

An employer under the circumstance described by this commenter would still be required to reinstate the eligible employee to the same or an equivalent position.

Limitations on Employer's Obligation to Reinstate (§ 825.216)

Section 104(a)(3) of FMLA limits the entitlement of any restored employee to no greater right, benefit, or position of employment than any right, benefit, or position of employment to which the employee would have been entitled had the employee not taken the leave. An employer must demonstrate that the employee would not otherwise have been employed when reinstatement is requested to be able to deny restoring the employee (for example, in the case of a department-wide layoff affecting the employee's former position). Similarly, if a shift has been eliminated or overtime work has decreased, a returning employee would not be entitled to return to that shift or to work the same overtime hours as before. In addition, an employer may deny reinstatement to an eligible "key" employee if such reinstatement would cause substantial and grievous economic injury to the employer's operations and if the employer has complied with all the provisions of § 825.217; and, an employer may delay reinstatement of an employee who fails to furnish a fitness for duty certificate on return to work in the circumstances described in § 825.310, until the certificate is furnished.

The National Association of Computer Consultant Business commented that while this section referred to the task of the project being completed while an employee is on FMLA leave and the loss of reinstatement rights in that instance, it did not refer to other similar limitations, such as where a position is eliminated or resubcontracted. The same principles would apply in these other instances where the position of employment no longer exists and the change occurs during an employee's FMLA leave. An employee's rights to be restored are the same as if the employee had not taken the leave. The employer must establish that the employee who seeks reinstatement would not otherwise have been employed if leave had not been taken in order to deny reinstatement. See also § 825.312(d).

Employers Association of New Jersey asked, where an employee would have been laid off during a period of FMLA leave, at what point does the leave end and the employee's entitlement to maintenance of group health benefits cease? Or, where the employer makes a bona fide determination that, because of

reduced workforce requirements, the services of the employee on FMLA leave will no longer be required? Similarly, Alabama Power Company (Balch & Bingham) requested more guidance be given on department-wide downsizing while an employee is on leave—must the employee still be kept on leave for the remainder of the planned FMLA leave if he or she would have been permanently laid off when the downsizing occurred? Fisher and Phillips also suggested the regulations clarify that an eligible employee's rights to group health plan benefits end after the date of a layoff affecting an employee on FMLA leave. The National Restaurant Association suggested that it would be helpful if more examples were included of circumstances where an employee's rights to job restoration and maintenance of health benefits are limited.

As explained in several sections of the regulations, an eligible employee under FMLA is entitled to no greater right of employment than if leave had not been taken. The legislative history points out that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave at the time of the layoff. Thus, if an employee is laid off during an FMLA leave period, the employer's obligations to continue the employee on FMLA leave, maintain the employee's group health plan benefits, and restore the employee to a position of employment, all cease at the time the employee is laid off *provided* the employer has no such obligation under a collective bargaining agreement or otherwise, and the employer can demonstrate that the employee would not have been reinstated, reassigned, or transferred in the absence of the FMLA leave. This section has been so clarified. Note, too, however, an employer is prohibited from discharging or otherwise discriminating against an employee for exercising rights under the Act, and the employer that eliminates the job of an employee who takes FMLA leave (for example, by redistributing the work to other employees) bears the burden of establishing that the job would have been eliminated, and the employee would not otherwise have been employed by the employer, if the employee had continued to work instead of taking the leave. (See also the discussion of § 825.214, above.)

Employers Association of New Jersey also asked whether an employer is obligated to reinstate an employee if, during the leave, the employee engaged in conduct which would have resulted in discharge if the conduct occurred

while the employee was at work. If no such obligation exists, may the FMLA leave and maintenance of group health insurance be discontinued at the point in time that the misconduct took place? Again, an employee on FMLA leave is entitled to no greater right of employment than if the leave was not taken. Provided the employer's policies are nondiscriminatory, are applied uniformly to similarly-situated employees, and violate no other laws, regulations, or collective bargaining agreements where applicable, sanctions such as discharge for misconduct may continue to be applied to the employee on FMLA leave for actionable offenses as if the employee had continued to work.

"Key" Employee Exemption (§ 825.217)

FMLA provides a limited exemption from an employer's requirement to restore an employee to employment after FMLA leave if certain factors are met: (1) denial of restoration to employment (but not the taking of the leave) must be necessary to prevent "substantial and grievous economic injury" to the employer's operations; (2) the employer must notify the employee of its intent to deny restoration under this exemption at the time the employer determines that such grievous economic injury would occur; (3) if the leave has already commenced, the employer must allow the employee an opportunity to elect to return to work after receiving the notice from the employer; and (4) the exemption is limited to a salaried eligible employee who is among the highest paid 10 percent of the employer's workforce within 75 miles of the facility where employed. These provisions are statutory, as set forth in § 104(b) of FMLA.

Several commenters suggested changes that would be inconsistent with the statutory terms of the exemption, such as increase the "top 10 percent" to "top 25 percent" or decrease it to "top five percent," or guarantee reinstatement rights to women who have achieved the top 10 percent status despite the terms of the exemption, or limit applicability of the exemption to private sector employers only. The Department cannot adopt regulatory provisions for the exemption that would run counter to the terms of the statute.

The National Association of Plumbing-Heating-Cooling Contractors questioned whether key employees had to be notified of their designation as "key" prior to requesting FMLA leave, suggesting that employers should be required to do this to prevent misunderstandings and abuses (e.g., at the time of being hired). Under the