

Employment Law Series: Session 2 - Leaves of Absence

Collaborative. Accountable. Authentic.
Legal Solutions for Business Objectives.



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Key Topics Covered

- Overview of federal and California protected leave laws
 - Family and Medical Leave Act (FMLA)
 - California Family Rights Act (CFRA)
- Pregnancy-related protections and accommodations
 - Pregnancy Disability Leave (PDL)
 - Pregnant Workers Fairness Act (PWFA)
- California Paid Sick Leave requirements
 - Accrual methods
 - Permissible uses
 - Employer compliance obligations
- Emerging and expanded employee leave rights
 - Reproductive Loss Leave
 - Bereavement Leave
 - Emergency Conditions Leave protections

Practical Takeaways

- Determining employee eligibility and leave entitlements
- Managing medical certifications, interactive process/dialogue, and notice requirements
- Coordinating overlapping leave laws
- Avoiding common compliance pitfalls and retaliation risks
- Best practices for documentation, communication, and reinstatement obligations

FMLA and CFRA Leave

When is the individual eligible?

| CFRA | FMLA |
|--|---|
| <p>Employee or a family member has a serious health condition, employee has worked for their employer for 1+ year, the employee has 1250 hours of service in the past year, and the employer has 5+ employees.</p> <p><i>(Gov. Code, § 12945.2; Cal. Code Regs., tit. 2, § 11087).</i></p> | <p>Employee or a family member has a serious health condition, employee has worked for my employer for 1+ year, employee has 1250+ hours of service in the past year, and 50+ employees work within 75-mile radius.</p> <p><i>(29 U.S.C. § 2611(2); 29 C.F.R. § 825.110).</i></p> |

How much leave is the employee entitled to?

| CFRA | FMLA |
|---|--|
| <p>Up to 12 weeks per year for all CFRA purposes.</p> <p><i>(Cal. Code Regs., tit. 2, § 11090).</i></p> | <p>Up to 12 weeks per year for all FMLA purposes.</p> <p><i>(29 U.S.C. § 2612; 29 C.F.R. § 825.701).</i></p> |

Which family members may the employee take leave for?

| CFRA | FMLA |
|---|--|
| <p>The following people experiencing a serious health condition: a child of any age, spouse, domestic partner, parent, grandparent, grandchild, or sibling, or someone else with a blood or family-like relationship with the employee (“designated person”).</p> | <p>An eligible employee may take job-protected leave to care for a child, spouse, or parent with a serious health condition.</p> |

What is a serious health condition?

| CFRA | FMLA |
|---|--|
| <p>A serious health condition is an illness, injury, or physical or mental condition that involves either inpatient care or continuing treatment by a healthcare provider.</p> <p><i>(Cal Code Regs., tit. 2, § 11087).</i></p> | <p>A serious health condition is an illness, injury, or physical or mental condition that involves either inpatient care or continuing treatment by a healthcare provider.</p> <p><i>(29 U.S.C. § 2611(11); 29 CFR § 825.113).</i></p> |

When should employee notify employer about taking leave?

| CFRA | FMLA |
|--|--|
| <p>Employee should give their employer at least 30 days' notice if possible.</p> <p><i>(Cal. Code Regs., tit. 2, § 11091).</i></p> | <p>Employee should give their employer at least 30 days' notice if possible.</p> <p><i>(29 U.S.C. § 2612(e)(1)).</i></p> |

Is employee required to take leave all at once?

| CFRA | FMLA |
|---|--|
| <p>No. The leave does not need to be taken in one continuous period of time.</p> <p><i>(Cal. Code Regs., tit. 2, §s 11090).</i></p> | <p>Maybe. Employee can take leave intermittently if medically necessary. Otherwise, employee needs the approval of their employer to take intermittent leave.</p> <p><i>(29 U.S.C. § 2612(b); 29 C.F.R. § 825.202(c)).</i></p> |

Will I lose my job while on leave?

