

THE
NATIONAL LAW REVIEW

To Pay or Not to Pay - That is the Question!

Monday, June 24, 2019

A sales employee suffers from acute stress and anxiety, which ultimately force him to take a 12-week medical leave of absence under the FMLA. Later that year, when the employer considers bonuses, the employee does not receive one because he failed to meet the established sales targets.

The employee maintains that the employer's decision was largely motivated by his taking of FMLA leave, which in turn impacted his ability to meet sales goals. In other words, from the employee's point of view, because he was on FMLA leave for a long period of time, it was impossible for him to reach the employer's designated sales targets. He therefore claims that the employer should have adjusted the quota so that his FMLA leave was not considered a "negative" factor in the employer's bonus payment decision, and that the employer violated the FMLA by not doing so. Is he right?

The answer is no, the employee does not have a right to receive the bonus. But there is one key caveat - the employer must apply the same bonus policy to workers who take non-protected leave.

This issue was recently considered in [Banaga v. Government Employees Insurance Company](#), a federal court case in Southern California. The court, in a June 12, 2019 decision, dismissed an employee's FMLA claim, relying on the Department of Labor's regulations and binding case precedent. Under the [FMLA regulations](#), although an employee on FMLA leave is typically entitled to any bonus or payment made during that time, employers can lawfully withhold a bonus based on the employee's failure to achieve a specific goal due to the FMLA leave. That section makes it clear that the employee on FMLA leave must be treated at least as favorably as employees on equivalent leave status for a reason that does not qualify as FMLA leave.

Some employers have adopted a more employee-friendly bonus plan that allows for bonuses to be pro-rated if employees are off of work for some time during the bonus period. The *Banaga* court also addressed such a practice and acknowledged that while employers are "free" to prorate bonuses or awards to factor in medical leaves if they so choose, there is no legal requirement to do so. See [73 Fed. Reg. 67934-01, 67985.2](#) (Nov. 17, 2008).

The takeaway is that employers have some discretion as to how they implement bonus plans for employees. Nonetheless, it is critical that the plan consider whether employees on various types of leave are eligible for bonuses in order to analyze the risk of potential FMLA claims.

Consistency is key - employees on medical leave cannot be considered differently than those on other types of non-protected leaves.

To ensure compliance, employers should:

- Review bonus plans and determine how leaves of absence impact potential bonus payouts;
- Determine whether bonus eligibility is different for employees on medical leave versus other types of leaves; and
- Consider whether proration of bonuses, rather than ineligibility, is better for certain other reasons (e.g., employee morale).



Article By [Foley & Lardner LLP](#)
[Jeffrey S. Kopp](#)
[Labor and Employment Law Perspectives](#)

[Labor & Employment](#)
[Litigation / Trial Practice](#)
[All Federal](#)

Source URL: <https://www.natlawreview.com/article/to-pay-or-not-to-pay-question>