

CALIFORNIA FAMILY RIGHTS ACT: REGULATORY UPDATE EFFECTIVE JULY 1, 2015

On March 15, 2015, the California Fair Employment and Housing Council issued a regulatory update to the California Family Rights Act (CFRA) regulations. The guidance clarifies certain definitions and better aligns with the current state of the law as interpreted by the courts. These changes were especially designed to bring CFRA regulations into greater conformity with its Family and Medical Leave Act (FMLA) counterpart. However, significant differences between FMLA and CFRA remain. We have provided a comparison table of some of the key differences between the two Acts on the last page of this *Briefing*. The updated regulations have been approved and will take effect July 1, 2015.

This *Briefing* is a high level summary of the regulations as amended. The full text of the CFRA regulations can be reviewed here:

<http://www.dfeh.ca.gov/res/docs/FEHC/Final%20Text%20%281%29.pdf>

NEW NOTICE AND FORM REQUIREMENTS

Effective July 1, 2015, covered employers must provide a new notice to employees of the right to request CFRA leave. It must be posted in a conspicuous place where it can be readily seen by employees and applicants and replaces the previous CFRA notice. Moreover, on that same date, employers will be required to use a new medical certification form.

MEDICAL CERTIFICATION

Employers may not contact the employee's health care provider for any reason other than to authenticate the medical certification. Employers must have a "good faith, objective reason" to doubt the validity of a medical certification in order to seek a second opinion. Employers are prohibited from seeking second opinions unless the certification involves the employee's own serious health condition. Employers may not ask employees to provide additional information in the certification process, such as symptoms or the underlying diagnosis.

Upon receiving a request for CFRA leave, the employer shall respond in five (5) business days. This is different from the previous requirement of 10 calendar days.

UPDATED DEFINITIONS

The definitions of "Covered Employer" and "Eligible Employees" have been updated including the following definitions:

- "Spouse" includes registered domestic partners and same-sex partners in marriage.
- "Inpatient Care" means an illness, injury impairment, or physical or mental condition that involves inpatient care qualifies as a "serious health condition." Previously, "inpatient care" meant "overnight

stay” in a medical facility and regulations interpreting the Family and Medical Leave Act still define “inpatient care” as an “overnight stay.” The new CFRA regulations require only an “expectation” that the individual will remain overnight.

OTHER CHANGES

Provisions relating to intermittent leave and reduced schedules regarding overtime, holidays, and calculating leave entitlement have been revised. Reinstatements, including expanded reinstatement guarantees and defenses to a refusal to reinstate, have also been updated. The consequences of an employee’s failure to respond to employer inquiries regarding the leave request, failure to return a required medical certification, and fraudulently obtaining CFRA leave are covered in the new guidance as well.

PREGNANCY DISABILITY

Pregnancy disability is not covered under CFRA, but it is a serious health condition under FMLA. The CFRA regulations, as amended, clarify, consistent with the recently updated pregnancy disability leave regulations, that an employer must maintain an employee’s group health benefits for the entire time an employee is on unpaid, protected pregnancy disability leave for up to four (4) months, followed by a subsequent CFRA leave of up to 12 weeks.

CALIFORNIA SPECIFIC HANDBOOKS

Employers who publish an employee handbook that describes other kinds of personal or disability leaves available to its employees shall include a description of the rules governing CFRA leave in the next edition of their handbook published on or after July 1, 2015. The handbook may include both pregnancy disability leave and CFRA leave requirements in a single notice.

For questions regarding this *Briefing*, please contact your Keenan Account Manager.

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Key Differences	FMLA	CFRA
Pregnancy as a “serious health condition”	Covered as a Family and Medical Leave Act “serious health condition.”	<u>Not</u> covered under CFRA. A pregnant employee is entitled to a pregnancy disability leave (PDL) of up to 4 months. Eligible employees can take a 12-week CFRA baby bonding leave. First 12 weeks of PDL can run concurrently with FMLA for eligible employees and for that period, the employer needs to maintain health benefits.
Medical Certifications	Employer may clarify or authenticate a medical certification.	Employer may not contact a health care provider for any reason other than to authenticate a medical certification.
Second Opinions	Employer may seek second opinion when it has “reason to doubt” the validity of a medical certification.	Employer must have a “good faith, objective reason” to doubt the validity of a medical certification to seek second opinion. Employer is barred from seeking second opinions unless the certification involves the employee’s own serious health condition. Employer may not ask employees to provide additional information in the certification process, such as symptoms or the underlying diagnosis.
Fitness for Duty Examination	Employer may require employees who take leave for their own serious health condition to provide a fitness for duty certification. Employer may require that the certification specifically address the employee's ability to perform the essential functions of the job, but only if the employer tells the employee that this will be required and gives the employee a list of the essential job functions when the employer first designates the employee's time off as FMLA leave.	Employers may not require fitness-for-duty examinations at the end of leave. Employers may only obtain a simple statement from healthcare provider that the employee is able to resume work.
Substituting Paid Leave	Employee may choose to substitute accrued paid leave during an otherwise unpaid FMLA leave, or for an employer to require the substitution of accrued paid leave.	CFRA differentiates between leave for the employee’s own serious health condition and for other reasons. Employee may elect or the employer can require the employee to use sick leave during an unpaid portion of CFRA leave for the employee’s own serious health condition, and the employer and the employee can agree to substitute sick leave during other CFRA leaves. An employee may elect or the employer can require the employee to use vacation or PTO for any unpaid CFRA leave. An employee using Paid Family Leave (PFL) benefits is not unpaid leave, so the employer cannot require substitution of accrued paid time off during any such portion of a CFRA leave.