| CFRA | FMLA |
|---|---|
| <p>No. Employee must be reinstated to their same or comparable job, except in limited circumstances unrelated to the leave (such as layoffs).</p> <p><i>(Cal. Code Regs., tit. 2, § 11089).</i></p> | <p>No. Employee must be reinstated to their same or comparable job, except in limited circumstances unrelated to the leave (such as layoffs).</p> <p><i>(29 U.S.C. § 2614(a); 29 C.F.R. § 825.214 & 825.216).</i></p> |

Will the leave be a paid leave?

| CFRA | FMLA |
|---|---|
| <p>Maybe. The employee will be paid if the Company pays employees on CFRA leave, if the employee uses accrued paid time off (such as vacation time), or if the employee applies to the California Employment Development Department (EDD) for State Disability Insurance (SDI) or Paid Family Leave (PFL) and qualify.</p> <p>(Cal. Code Regs., tit. 2, § 11092).</p> | <p>The employee will be paid if the Company pays employees on FMLA leave, if the employee uses accrued paid time off (such as vacation time), or if the employee applies to EDD for SDI or PFL and qualify.</p> |

Am I required to use sick/vacation time?

CFRA

For self: If employee is receiving SDI for their own serious health condition, an employer may not require employee to use accrued vacation or sick time. Employee may elect to supplement SDI with accrued vacation or sick time. If employee is not receiving SDI, they may elect to use, and the employer may require employee to use, accrued vacation and/or sick time.

For family member: If employee is receiving PFL to care for the serious health condition of a family member, an employer may not require employee to take accrued vacation time. Employee may elect to supplement PFL with accrued vacation time or, if employer agrees, sick time. If employee is not receiving PFL, they may elect to use it, and employer may require employee to use accrued vacation time, and employee and employer may agree employee can use sick time.

FMLA

You may elect to use vacation time, sick leave, or paid time off. If you are on unpaid leave, your employer may require you to use vacation time, sick leave, or paid time off.

(29 C.F.R. § 825.207).

Will the employer continue to pay for health coverage?

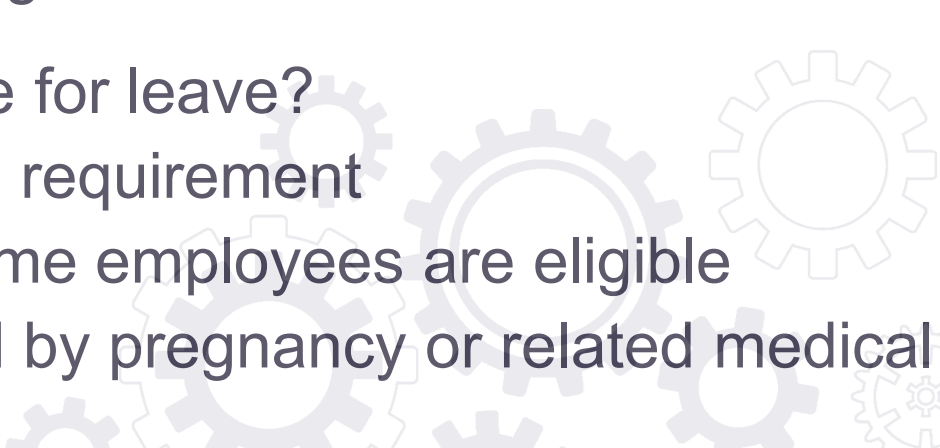
| CFRA | FMLA |
|--|--|
| <p data-bbox="86 333 942 548">Yes. The employer must pay for the continuation of employee's group health benefits if the employer normally pays for those benefits.</p> <p data-bbox="86 620 803 671"><i>(Cal. Code Regs., tit. 2, § 11092).</i></p> | <p data-bbox="985 333 1841 548">Yes. The employer must pay for the continuation of employee's group health benefits if the employer normally pays for those benefits.</p> <p data-bbox="985 620 1696 726"><i>(29 U.S.C. § 2614(c); 29 C.F.R. § 825.209).</i></p> |

