

# FMLA Leave: When Can Employers Prorate Bonus Payments?

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Employers frequently wonder when to pay bonuses to employees on leave under the Family and Medical Leave Act (FMLA). Do employees who do not meet certain goals due to leave qualify for such bonuses? The FMLA regulations provide:

[I]f 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.

The key, as the Second Circuit Court of Appeals recently confirmed, is treating FMLA absences and non-FMLA absences the same for goal-based bonus purposes. In *Clemens v. Moody's Analytics, Inc.*, No. 18-1283-cv (May 3, 2019), the Second Circuit held that an employer did not unlawfully interfere with an employee's rights by prorating the employee's bonus payment. The decision reaffirmed employers' authority to prorate bonus payments under the FMLA and serves as reminder of when employers are permitted to prorate bonuses.

### **The Case**

Moody's Analytics, Inc. employee Gregory Clemons brought a suit in the Southern District of New York, alleging retaliation for and interference with the exercise of his rights under the FMLA. The district court dismissed his claims. On appeal, Clemons argued that Moody's unlawfully prorated bonus payments owed to him under the company's incentive program. Under this incentive program, Clemons was eligible to receive incentive payments for completing certain enumerated tasks throughout the year.

The Second Circuit rejected Clemons's argument that the prorated bonus payment interfered with his rights under the FMLA. The court recognized that Moody's prorates payments under the incentive bonus program based on the length of an employee's leave, regardless of the reason for the leave. Because Moody's neutrally applied its policy of prorating bonus payments under the program to *all* types of leave, the court determined that Moody's did not violate the FMLA. Consequently, the court upheld the circuit court's dismissal of this issue.

### **Bonus Payments Under the FMLA**

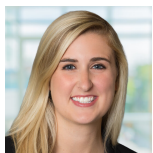
The Second Circuit's decision serves as a good reminder of employers' rights and responsibilities under the FMLA. The FMLA requires employers to treat FMLA absences the same way they treat non-FMLA absences. However, this means employers can prorate certain bonus payments to employees on FMLA leave, so long as they limit such payments to employees on similar non-FMLA leaves types of leaves. If an employee uses paid time off for non-FMLA leave and qualifies for a bonus, then those who use paid time off for FMLA leave must also qualify for the bonus. Generally, these goal-orientated or production-based bonus programs include bonus programs based on attendance, production, or sales, such as the incentive program facilitated by Moody's. Employers should remember that goal-oriented bonuses do not include bonuses awarded to all employees, such as holiday or company-wide bonuses.

### **Key Takeaways for Employers**

Employers seeking to prorate bonus payments to employees on FMLA leave, or other leave, may want to consider the following:

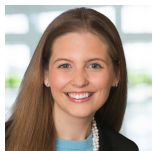
- making bonus structures goal or production based and tied to specific goals, such as sales, hours worked, or production;
- clearly identifying the requirements for obtaining bonuses;
- ensuring that bonuses distributed to employees on leave are prorated and calculated in the same fashion as employees who are utilizing other types of unpaid leave;
- accurately prorating the bonus payment so that the employee is paid for the work he or she put toward the goal (e.g., if the bonus is tied to hours worked, prorating the payment for every hour worked toward the goal, before and after the employee went on leave); and
- paying company-wide bonuses to employees on FMLA leave when bonuses are tied to company results, rather than individual results, or neutrally distributed to all employees.

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