**Ask an HR Advisor: Returning from FMLA Leave**

**Q:** What can I do when my employee doesn’t return from FMLA leave?

A: With FMLA, an employee is guaranteed restoration to the same (or equivalent) position upon their return from leave.  Under the above scenario, however, certain obligations of the employer are no longer mandated.  When an employee gives **unequivocal** (clear, unmistakable) notice of their intent not to return to work, the employer may exercise their right to terminate the employee immediately and to cease their obligations to maintain health benefits outside of COBRA requirements. Thus, employees who give unequivocal notice that they do not intend to return to work lose their entitlement to FMLA leave. Keep in mind, “unequivocal” means, clear; unambiguous, having only one possible meaning or interpretation; so there is no "maybe" here. You will want to keep copious notes and documentation around discussions and related activity regarding the employee's expressing their intent not to return to work.

Per the Department of Labor (DOL) Wage and Hour Regulation § 825.124,

On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment.

 An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

However, also according to the Department of Labor (DOL) Wage and Hour Regulation § 825.311(b),

If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

   In fact, in addition to ceasing the continuation of health benefits (outside of COBRA), the employer may decide to seek reimbursement from the employee for the company’s share of any health benefit premiums paid during the time period where the employee was under the protective coverage of FMLA.  A word of caution when considering the pursuit of these recoverable benefit premiums.  Make certain all employees falling under this scenario are treated the same.  For example, you cannot pursue recovery of premiums from one or two employees without applying the same policy across the board.  Otherwise, you run the risk of a discrimination suit.

Contact Catapult’s Advice team for additional information at 919-878-9222.

Written by a Catapult Advisor