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# Protections for Employees Who Assert FMLA Rights

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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# Protections for Employees Who Assert FMLA Rights

Reference Number: CTAS-1043

The FMLA contains the following protections for employees who assert rights under the FMLA<sup>[1]</sup>:

1. An employer is prohibited from interfering with or denying the exercise of any rights under the FMLA.
2. An employer is prohibited from discharging or discriminating against any person for opposing or complaining about any unlawful practice under the FMLA.
3. All persons are prohibited from discharging or in any way discriminating against any person who has filed a charge or instituted a proceeding related to the FMLA, given information or testified in connection with an inquiry or proceeding related to rights under the FMLA.

The prohibition on interference means that employers may not discriminate or retaliate against an employee or prospective employee for having exercised or attempting to exercise FMLA rights. Employers cannot use the taking of FMLA leave as a negative factor in employment decisions.

Employers who violate the act by interfering with or denying rights under the FMLA may be liable for compensation and benefits lost by the employee and other actual monetary losses sustained as a direct result of the violation. Individuals may obtain appropriate equitable relief, including employment, reinstatement, promotion, or other relief tailored to the harm suffered.

Right to Reinstatement.<sup>[2]</sup> The general rule is that upon return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave began, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. This requirement does not extend to de minimis, intangible or unmeasurable aspects of the job.

Equivalent Position.<sup>[3]</sup> An equivalent position is one that is virtually identical in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must have the same or substantially similar duties and responsibilities and entail equivalent skill, effort, responsibility and authority. The employee is normally entitled to return to the same shift or the same or an equivalent work schedule, but if the employee requests a different shift, schedule, or position that better accommodates the employee's needs on return from leave, the employer may agree to the changes. However, the employee cannot be induced into a different position against the employee's wishes.

Equivalent Pay.<sup>[4]</sup> The employee is entitled to any unconditional pay increases and bonuses that occurred during the employee's leave period, such as cost of living increases. Pay increases and bonuses based on seniority, length of service, or work performed must be granted in the same way the employer does for employees on an equivalent leave status that does not qualify for FMLA leave. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked or perfect attendance, and the employee does not meet the requirements due to FMLA leave, the payment may be denied unless the employer pays it to employees on equivalent non-FMLA leave. The employee also is entitled to a position with equivalent pay premiums (such as a position that usually has overtime work with overtime pay).

Equivalent Benefits.<sup>[5]</sup> Benefits includes all benefits provided or made available to employees, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits and pensions. When the employee is reinstated, the benefits must be resumed in the same manner and at the same levels as provided when the leave began, with any changes applicable to the entire workforce. An employee cannot be required to re-qualify for any benefits the employee had prior to the leave's commencement. Employers should make sure they are able to meet this requirement, even if it means paying the employee's share of the costs to maintain the benefits (subject to recovery from the employee upon return from leave – see *Failure to Pay Premiums*).

For purposes of pension and other retirement benefits, a period of unpaid FMLA leave is not treated as a break in service for vesting or eligibility to participate, but periods of unpaid FMLA leave need not be treated as credited service.

Accrual of Additional Benefits.<sup>[6]</sup> The employee is not entitled to accrue any additional benefits (such as sick leave or annual leave) or seniority during unpaid FMLA leave unless the employer allows it. Benefits accrued at the time leave began, however, must be made available to the employee upon return from leave.

Limitations on the Right to Reinstatement.<sup>[7]</sup> The employee on FMLA leave has no greater right to

reinstatement than if he or she had been continuously working during the leave period. Other factors also can affect an employee's right to reinstatement after FMLA leave.

Job Elimination or Changes. To deny reinstatement due to elimination of the employee's position, the employer must be able to show that the employee would not otherwise have been employed at the time reinstatement is requested. For example, if the employee is laid off and employment is terminated during FMLA leave, the employer's responsibilities under the FMLA cease as long as the employer can prove that the employee would have been laid off regardless of the FMLA leave. Similarly, if a shift has been eliminated or overtime has been decreased, the employee would not be entitled to return to work that shift or the original overtime hours upon restoration. If the employee was hired for a specific term or project and that term expires or project ends during the FMLA leave period and the employer would not otherwise have continued to employ the person, the employer has no obligation to reinstate the employee.

Fraud or Failure to Comply with Requirements. An employee who fraudulently obtains FMLA leave is not entitled to job restoration or maintenance of health benefits. Restoration may be delayed or denied if an employee fails to provide a required fitness for duty certification.

Supplemental Employment while on FMLA Leave. If the employer has a uniformly-applied policy governing outside or supplemental employment, the policy may continue to apply to an employee on FMLA leave. An employer who does not have such a policy may not deny benefits on this basis unless the FMLA leave was fraudulently obtained.

Inability to Perform Essential Functions of Position. If at the end of FMLA leave the employee is unable to perform the essential functions of the position due to a mental or physical condition, including the continuation of a serious health condition or an injury or illness that is covered by worker's compensation, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act, worker's compensation or other laws.

Key Employees.<sup>[8]</sup> Under a very limited exception, employers may deny restoration to key employees when necessary to prevent substantial and grievous economic injury to the operations of the employer. A "key employee" is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all employees employed by the employer within 75 miles of the work site. The test for substantial and grievous economic injury is a stringent one that requires a threat to the economic viability of the employer or substantial long-term economic injury, and would not include minor inconveniences or costs that the employer would experience in the normal course of doing business.

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[1] 29 C.F.R. § 825.220.

[2] 29 C.F.R. § 825.214.

[3] 29 C.F.R. § 825.215.

[4] 29 C.F.R. § 825.215.

[5] 29 C.F.R. § 825.215.

[6] 29 C.F.R. § 825.215.

[7] 29 C.F.R. § 825.216.

[8] 29 C.F.R. §§ 825.216--825.219.

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