

# Denying FMLA leave: What's a 'key' employee?

**Q. When can we deny an employee FMLA leave because of hardship? We have only two nurses, and one is going out on FMLA leave so the other must be present. — J.V., Arizona**

**A.** You can't deny unpaid FMLA leave and benefits to this employee. However, depending on the circumstances, it is possible that you may be able to deny this employee reinstatement to her job after her FMLA leave is done.

The FMLA says employers can deny job restoration to "key employees" if such denial is necessary to prevent "substantial and grievous economic injury to the operations of the employer." A key employee is a salaried employee who is among the highest-paid 10% of employees within 75 miles of the employee's work site. There is no precise test in determining whether the harm caused by restoring the employee to his or her position rises to the level of causing "substantial and grievous economic injury."

If an employer believes it can deny reinstatement because the employee is a key employee, it must notify the employee of this designation in writing at the time the employee gives notice of FMLA leave.

**Bottom line:** Before deciding to deny post-FMLA job restoration, review the details with your company's legal counsel.