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## ***Employment Law Forum***

### **Family and Medical Leave**

The federal Family and Medical Leave Act of 1993 (FMLA)<sup>1</sup> and the Moore-Brown-Roberti California Family Rights Act of 1993 (CFRA)<sup>2</sup> set forth the rights and responsibilities of employers and employees. Subsequent amendments to the legislation have impacted both the employer's and the employee's rights and obligations. The U.S. Department of Labor published the final regulations on November 17, 2008. Following are questions and answers to issues frequently raised concerning the federal and California legislation:

*Question:* What employers are covered by the legislation?

*Answer:* Family leave laws cover employers with 50 or more employees during each of any 20 or more calendar workweeks in the current calendar year or the preceding calendar year.<sup>3</sup> All public sector employers are covered regardless of the number of employees it employs.<sup>4</sup>

*Question:* What is the definition of an eligible employee?

*Answer:* The employee must satisfy each of the following:

- a. Works for a covered employer.
- b. Has worked for that employer for at least 12 months (does not need to be consecutive). *Note – CFRA coverage – must be employed more than twelve months with the employer at any time.*<sup>5</sup>
- c. Has worked for the employer for at least 1,250 hours during the 12 month period immediately preceding the commencement of the leave.
- d. Employers must consider prior employment in determining eligibility for FMLA leave, with certain limitations.
- e. Is employed at a worksite where the employer employs 50 or more employees either at the worksite or within 75 miles of the worksite.<sup>6</sup>
- f. An employee may attain FMLA eligibility while out on a block of leave when the employee satisfies the requirement of 12 months of employment.

*Question:* What must an employer do when a request for FMLA leave is received?

*Answer:* An employer has five business days to notify the employee of the employee's eligibility to take FMLA leave.

*Question:* What happens if an employer fails to notify an employee of eligibility for FMLA leave?

*Answer:* The employee is presumed to be eligible.

*Question:* May an eligible employee take portions of family leave over an extended period of time?

*Answer:* An employee is entitled up to 12 workweeks of family leave during any 12 month period.<sup>7</sup> Family leave for covered *servicemembers*, a member of the armed forces, are covered for 26 weeks.<sup>8</sup> The leave may be taken at one time, or over shorter periods in increments of hours, days, or weeks. Leave may also be used to create a reduced work schedule where the employee works fewer hours per day and counts those hours toward the 12 week entitlement. Leave used for baby bonding generally must be used in minimum increments of two weeks.

*Question:* What are the reasons that an employee would qualify for FMLA leave?

- a. Baby bonding: Birth of a child to an employee, care for a newborn child, or placement of a child with an employee in connection with the adoption or foster care of the child.
- b. Family care: Care of a child, parent, or spouse who has a serious health condition.
  - (1) Child: A biological, adopted, or foster son or daughter; a stepson or stepdaughter; or a legal ward. The child must be under 18 years of age or dependent upon the employee for providing care.
  - (2) Parent: A biological, foster, or adoptive parent; a stepparent or legal guardian.
  - (3) Spouse: A partner in marriage. Persons living together but not married do not qualify. Persons who live apart who are married qualify.
- c. Military: Care of a member of the armed forces , including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy , is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

d Medical leave: This means an employee's own serious health condition that makes the employee either unable to work at all, or unable to perform one or more essential functions of the job.<sup>9</sup>

*Question:* How much time does an employer have to respond to an employee's request for leave under the FMLA?

*Answer:* Once the employer determines that the requested leave qualifies, the employer must respond to an employee's request, at least verbally, within two business days, absent extenuating circumstances, from the time the employee gives notice of the need for the leave. Notice may be given orally or in writing, but there must be a written record as of the date of notification to the employee.<sup>10</sup>

*Question:* What is a "serious health condition"?

