California Family Leave Law: Are CFRA and FMLA Finally Playing in Unison?

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If you have any questions, please send them to the host using the Chat feature in the bottom right corner during the webinar.

The webinar will start at 10 a.m.

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California Family Leave Law: Are CFRA and FMLA Finally Playing in Unison?

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Agenda

• Family Leave Basics
• Changes to California Regulations
• Increased Alignment with FMLA
• Remaining differences between CFRA and FMLA
• Other 2015 Changes
• Recent Changes in California Paid Leave Laws
## Leave Laws

<table>
<thead>
<tr>
<th>FEDERAL</th>
<th>CALIFORNIA</th>
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<tr>
<td>Family &amp; Medical Leave Act (FMLA)</td>
<td>California Family Rights Act (CFRA)</td>
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<td>Paid Family Leave Law (PFL)</td>
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<td>Family-School Partnership Act (FSPA)</td>
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California Leave Laws

- CFRA
- PFL
- PDL
- Paid Sick Leave/Kin Care Leave
- FSPA
CFRA Review

- California Family Rights Act
- California analog to Family and Medical Leave Act (FMLA)
  - CFRA Predates FMLA
  - Amended in 1993 to conform with FMLA
- 2015 regulatory changes → greater conformity with FMLA
  - Still differences between the two laws
Entitles *eligible employees* who work for *covered employers* to **12 workweeks** of leave in a **12-month period** for a *qualifying reason*.
2015 Changes Aligned with FMLA

- Definitions of *covered employee* and *eligible employee*
- Definition of *spouse*
- Employer designation of leave
- Intermittent Leave and Reduced Schedules
- Computation of leave time
- Reinstatement Provisions
Definition of *Covered Employer*

- Engaged in business in CA, directly employing 50 or more persons in the U.S.
  - 50 employees includes employees on unpaid leave
    - Includes the state and any subdivision of the state
- Includes *joint employers*
Joint Employers

• Where 2 or more businesses exercise some control over the work or working conditions of employee
  – Share an employee’s services or interchange employees
  – One employer acts in the interest of the other employer
  – Common control

• “Viewed in its totality based on the economic realities of the situation”
Definition of *Eligible Employee*

- 12 months and 1,250 hours
- Employer with 50 employees within 75 miles of worksite
- Leave taken for qualifying reason
  - Own serious health condition
  - Serious health condition of family member
  - Bonding with new child in family

License No. 0451271
Definition of *Eligible Employee*

- Employee may meet 12-month requirement while on leave
  - Designate portion that qualifies as CFRA
  - Leave time still does not count toward 1,250 hours
- Employment prior to a break in service ≥ 7 years not counted
  - Unless for military service obligation or written agreement
Definition of *Eligible Employee*

**Worksite**

- Either single location or group of contiguous locations
- Employees with no fixed worksite
  - Home base/where work is assigned/where employee reports
- Employees jointly employed
  - Primary employer’s office from which employee is assigned or reports, unless employee has physically worked for at least one year at a facility of a secondary employer
    - Employee also counted by secondary employer to determine CFRA eligibility for secondary employer’s employees
Definition of Spouse

- **FMLA**
  - Partner in marriage
- **CFRA**
  - Partner in marriage
  - Registered domestic partner
Employer Designation of Leave

• Once employee has expressed a CFRA-qualifying need for leave, employer is obligated to inquire further
  – Employee mention of “vacation” other PTO or resignation does not render the notice insufficient

• Employee must respond to employer’s questions
  – Failure to do so may result in denial of CFRA protection

License No. 0451271
Employer Designation of Leave

- Employer has 5 business days to respond
  - Shorter than previous requirement of 10 calendar days

- Not retroactive designation of CFRA leave after reinstatement, except
  - With appropriate notice to employee
  - Where the employer’s failure to timely designate does not cause harm or injury to the employee
Intermittent Leave and Reduced Leave Schedules

- Employee must make reasonable effort to schedule
- Holidays only counted if employee was scheduled to work
- Overtime only counted if it would have been mandatory
  - Doesn’t apply to voluntary overtime hours
Intermittent Leave and Reduced Schedules

• **Bonding leave:** minimum duration is still 2 weeks
  – 2 requests for less than 2 weeks
  – May grant additional requests for shorter leaves

• **Can transfer employee to temporary alternative position, but:**
  – Transfer cannot be to discourage leave
  – Must comply with CBA, employer leave policy, FEHA, etc.

• **Intermittent/reduced schedule leave available even if no treatment received from health care provider**
Intermittent Leave and Reduced Schedule

• Employer may reduce pay for exempt employees intermittent leave/reduced schedule
  – Must comply with CBA, employer leave policy, FEHA, etc.

