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FMLA Equivalent Position: What Am I Doing Wrong? Common FMLA Mistakes Part 3

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What did I do wrong?" and "*Am I doing this correctly*?" are frequent questions from clients regarding ***Family Medical Leave Act*** administration. This is the third in a monthly series highlighting some of the more common mistakes employers can inadvertently make regarding FMLA administration.

Failing to restore an employee returning from FMLA leave to an "equivalent position."

When an employee requests FMLA leave, an employer can do everything properly to provide required FMLA notices, designate FMLA leave, and require return-to-work certifications. But the process is not over yet. Under the FMLA, any eligible employee who takes FMLA leave is entitled, upon return to work, to be restored to the job position the employee held when the leave commenced, or to be restored to an equivalent job position with equivalent benefits, pay, and other terms and conditions of employment. 29 U.S.C.S. § 2614(a)(1).

This seems straightforward. However, changes can evolve over time in job duties and organizational operations. If such changes occur, an employer must be careful to analyze whether it is meeting this FMLA requirement when an employee returns from FMLA leave.

In one case, *Mitchell v. Dutchman Mfg.*, 389 F.3d 746 (7th Cir. 2004), the plaintiff-employee quit her job shortly after returning from FMLA leave, and sued her employer for not returning her to the same or an equivalent position. Her job prior to her FMLA leave was working on an assembly line where cars were finalized and prepared for sale. Her job duties consisted of various cleaning tasks, sweeping, wiping, and applying sticker decals and putty to vehicles. While the employee was on FMLA leave, the employer consolidated two of its production lines. When the employee returned from leave, some of the tasks expected of her changed – she was also required to use certain small hand tools, including an electric screw gun, a screwdriver, and a caulking gun. The employee injured herself while using the screw gun, and ultimately presented a doctor's note which prevented her from using the screw gun, but which stated she could still use the caulking gun. When her supervisor instructed her to use the caulking gun, the employee walked off of the job and did not return. The employee filed suit, claiming in part that the employer failed to restore her to the duties she had prior to her leave. The federal district court granted summary judgment to the employer, and the former employee appealed. The Seventh Circuit upheld the lower court's grant of summary judgment, reasoning that the new tasks assigned to the employee only took 10-23 minutes per car, while she spent 40-45 minutes per car on the same tasks she performed pre-leave. The Court determined that her job duties remained "substantially similar," and found that the employee was returned to an "equivalent position."

In another case, *Adler v. Orangetown Cent. Sch. Dist.*, 05 Civ. 4835 (SCR) (S.D.N.Y. Jan. 17, 2008), an employee who worked as a teacher took FMLA leave for a high-risk pregnancy. After she returned from FMLA leave, the teacher requested that she continue to teach certain Advanced Placement ("AP") classes that she had previously taught. The school informed her she would not be teaching the AP classes due to issues relating to her pregnancy and because of the school's "rotational philosophy," which was never fully explained. The teacher alleged that the non-AP classes she was assigned to teach upon her return from FMLA leave were not equivalent to the AP classes she taught prior to her FMLA leave. The School asserted that there was no legal basis to support the teacher's contention that the FMLA required her to be given her top choice class assignments, and asserted that the distinction between a few AP classes was *de minimus*. The court decided, on the motion to dismiss, that it could not conclude, as a matter of law that the teacher was returned to an "equivalent position" because the

teacher argued in her complaint that teaching AP classes is different than teaching non-AP classes for a variety of reasons. That sufficed, at the early stage of litigation, to deny the employer's motion to dismiss.

The above cases illustrate that when employees return from FMLA leave, employers should be careful at this final stage of the leave process to analyze the specific job position to which the employee will be returning. If an employee has been on continuous leave and organizational changes have been made, or job duties have otherwise changed, an employer should carefully analyze how this might impact the employer's obligation to return the employee to an "equivalent position." If an employee is returning to his/her same position, an employer should determine whether any of the actual job duties have changed, or been reassigned, in order to confirm that the employee is returning to the same position with the same job duties.

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