

Stephen Colbert Takes FMLA Leave to Care for Mom; Will His "Key Employee" Status under the FMLA Deny His Return to "The Colbert Report"?

By [Jeff Nowak](#) February 19, 2012

According to [Forbes](#) and other news sources, Stephen Colbert has taken a leave of absence from his late-night comedy show, "[The Colbert Report](#)," to attend to his ailing 91 year-old mother.

Only a true [FMLA nerd](#) would use this as an opportunity to explain a little-used, often forgotten rule under the Family and Medical Leave Act -- the "key employee" provision -- that actually could deny Colbert's reinstatement to his wildly popular comedy show. The FMLA allows employers to utilize this "key employee" provision to deny reinstatement to an employee who is among the highest paid in the workplace and whose absence creates a significant financial hardship on the employer.

Before I explain further, to all those who inadvertently stumbled upon this blog article while searching google for "Stephen Colbert," I assure you -- the man running for [President of the United States of America of South Carolina](#) most assuredly will be welcomed back to [The Colbert Report](#) once his FMLA leave ends.

But, let's suppose for an instant that we lived in the [bizarro world](#), and [Comedy Central](#) wanted to get rid of Colbert as quickly as NBC chucked Conan O'Brien from the Tonight Show. Could it do so under the FMLA? Under the FMLA's "key employee" exception, Comedy Central could terminate Colbert's employment so long as it could show that:

1. Colbert is among the highest paid 10 percent of all the employees working for Comedy Central. Keep in mind two points: a) Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses; however, earnings do not include incentives whose value is determined at some future date, (e.g., stock options, future benefits or even incentives for Colbert because he reportedly is surging ahead of Buddy Roemer in the presidential polls in the upcoming [Louisiana primary](#)); and b) the determination of whether Colbert is among the highest paid 10 percent is made at the time he gives notice of the need for FMLA leave.

2. Losing Colbert would cause **substantial and grievous economic injury** to Comedy Central's operations. This is an overwhelming standard for any employer to meet, and the FMLA regulations even note that this test is significantly harder to establish than the "undue hardship" test under the ADA. In short, the only real guidance the regulations give employers is not much in the way of guidance at all:



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A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a "key employee" threatens the economic viability of the firm, that would constitute "substantial and grievous economic injury." A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute "substantial and grievous economic injury." 29 C.F.R. 825.218(c)

In other words, an employer has to show it would be in a world of hurt because of a key employee's absence.

Notice to "Key Employee" is Critical

Even if the employer can satisfy the above factors, the employer still must provide the employee written notice at the start of FMLA leave explaining the potential consequences with respect to reinstatement and maintenance of benefits. If the employer fails to do so, it cannot deny reinstatement. Once the employer makes a determination that substantial and grievous economic injury will occur to its operations, the employer must provide notice to the employee, including the determination that the employee's leave will cause such injury, and the basis for the determination. If the employee already has begun FMLA leave, the employer still must provide FMLA leave but allow the employee a reasonable period to return to work in lieu of additional FMLA leave.

If the employee does not return after receiving this notice, he or she still is entitled to take FMLA leave. Upon the employee's return from FMLA, the employer must again assess whether substantial and grievous economic injury will occur to its operations if the employee is reinstated. If the employer finds that this injury still will occur, the employer must deny reinstatement in writing and, like before, provide the basis for the determination. *Keep in mind:* the "key employee" provision of the FMLA does not allow the employer to deny FMLA leave, but only to deny reinstatement.

Of course, as to Colbert himself, this is simply a hypothetical from the bizarro world. We look forward to Stephen Colbert's return to his rightful place at The Colbert Report -- and making us laugh on the presidential campaign trail.

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