Does employee need to provide a medical certification?

| CFRA | FMLA |
|--|---|
| <p>Maybe. The Company may require medical certification of a serious health condition.</p> <p><i>(Cal. Code Regs., tit. 2, § 11091).</i></p> | <p>Maybe. The Company may require medical certification of a serious health condition.</p> <p><i>(29 U.S.C. § 2614(a)(4); 29 C.F.R. § 825.306).</i></p> |

Pregnancy Disability Leave

Pregnancy Disability Leave (PDL)

- Are you a covered Employer?
 - 5 or more employees
 - Is the Employee eligible for leave?
 - No length of service requirement
 - Full-time and part-time employees are eligible
 - Disabled or affected by pregnancy or related medical condition
- 

PDL- Disabled or Affected

- **Disabled:** (1) unable to perform one or more of the essential functions of her job, or (2) unable to perform such duties without undue risk to the Employee, to other persons, or the successful completion of the pregnancy
- **Affected:** pregnant, in childbirth, or have a medical condition related to pregnancy, regardless of whether the Employee is actually disabled by any of these conditions

PDL- Duration

- Eligible Employees are entitled to a leave of absence “for a **reasonable period of time** not to exceed four months” if they are disabled by pregnancy
- Leave may be taken as a single continuous leave or on an intermittent basis (like the FMLA / CFRA)
- Leave may be taken before or after childbirth

PDL- Eligibility for Accommodation

- An Employee affected by pregnancy is entitled to a reasonable accommodation
 - modified duties
 - temporary transfer to a less strenuous position
 - reduced work schedule
 - time off

PDL: Effect on Pay

- PDL is unpaid
- Employee may elect to use accrued vacation or PTO
- Employer may require use of accrued sick leave,
 - *Cannot require use of vacation or PTO*
- Employee may be eligible for short-term disability leave benefits

PDL: Effect on Health Care and Other Benefits

- Employer is required to continue health insurance coverage
- Employee is entitled to:
 - accrual of seniority and
 - participation in employee benefit plans to the same extent and under the same conditions as would apply to any other leave granted by the Employer for any reason other than FML/CFRA

PDL: Medical Certification

- When may an Employer require medical certification for pregnancy disability leave?

- What information should a medical certification include?

PDL: Notice Requirements

- Notice depends on the circumstances
 - Foreseeable: At least 30 days' notice
 - Unforeseeable: As much advance notice as is feasible
- Employee must consult with the Employer and make a reasonable effort to minimize disruption to the business

PDL: Reinstatement Rights

- Employee is generally entitled to reinstatement to the same position held prior to the leave
- If the Employee's position is unavailable, reinstatement to a “comparable” position is required
- However, the Employee has no greater right to reinstatement than if she had continued working

Pregnancy Disability Leave- Common Pitfalls

- Forcing a pregnant employee to take accommodations they have not requested and are not needed
- Requiring or forcing the employee to take a leave if an alternative accommodation would be reasonable
- Assuming pregnant employees will not be available to take on additional responsibilities (such as travelling)
- Not considering a pregnant employee for a promotion
- Evaluating an employee's performance inclusive of the time on leave

Federal Pregnant Workers Fairness Act

- Covered employers- 15 or more employees
- Federal law- covers all employees
- Provides accommodations similar to California's PDL
- Does not provide leave

Pregnancy Disability Leave- Interaction with Other Leaves

- Runs concurrently with FMLA
- Does **not** run concurrently with CFRA
- Runs concurrently with paid leaves such as Padi Family Leave benefit from the state, short-term disability leave, or paid sick leave

