



Can an employer lay off an employee who is on Family and Medical Leave Act (FMLA) leave?

Although an employee has job and benefit protections during FMLA leave, he or she is not totally exempt from a layoff or other type of termination as long as the action is not related to FMLA leave. FMLA regulation 825.216 (a ([http://www.ecfr.gov/cgi-bin/text-idx?](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=abbd92cdf37c5d32de741cc5ccc1e81&rgn=div5&view=text&node=29:3.11.3.54&idno=29#se29.3.825_1216)

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applies. The regulation states: "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment."

As the regulation indicates, the employer has the responsibility of proving that the layoff was not related to FMLA leave. For that reason, an employer should be cautious when laying off or terminating an employee on FMLA leave. Before taking action, an employer should make sure that it has a valid business reason for laying off the employee, that the employee would have been laid off even if he or she was working and not taking FMLA leave, and that it has appropriate documentation to justify the action. As with other types of termination decisions, advice of legal counsel is strongly encouraged.

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