recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer’s share of allowable “premiums” as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee’s failure to return to work does not alter the employer’s responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

§ 825.214 Employee right to reinstatement.

General rule. 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. See also §825.106(e) for the obligations of joint employers.

§ 825.215 Equivalent position.

(a) Equivalent position. An equivalent position is one that is virtually identical to the employee’s former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) Conditions to qualify. If an employee is no longer qualified for the position because of the employee’s inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) Equivalent pay. (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer’s policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) Equivalent benefits. “Benefits” include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick...
leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during the leave period, subject to recovery from the employee on return from leave. See §825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefit plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, §825.209 addresses health benefits.)

(e) Equivalent terms and conditions of employment. An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee’s original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee’s original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the
same conditions as if he or she had con-
tinued to be employed.

(2) The employee is ordinarily enti-
tled to return to the same shift or the
same or an equivalent work schedule.

(3) The employee must have the same
or an equivalent opportunity for bo-
nuses, profit-sharing, and other similar
discretionary and non-discretionary
payments.

(4) FMLA does not prohibit an em-
ployer from accommodating an em-
ployee’s request to be restored to a dif-
ferent shift, schedule, or position
which better suits the employee’s per-
sonal needs on return from leave, or to
offer a promotion to a better position.
However, an employee cannot be in-
duced by the employer to accept a dif-
ferent position against the employee’s
wishes.

(f) De minimis exception. The require-
ment that an employee be restored to
the same or equivalent job with the
same or equivalent pay, benefits, and
terms and conditions of employment
does not extend to de minimis, intan-
gible, or unmeasurable aspects of the
job.

§ 825.216 Limitations on an employee’s
right to reinstatement.

(a) 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 pe-
riod. An employer must be able to show
that an employee would not otherwise
have been employed at the time rein-
statement is requested in order to deny
restoration to employment. For exam-
ple:

(1) If an employee is laid off during
the course of taking FMLA leave and
employment is terminated, the em-
ployer’s responsibility to continue
FMLA leave, maintain group health
plan benefits and restore the employee
cease at the time the employee is laid
off, provided the employer has no con-
tinuing obligations under a collective
bargaining agreement or otherwise. An
employer would have the burden of
proving that an employee would have
been laid off during the FMLA leave
period and, therefore, would not be en-
titled to restoration. Restoration to a
job slated for lay-off when the employ-
ee’s original position is not would not
meet the requirements of an equivalent
position.

(2) If a shift has been eliminated, or
overtime has been decreased, an em-
ployee would not be entitled to return
to work that shift or the original over-
time hours upon restoration. However,
if a position on, for example, a night
shift has been filled by another em-
ployee, the employee is entitled to re-
turn to the same shift on which em-
ployed before taking FMLA leave.

(3) If an employee was hired for a spe-
cific term or only to perform work on
a discrete project, the employer has no
obligation to restore the employee if
the employment term or project is over
and the employer would not otherwise
have continued to employ the em-
ployee. On the other hand, if an em-
ployee was hired to perform work on a
contract, and after that contract pe-
riod the contract was awarded to an-
other contractor, the successor con-
tractor may be required to restore the
employee if it is a successor employer.
See §825.107.

(b) In addition to the circumstances
explained above, an employer may
deny job restoration to salaried eligi-
ble employees (“key employees,” as de-
 fined in §825.217(c)), if such denial is
necessary to prevent substantial and
grievous economic injury to the oper-
atations of the employer; or may delay
restoration to an employee who fails to
provide a fitness-for-duty certificate to
return to work under the conditions
described in §825.312.

(c) If the employee is unable to per-
form an essential function of the posi-
tion because of a physical or mental
condition, including the continuation
of a serious health condition or an in-
jury or illness also covered by workers’
compensation, the employee has no
right to restoration to another position
under the FMLA. The employer’s obli-
gations may, however, be governed by
the Americans with Disabilities Act
(ADA), as amended. See §825.702, state
leave laws, or workers’ compensation
laws.

(d) An employee who fraudulently ob-
tains FMLA leave from an employer is
not protected by FMLA’s job restora-
tion or maintenance of health benefits
provisions.