*Answer:* A "serious health condition" is an illness, injury, impairment, or physical or mental condition that involves:

- a. Inpatient care in a hospital, hospice, or residential medical care facility (i.e., an overnight stay); or
- b. Continuing treatment by, or under the supervision of, a health care provider that includes any one or more of the following:
  - (1) A period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities due to a serious health condition) of more than three consecutive, full calendar days, if the employee or family member is treated two or more times by a health care provider within 30 days from the first day of incapacity,
  - (2) and any subsequent treatment or period of incapacity relating to the same condition.
  - (3) Any period of incapacity due to pregnancy or for prenatal care. *Note: Not covered by CFRA.<sup>11</sup> See Pregnancy Disability Leave Act.<sup>12</sup>*
  - (4) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one that:
    - (a) Requires periodic visits for treatment by a health care provider.
    - (b) Continues over an extended period of time; and
    - (c) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

- (5) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective.
- (6) Any period of absence to receive multiple treatment from a health care provider.

A serious health condition is construed very broadly.<sup>13</sup>

*Question:* What is a “health care provider”?

*Answer:* A “health care provider” is:

1. A doctor of medicine or osteopathy who is licensed to practice medicine or surgery by the state which the doctor practices.
2. Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation visible by x-ray licensed to practice in the state of their practice.
3. Nurse practitioners, nurse-midwives, physician assistants, and clinical social workers authorized to practice in the state where services are performed.
4. Christian Science practitioners listed with the First Church of Christ, Scientist, in Boston, Massachusetts.
5. Any health care provider from whom an employer or group health plan’s benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.
6. A health care provider who practices in a country other than the United States, who is licensed to practice in accordance with the laws and regulations of that country.
7. Any other person determined by the Secretary of Labor to be capable of providing health care services.<sup>14</sup>

*Question:* What is the duration of a leave of absence?

*Answer:* Both the FMLA and the CFRA provide eligible employees with the equivalent of up to 12 workweeks of leave during any 12 month period.<sup>15</sup>

*Question:* How does an employer determine a “year” for the purposes of the FMLA?

*Answer:* Any of the following methods may be used for determining the 12 month period in which the 12 workweeks of leave entitlement occur:

- a. The calendar year.
- b. Any fixed 12 month leave year for all employees.
- c. The 12 month period measured forward from the date of an employee’s first family leave begins; or

- d. A “rolling” 12 month period measured backward from the date leave is used.<sup>16</sup>

*Question:* How much advance notice must be provided by an employee for FMLA?

*Answer:* An employer may require an employee to provide a minimum of 30 calendar days advance notice before family leave begins if the need for the leave is foreseeable. If less than a 30 day request for FMLA is made by the employee, an employer may ask why it was not possible to provide notice of the need for FMLA leave. However, an employer may not deny family leave that is an emergency or unforeseeable on the basis that the employee did not provide advance notice of the need for the leave.<sup>17</sup>

*Question:* What must an employee provide to the employer when requesting a leave of absence?

An employer may require an employee to provide a medical certification at the time the employee gives notice of the need for leave as soon as practicable. In the case of unforeseen leave, notice must be given as soon as practicable after the leave has commenced.<sup>18</sup>

*Question:* Does an eligible employee have the right to paid leave under the FMLA while on a leave of absence?

*Answer:* No. The FMLA does not require that the leave of absence be paid. However, if the employer has a policy allowing for the use of vacation, personal or family leave, the employee may elect to use accumulated leave credits while on FMLA.<sup>19</sup>

If an employee does not elect to substitute accrued paid leave, the employer may require that the paid leave be used.<sup>20</sup>

*Question:* May accrued sick leave credits be used for pay purposes when on FMRA leave?

*Answer:* Only when it is used because of the employee’s own serious health condition or for care of a family member consistent with the employer’s policy.<sup>21</sup>

*Question:* Does an eligible employee have the right to paid medical and dental benefits while on a leave of absence?

