
FOR YOUR INFORMATION

News For School Clients – May 2005

Family and Medical Leave Act Special Rules for School Employees

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide employees with unpaid family leave to care for a family member's serious health condition or following the birth or adoption of a child, and medical leave to care for their own serious health condition. The FMLA contains a detailed set of requirements, one of which is a stringent restoration requirement. The FMLA requires that, upon returning from leave, the employee be restored to the position he or she held prior to going on leave, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

Whether a position is considered to have equivalent pay, benefits, and other terms and conditions of employment depends on several factors. In order for a position to offer equivalent pay, the position must offer the same base pay, as well as the same or equivalent overtime opportunities and shift differentials.

A position is considered to have equivalent benefits if the insurance, sick leave, pensions, and any other benefits made available to employees is the same as the employee's original position. Moreover, an employee's period of time on FMLA leave may not be considered a break in service for purposes of vesting or eligibility to participate in employee benefit programs.

Finally, a position is considered to have equivalent terms and conditions of employment if the position has substantially similar duties, conditions, responsibilities, privileges, and status as the employee's original position. It is

not necessary, however, that the employee be restored to a position with the same immeasurable benefits such as potential for advancement or possibility of future layoff. Additionally, the employer cannot force the employee to accept a different position that the employer deems better, even if the new position is a promotion or at the equivalent rate of pay.

Notwithstanding the general restoration requirements following FMLA leave, there are special rules that apply to employees of local educational agencies, including public school boards and the elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The determination of how a school employee is to be restored to an "equivalent position" following leave is made based on established school board policies and practices and the collective bargaining agreement. The established policies and bargaining agreement used as a basis for restoration decisions must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave.

Any established school board policy or collective bargaining agreement that sets forth restoration procedures following family and medical leave must provide substantially the same protection that the FMLA provides regarding restoration to a position with equivalent benefits, pay, and terms and conditions of employment.

When adopting the FMLA, Congress recognized that a substantial disruption to the educational process could result from instructional employees taking leave at certain times during the academic year. Therefore, special rules were created to allow school district employers to deviate slightly from the general FMLA restoration requirements. School district employers are not required to follow the special rules instead of the general FMLA requirements, but they should be aware that the special rules are available in order to prevent disruption during the school year.

The special rules that apply to the restoration requirements are available when instructional employees at elementary and secondary schools take FMLA leave near the end of an academic term. Under FMLA regulations, an employee normally must be restored to his or her previous position or to an equivalent position immediately following the end of his or her leave period. There are three sets of circumstances, however, in which an instructional employee need not immediately be restored to his or her position if the leave occurs near the end of an academic term. In each of the three situations, the employer may require the employee to continue taking leave until the end of the academic term.

For purposes of the special rules regarding the FMLA restoration requirements, “instructional employees” are those employees whose primary function is to teach and instruct students in a class, a small group, or an individual setting. Included in the term “instructional employees” are athletic coaches, driving instructors, and special education assistants. “Academic term”

means a school semester, which usually ends near the end of the calendar year or the end of spring.

The three circumstances in which an employer may require an instructional employee to continue to take leave until the end of the academic term are:

- 1) When an employee begins leave more than five weeks before the end of the term if the leave will last at least three weeks and the employee would return to work during the three-week period before the end of the term; or
- 2) When an employee takes leave for a purpose other than his or her own serious health condition during the five-week period before the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term; or
- 3) When an employee takes leave for a purpose other than his or her own serious health condition during the three-week period before the end of a term AND the leave will last more than five working days.

School district employers should feel free to make use of the special restoration rules. Of course, before requiring an instructional employee to extend his or her leave, the school district must be sure that the employee properly fits into one of the three exceptions in order to avoid a violation of the FMLA.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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