

# MANAGER TRAINING

## Absence Makes the Heart Grow Fonder? Not in Employment!



It is a familiar workplace situation. A company has an employee, John, who is well-liked by management. There are no documented performance problems and John's performance evaluations are always positive. From an outside perspective, John is a model employee.

John goes out on federal family medical leave (FMLA leave, a protected leave of absence), and the company hires a temporary employee (John 2.0) to fill the position. In John's absence, John 2.0 excels in the position. He is more efficient than John, he makes fewer mistakes, and he turns in a better work product. After a few short weeks, the company learns that John was not performing all of his assigned duties, while John 2.0 easily completes the assigned tasks and has time to help others.

As time passes and more of John's shortcomings are uncovered, the company finds itself more and more displeased with John as an employee and more enamored with John 2.0. Now, with John's return to work eminent, the company wants to terminate John for poor performance and upgrade to John 2.0.

### What should the company do?

Before giving into temptation, the company must remember that the Family Medical Leave Act (FMLA) gives John certain reinstatement guarantees. Prior to taking any action against John, the company must familiarize itself with its reinstatement obligations under the FMLA.

Upon return from FMLA leave, John must be restored to his original job, or to an "equivalent" job. While this seems to imply the company can retain John 2.0 and simply place John in an "equivalent" position, it is not that simple.

An equivalent position is one that is **virtually identical** to the employee's former position in terms of pay, benefits, and other terms and conditions of employment. The equivalent position must have virtually identical job duties, working conditions, responsibilities, privileges, and status as the employee's original position.

With these restrictions, it is clear that the company does not have much flexibility returning John to a different position. The mere fact that the new position offers the same pay, benefits, and even title as the old position is not sufficient to meet the "equivalent position" standard if the job itself is different. For example, if the new position requires different skills, eliminates skills previously required, offers fewer opportunities for advancement, and/or includes different duties, there is a risk that the position would not meet the standard.

### What is the best course of action?

The company should not give into the temptation and "upgrade" to a newer model. Instead, John should be restored to his former position and held accountable for his performance deficiencies. Upon his return from leave, the company should meet with John and talk about the problems that were discovered during his absence. The company should place John on a performance improvement plan and John should be given a fair opportunity to correct his performance.

**Note:** While this article focuses on an employee's reinstatement rights under the FMLA, employers must remember that in addition to the FMLA, there are many other federal and state leave laws (e.g. state FMLA, pregnancy disability leave, workers' compensation leave, disability leave, military leave, etc.) that have their own provisions regarding an employee's reinstatement rights. Before taking any action regarding an employee's reinstatement following a protected leave, employers must review the reinstatement obligations under all applicable state and federal laws.

For more information regarding leaves of absence, please see our materials regarding leaves of absence and time off, which are available on our Online Knowledge Center at **HR Tasks —> Leave of Absences & Time Off**.