

Key employees are not guaranteed reinstatement after FMLA

The Family Medical Leave Act of 1993 (FMLA) states that employers with over 50 employees are required to provide up to 12 weeks of unpaid leave per year to employees who have a serious health condition, or who are taking care of a newborn or newly adopted child or a close family member with a serious health condition.

Employers are required to continue health care coverage during the entire leave period. After FMLA leave is completed, employers are required to reinstate employees to their former positions—or equivalent positions—at no loss in pay or reduction in benefits.

Under very limited circumstances, a highly-paid employee who is considered essential or “key” to the organization may be denied reinstatement to his or her job.

Who is a key employee?

A key employee is defined as a salaried FMLA-eligible employee who is among the *highest paid 10 percent* of employees within 75 miles of the work site. To determine if an employee is within the top 10 percent, the employer should calculate the year-to-date earnings (including wages, bonuses, and incentive pay) of all salaried and non-salaried employees in the organization.

Key employees may be denied reinstatement

The employer may terminate a key employee at the end of the leave period if the employer believes that reinstating the employee will cause “grievous economic injury” to the employer’s operations.

If the employer believes that it may be harmed by reinstating an employee, the employer must tell the employee when he or she requests FMLA leave that he or she is considered a key employee and may potentially be denied reinstatement to his or her job.

Once the employer determines that it will suffer a grievous economic injury by reinstating the employee, it must notify the employee of its intent to terminate him or her at the end of the leave period. The notification must explain the reason for the decision to terminate and must allow the employee to return to work within a reasonable time to avoid termination. The notification must be delivered in person or by certified mail.

At the end of the leave period, after the employee has been notified of termination, the employee may still request reinstatement to his or her job. At this time, the employer must again determine if grievous economic injury will result from the reinstatement. If so, the employer must again deliver the notification of denied reinstatement in person or by certified mail.

Regardless of whether an employer reinstates a key employee or not, the employer must continue health care benefits for the duration of the FMLA leave.

What should counties do?

CTSI believes that counties should make every effort to reinstate all employees—including key employees—to their former positions or to equivalent positions after FMLA leave.

CTSI recognizes that there may be some instances when reinstating a key employee would cause grievous injury to the county. In these cases, we recommend that you contact CTSI before taking any action to deny reinstatement. If your county does not follow the process properly, you could end up with a wrongful termination case on your hands.

For more information, contact CTSI at 303-861-0507.

County Technical Services, Inc.

800 Grant St., Suite 400
Denver CO 80203

303.861.0507
FAX: 303.861.2832

Technical Updates are available online at: www.ctsi.org