the overtime requirements of the Fair Labor Standards Act (FLSA). The Act exempts from its overtime provisions certain executive, administrative, and professional employees who are “paid on a salary basis,” often referred to as the “white-collar” exemptions. The FLSA regulations define salary basis as the payment on a weekly or less frequent basis of a predetermined amount constituting all or part of compensation, without reductions for variations in the quality or quantity of the work performed. Thus, you are not required to pay exempt employees any more than their agreed upon salary, even when they perform extra work.

However, many employers feel there is a legitimate need to provide extra pay to maintain good employee relations. For example, an exempt employee may take on additional job duties to fill in temporarily for a coworker on leave or may work longer hours than usual to complete a special project. In these cases, additional pay shows that you value the extra work and that you recognize that the employee is, in effect, going “above and beyond” the usual job requirements.

If you would like to provide exempt employees with additional compensation above their stated salaries, the new exemption regulations specifically allow you to do so. The regulations, which took effect on August 23, 2004, clarify when you may pay an exempt employee additional compensation without jeopardizing the exemption or violating the salary basis requirement. Specifically, if the exempt employee is

guaranteed a minimum weekly payment of \$455, he also may be paid a commission on sales or a percentage of profits or sales, or even additional compensation based on hours worked beyond the normal workweek. This additional compensation can be paid on any basis, including a flat sum, bonus payment, straight-time hourly amount, time and one-half, or any other basis, including paid time-off.

Note that this reference to extra payments calculated on an hourly basis is a new addition to the regulations. The old regulations also allowed for extra compensation in the form of commissions and bonuses, but did not address whether employers could pay exempt employees extra amounts based on hours worked. The Department of Labor (DOL), in nonbinding opinion letters, traditionally has allowed employers to pay additional compensation calculated on hours worked without affecting the exempt status. It now appears the agency has formalized its position in the new regulations.

One final point – if you find that you are paying an exempt employee extra compensation on a regular basis, you may need to reevaluate that employee’s pay. This pattern may mean that the employee’s job duties have been increased for the long term, not just to complete one-time projects. Thus, it may be time to consider giving the employee a more permanent raise. ♦

FOR MORE INFORMATION

Extra compensation and exempt employees, *SALARY ADMINISTRATION*, Chapter 301, note 10.
Salary basis test explained, *HOURS OF WORK*, Chapter 207, note 32.