PDL, FMLA, CFRA Interaction



Baby's Birth

12 Weeks of FMLA Leave



17 $\frac{1}{3}$ Weeks of PDL

12 Weeks of CFRA Leave

17 $\frac{1}{3}$ Weeks + 12 Weeks = 29 $\frac{1}{3}$ Weeks Total

Paid Sick Leave

Covered Employers & Employees

- Who is a covered employer?
 - any person employing another under any appointment or contract of hire and includes the state, political subdivisions of the state, and municipalities
- Who is a covered employee?
 - employees who work at least 30 days for the same employer within a year in CA
 - satisfy a 90-day employment period before taking sick leave
 - exceptions:
 1. employees covered by a qualifying CBA
 2. employees of railroads
 3. flight deck or cabin crew of air carriers employed as flight deck or cabin crew
 4. certain government employees receiving retirement allowances

Methods of Granting Sick Leave

- How much paid sick leave?
 - 40 hours or 5 days per year (whichever is more)
- Accrual method
 - 1 hour for each 30 hours of work
 - alternative methods must result in at least 24 hours of accrued sick leave by the 120th calendar day of employment and 40 hours by the 200th calendar day of employment
- Lump sum method
 - 40 hours or 5 days (whichever is greater) available at the beginning of each year
 - Exception for initial hires
 - 3 days or 24 hours available for use by the 120th calendar day of employment; and
 - 5 days or 40 hours available for use by the 200th calendar day of employment

Use of Paid Sick Leave

- May be used for:
 - **diagnosis, care, or treatment of existing health condition** of an employee or an employee's family member
 - **preventive care** an employee or an employee's family member
- Family Members Defined
 - parent
 - child
 - spouse
 - registered domestic partner
 - grandparent
 - grandchild
 - sibling
 - **designated person**

Use of Paid Sick Leave (continued)

- May also be used for:
 - Employees or their family member is a victim of a **qualifying act of violence** to:
 - obtain relief (e.g., TRO) to help ensure the health, safety, or welfare
 - attend judicial proceedings
 - Employees performing **jury duty** or appearing in court to comply with a subpoena or court order as a **witness in a judicial proceeding**
- Qualifying Acts of Violence:
 - domestic violence
 - sexual assault
 - stalking
 - acts, conduct, or a patten of conduct involving injury or death, firearm, other dangerous weapon, threats of injury or death

Additional Rules

- Notice and posing rules
 - [https://www.dir.ca.gov/DLSE/Publications/Paid Sick Days Poster Template \(11 2014\).pdf](https://www.dir.ca.gov/DLSE/Publications/Paid_Sick_Days_Poster_Template_(11_2014).pdf)
 - https://www.dir.ca.gov/DLSE/LC_2810.5_Notice.pdf
- Calculation of payment
- Not payable at termination
- Presumption of retaliation

“New” Leaves

Reproductive Loss Leave

- “Reproductive Loss” Defined
 - miscarriage
 - stillbirth
 - failed adoption or failed surrogacy
 - unsuccessful assisted reproduction
- Eligibility
 - private employers with 5 or more employees
 - employees who have worked for at least 30 days before taking leave
- Timing and Duration of Leave
 - single loss: minimum of 5 days of leave to be completed within 3 months
 - multiple losses: maximum of 20 days of leave in a one-year period if m

Bereavement Leave

- Covered Family Members
 - spouse
 - child
 - parent
 - sibling
 - grandparent
 - grandchild
 - domestic partner
 - parent-in-law
- Eligibility
 - private employers with 5 or more employees
 - employees who have been employed for at least 30 days before taking leave
- Timing and Duration of Leave
 - 5 days of leave to be completed within 3 months upon the death of each family member

Emergency Conditions

- Emergency Conditions Defined
 - disaster or extreme peril to the safety of persons or property at the workplace or worksite caused by natural forces or a criminal act
 - order to evacuate a workplace, worksite, worker’s home, or school of a worker’s child due to a natural disaster or a criminal act
 - NOT a health pandemic
- Eligibility
 - “*reasonable belief that the workplace or workplace is unsafe*”: a reasonable person, under the circumstances known to the employee at the time, would conclude there is a real danger of death or serious injury if that person enters or remains on the premises

Q&A

Upcoming Events

- **Session 3: Performance Management –
Wednesday, September 16**

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