*Answer:* If the employer provides health benefits under any group health plan, the benefits must continue during an employee's family leave. The following rules apply:

- a. The employer must maintain and pay for the employee's health coverage at the same level and under the same conditions as if the employee were not on a leave of absence.
- b. Any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the leave period.<sup>22</sup>
- c. Other health plan benefits including dental care, vision, Employee Assistance Programs, etc., must also be continued. If health plan benefits include dependent coverage, the employer contribution for dependents must continue.<sup>23</sup>

*Question:* Does an employee accumulate seniority or other rights when on a leave of absence?

*Answer:* An employee returning from family leave must have at least as much seniority as when the leave began for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits. When the employee returns to work all benefits continue as if the employee had not taken a leave of absence.<sup>24</sup>

*Question:* What is required from the employee when returning from a leave of absence?

*Answer:* If an employer has an established practice of requiring employees to obtain a fitness for duty certification from his/her health care provider for absences involving illness, injury, and other absences involving disability, the employer must provide a list of essential job functions that the employee must perform. The employee must provide the certification when returning from FMLA leave.<sup>25</sup>

*Question:* Is an employee returning from FMLA leave entitled to the same position that was held prior to the leave?

*Answer:* No. The employer may place the employee in an equivalent position.<sup>26</sup>

*Question:* What is an “equivalent position”?

*Answer:* Employment in an “equivalent position” means employment in a position that is virtually identical to the employee’s original position in terms of pay, benefits, and working conditions, including privileges, fringe benefits, and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee previously was employed. It ordinarily means the same shift or the same or an equivalent work schedule.<sup>27</sup>

*Question:* The CFRA references “comparable position.” Is there a difference from the FMLA designation of “equivalent position”?

*Answer:* No.<sup>28</sup>

*Question:* Although the provisions of the FMLA and the CFRA are very similar, what happens if there is a conflict between the two acts?

*Answer:* The general rule is that the provisions most favorable to the employee applies.

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<sup>1</sup> 29 USC Secs. 2600 *et seq.*

<sup>2</sup> California Government Code Secs. 12945 *et seq.*

<sup>3</sup> 29 CFR Sec. 825.104.

<sup>4</sup> 29 CFR Sec. 825.108(d).

<sup>5</sup> Title 2 CCR Sec. 7297.0(e).

<sup>6</sup> 29 CFR Sec. 825.110(a).

<sup>7</sup> 29 CFR Sec. 825.200(c).

<sup>8</sup> 29 CFR Sec. 825, 101(16).

<sup>9</sup> 29 CFR 825.112(a).

<sup>10</sup> 29 CFR 825.208(b)(1)(2).

<sup>11</sup> Title 2 CCR Sec. 7297.6(b).

<sup>12</sup> California Government Code Sec, 12945(b)(2).

<sup>13</sup> 29 CFR Sec. 825.114.

<sup>14</sup> 29 CFR Sec. 825.118.

<sup>15</sup> 29 CFR Sec. 825.200; Title 2 CCR Sec. 7297.3(a).

<sup>16</sup> 29 CFR Sec. 825.200(b)(4).

<sup>17</sup> 29 CFR Sec. 825.302(a).

<sup>18</sup> 29 CFR Sec. 825.302(c); 825.305(a).

<sup>19</sup> 29 CFR Sec. 825.207(a).

<sup>20</sup> *Id.*

<sup>21</sup> 29 CFR Sec. 825.207(c).

<sup>22</sup> 29 CFR Sec. 825.210(a).

<sup>23</sup> 29 CFR Secs. 825.209(a)(b).

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<sup>24</sup> 29 CFR Sec. 825.215(d)(1)(2); Title 2 CCR Sec. 7297.5(f).

<sup>25</sup> 29 CFR Sec. 825.702(e).

<sup>26</sup> 29 CFR Sec. 825.215(a).

<sup>27</sup> 29 CFR Sec. 825.215(a)(e)(1).

<sup>28</sup> Title 2 CCR Sec. 7297.0(g).