



October 17, 1994

FMLA-47

Dear *Name**,

This is in further response to your inquiry regarding the Family and Medical Leave Act of 1993 (FMLA).

You request further guidance regarding an employee who, at the conclusion of leave, is still unable to perform the essential functions of the job which the employee held at the time the leave commenced, but who could perform the duties of an "equivalent" position which is not vacant. You ask if the employee who encumbers the "equivalent" position must be removed in order to make way for the employee who is returning from FMLA leave.

As my earlier response tried to indicate, the answer would be "No" in the situation presented. An employer is not required under the FMLA to create a position that does not exist for an employee who is unable to perform the functions of his or her former position at the end of the FMLA leave. If, at the end of 12 weeks of FMLA leave, an employee is still unable to perform the essential functions of the position which the employee held when the leave commenced, the employee has exhausted his or her job-protected leave entitlement under FMLA and would not be required, under the FMLA, to be restored to employment in a different job. An employer may, however, have additional compliance obligations with respect to this employee under other Federal or State statutes (e.g., the Americans with Disabilities Act). Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability. See 29 CFR § 825.702.

If further information is required, please let us know.

Sincerely,

J. DEAN SPEER
Director, Division of Policy and Analysis

* *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*