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Work While on FMLA Leave? Should Employers Allow It?

Your star employee, Allison, is on maternity leave. She is using her available paid time off for the first eight weeks; the last four weeks are unpaid. FMLA is approved for all twelve weeks. Allison is such a terrific employee, she wants to keep in touch and monitor her emails while she is on leave. And frankly, you want her to because some clients only want to deal with her and she holds the key to all knowledge about certain subjects.

Is this okay since everyone agrees?

Not so easy. This hypothetical raises potential issues under two federal laws: Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). A central question under the FLSA is whether Allison is classified as exempt or non-exempt under the statute. If non-exempt, she must be paid for all hours worked, and that includes the time she works while on leave unless it is “de minimus.” If she is exempt and working a significant amount, you may pay her a proportionate amount of her salary for time worked without risk of losing her exempt status.



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The problem under the FMLA, regardless of whether Allison is exempt or non-exempt, is when and whether such work “interferes” with her exercise of FMLA rights.

FLSA Issues: For exempt employees, deductions from fixed salary are permissible in certain circumstances, including while the exempt employee is on FMLA leave. An exempt employee’s salary may be prorated to reflect unpaid FMLA leave taken in a week. In Allison’s case, she is on unpaid leave for four weeks; if she works a significant amount during this period, her salary may be prorated to pay her for the time worked, without losing the FLSA exemption. If Allison’s emailing/ calling is sporadic, it may not be significant enough to prorate.

More importantly, non-exempt employees must be paid for all hours sending emails/ calling while on leave unless it is considered “de minimus.” (Generally, courts have found daily periods of approximately ten minutes or less to be “de minimus” as a matter of law.) Failure to pay Allison for her work while on leave (assuming it is more than “de minimus”) is a violation of the FLSA.

Of course the practical problem is monitoring how much time Allison is working while on leave. An FMLA policy may prohibit an employee from working while on unpaid leave without the express written authorization of the employee’s supervisor or HR. However, if an employer is aware of the employee’s work, i.e., because emails are sent or copied to the supervisor or manager, the employee must be paid regardless of authorization. The policy could also require the employee to account weekly for any time spent doing work, including a description of the work done and the time spent. Note: When Allison is utilizing paid leave this issue is not presented.

FMLA Issues: The question presented by an exempt or non-exempt employee working while on FMLA leave is when and whether such work “interferes” with the employee’s exercise of FMLA rights. Generally, an employer violates the FMLA by requiring an employee to work during FMLA leave. Similarly, an employee on FMLA leave cannot be required to remain “on call” to the employer during the leave. However, the FMLA does not create an absolute right to be left alone. The general consensus among courts is that reasonable contact limited to inquiries about location of files, status, or passing along institutional knowledge does not interfere with an employee’s rights; however, asking or requiring an employee to perform work while on leave can constitute interference. Employers must approach each situation in which an employee is working while on leave with caution and should limit the amount of time and type of work an employee is asked or allowed to perform. Unlike with the FLSA issues discussed above, paid leave does not prevent interference.

It is unlikely you will be considered to have interfered with Allison’s right to FMLA leave if she is asked or allowed to respond to occasional emails and take a few phone calls. Courts have held that “[f]ielding occasional calls about one’s job while on leave is a professional courtesy that does not abrogate or interfere with the exercise of an employee’s FMLA rights.” When limited to the scope of passing on institutional knowledge to new staff, or providing closure on completed assignments, employers do not violate the FMLA by making such calls. However, you should consider defining what Allison can and cannot be asked to do while on leave. Even though Allison appears to be checking her emails voluntarily, she may later claim she did so because she was worried about job security. It is unclear whether an employee has to complain first in order to allege interference. Certainly, the safest practice is to prohibit Allison from working entirely – but that may not be practical or realistic.

Consider a policy addressing:

1. An employee on leave should not be asked or permitted to do work except on a brief, occasional basis for institutional information or needed as a professional courtesy due to a client or customer relationship.
2. Supervisors seeking more than occasional information should first inform HR of the need for and nature of the proposed request and receive prior approval.
3. Working time spent by an employee on leave should be tracked, documented, and reported to HR.
4. The policy should define when an employee (exempt or non-exempt) on unpaid leave should be paid for time worked based on time tracked.