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What does it mean to be a "Key Employee" under the FMLA?

A Federal District Court recently held that an Executive Housekeeper at a Marriott hotel was not entitled to her old job after taking leave under the Family and Medical Leave Act because she was a "key employee." The court, in *Oby v. Baton Rouge Marriott*, concluded that the Marriott would have suffered "substantial and grievous economic injury" if it had been forced to reinstate Ms. Oby to her old position and, therefore, dismissed her lawsuit.

The Family and Medical Leave Act allows eligible employees to take up to 12 weeks of leave in a 12-month period for treatment of a serious health condition, to care for new born, adopted or foster children, or to care for a family member with a serious health condition. Generally, the FMLA requires an employer to reinstate an employee to the same or an equivalent position upon their return from FMLA leave. However, under certain circumstances, an employer may deny reinstatement to "key employees" if *reinstatement* would cause substantial and grievous economic injury to the operations of the employer (not whether the absence of the employee would cause such substantial and grievous injury).

The issue of who is a key employee is rather straightforward. The FMLA defines a "key employee" as a salaried employee who is among the highest paid 10 percent of all employees employed by the employer within 75 miles of the employee's worksite. An employee is considered "salaried" if he or she is paid a predetermined amount of compensation, independent of hours worked and not subject to deductions for absences of less than a day, discipline, or lack of work product. In the *Marriott* case, the Court found that Ms. Oby was a key employee" because she was the third-highest paid employee of 111 employees at the Marriott.

The issue of what an employer must show to establish that *reinstatement* (not absence) would cause substantial and grievous economic injury to its operations has not, however, been given much guidance by the courts. The regulations to the FMLA state that an employer may take into account whether the employee can be replaced on a temporary basis (i.e., not a substantial injury) and, if temporary replacement is not an option, it may consider the cost of reinstating the employee. The regulations provide little other guidance, stating merely that the

level of injury must be somewhere between a minor inconvenience and a threat to the economic viability of the employer.

In the *Marriott* case, the general manager of the hotel notified Ms. Oby one month into her FMLA leave that the hotel could not function without an Executive Housekeeper, that it would be forced to hire a new Executive Housekeeper unless Ms. Oby returned to work within two weeks, and that it could not afford to reinstate Ms. Oby as an additional Executive Housekeeper at the end of her leave if it were forced to hire a replacement in the meantime. Ms. Oby did not return to work by Marriott's stated deadline, but did ask for reinstatement at the end of her three-month leave. She argued that her reinstatement could not have caused the Marriott substantial economic injury at that point in time because the new Executive Housekeeper had not yet started work. The court disagreed, saying that, even though the new Executive Housekeeper had not started work by the time Ms. Oby requested reinstatement, he had already been hired and was scheduled to start shortly thereafter. This evidence was enough to show that *reinstating* Ms. Oby as a second Executive Housekeeper (when only one was needed) would cause grievous injury to the Marriott.

The court also held that the Marriott complied with the FMLA regardless of whether Oby was a "key employee" because, when she asked for reinstatement, the Marriott offered Oby a position that was "equivalent" to her previous position. Though the Marriott did not offer to reinstate Oby as Executive Housekeeper, it did offer her a job as Food & Beverage Manager with the same pay level and benefits provided under her old position, even though the previous Food & Beverage Manager had been paid less. Oby declined this offer, arguing that the position was not equivalent to the Executive Housekeeper position because it required her to undergo new job training and violated her religious beliefs by forcing her to sell alcoholic beverages. The court disagreed, saying that a new job position can be equivalent to an old position even if the new position requires the employee to undergo additional training, and that the differences between the Executive Housekeeper and Food & Beverage Manager positions were merely "intangible."

In order to avail itself of the "key employee" exception to job restoration under the FMLA, an employer must (1) timely notify the individual that he or she is a "key employee"; (2) give notice that it cannot reinstate him/her to his/her old position because substantial and grievous economic injury to the employer's operations would result; and (3) if the employee has already begun FMLA leave when this notice is given, give the employee a reasonable amount of time in which he or she may return to work without losing the right to reinstatement. Even if the employee fails to return to work in the time provided in the notice, the "key employee" may still request reinstatement at the end of the full FMLA leave period. If that happens, the employer can continue to deny reinstatement if it still believes, at that point in time, that reinstatement would cause substantial economic injury.

Many employers overlook the "key employee" exception provided under the FMLA. If you have any questions on whether or not it applies to a situation you are facing, do not hesitate to contact legal counsel.

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