• Physically impossible for worker to leave shift early
  – Entire period of absence is counted against CFRA leave
  – Must permit employee to return if able to perform other aspects of work that are not physically impossible
Computation of Leave Time

- **12 month period**
  - Calendar year, fixed year, 12 months forward from beginning of last CFRA leave, 12 months back from date employee last used CFRA leave
    - Must use same method for all CA employees & must notify employee of method when employee requests CFRA leave
    - If employer doesn’t select a method, use one most beneficial for employee
    - Must give 60 days notice before changing method
    - May not change method to avoid giving leave
Computation of Leave Time

- **Work Week**
  - Employee’s normally scheduled work weeks
  - If employee’s schedule varies to such an extent that employer can’t determine a normal workweek, use weekly average of hours scheduled over prior 12 months
Reinstatement—Rights Upon Return

• Same or comparable position
  – Even if employee has been replaced or position has been restructured to accommodate the absence

• Employee must be given reasonable opportunity to fulfill qualifications upon return to work

• Allowed to accommodate request for a different schedule, position or location
Reinstatement Defenses

• Employment would have ceased or hours would have been reduced
• Fraudulently obtained leave
  – Employer has burden of proof
• Key employee: much harder test and process
  – Went from 4-part test to 7-part test
  – Preponderance of the evidence standard
Definition of *Key Employee*

- Salaried employee
- Highest paid 10% of employees within 75 miles of worksite
  - Regulations detail how that is to be calculated
- Substantial and grievous economic injury to operations of employer
  - No precise test
  - Reinstatement would threaten economic viability of the firm, or lesser injury which causes substantial, long-term economic injury
Key Employee Designation Process

• Employee informed in writing at the time employee gives notice or begins CFRA leave
  – If not immediate, then as soon as practicable
  – Employer who fails to provide notice loses right to deny job restoration

• Once employer determines “substantial and grievous economic injury,” notify employee in writing of intent to deny reinstatement
  – In person or certified mail
  – Explain basis for findings, give reasonable time to return to work
Key Employee

• CFRA rights continue
  – Health benefits must be continued
  – Employer cannot seek reimbursement for health benefits

• Employee still entitled to request reinstatement
  – Even if no return to work in response to employer’s notice
  – Employer must re-evaluate and notify employee in writing
Remaining Differences from FMLA

• Pregnancy Leaves
• Benefits during leave
• Contacting employee’s healthcare provider and medical certifications
• Posters/Notices/Employee Handbook
• Paid leave provisions
Pregnancy Leaves in California

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<tr>
<th>FMLA</th>
<th>PDL</th>
<th>CFRA</th>
<th>PFL</th>
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<td>12 weeks of leave for the birth of a child, prenatal care, incapacity related to pregnancy, for serious health condition following the birth of a child.</td>
<td>Up to four months of job-protected time off for a person disabled by pregnancy or the birth of a child. Partial wage replacement for employees who pay into SDI.</td>
<td>Up to 12 weeks of job-protected leave to bond with a new child in the family within a year of birth, adoption or placement for foster care. Cannot run concurrently with PDL. Can run concurrently with FMLA or PFL.</td>
<td>Up to six weeks of partial wage replacement for employees who take time from work to bond with a newborn baby, adopted child or foster child, or care for seriously ill child, parent, spouse or DP. Only for employees who pay into SDI.</td>
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## Pregnancy Leave in Practice

### Pregnancy Disability and Bonding Leave for Birth Mother Eligible for FMLA/CFRA

(Typical, uncomplicated pregnancy & childbirth)

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<th>FMLA</th>
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<td>Pregnancy Disability Leave Law</td>
<td>Family Medical Leave Act</td>
<td>California Family Rights Act</td>
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<td>Up to 4 months unpaid, job-protected leave with continued health benefits</td>
<td>Up to 12 weeks of unpaid, job-protected leave (runs concurrently with PDL)</td>
<td>12 weeks of unpaid, job-protected leave to bond within 1 year</td>
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### WAGE REPLACEMENT

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<th>PFL</th>
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<td>State Disability Insurance</td>
<td>Paid Family Leave</td>
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<td>4 weeks pre-birth and 6 weeks recovery</td>
<td>6 weeks to bond</td>
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Benefits During Leave: Group Health

- Must maintain employee’s group health benefits for the entire time employee is on PDL up to four months + subsequent CFRA leave of up to 12 weeks
  - Regulations follow changes in state statute. More generous provision than FMLA
Group Health: Employee Premium Payments

- **Advance written notice of terms and conditions under which premium must be paid**
  - If CFRA leave paid: use normal method of paying premiums, unless voluntary agreement otherwise
  - If CFRA leave unpaid: Payments can be:
    - Due at same time as payroll deduction
    - Due on COBRA schedule
    - Prepaid pursuant to a cafeteria plan at employee’s option
    - Existing system for payment on leaves (no mandatory prepayment)
    - Another voluntary agreement
Group Health: Employee Premium Payments

• Employer may terminate health benefits if premium payment > 30 days late
  – Written notice at least 15 days before coverage ceases
  – May recover employee’s share of premium payments
  – All other employer obligations under CFRA continue
  – If employer terminates coverage and fails to restore at end of leave, employer may be liable for benefits lost, other monetary damage, and equitable relief
Contacting Employee’s Health Care Provider

- Initial Certification
- Second Opinions
- Fitness-For-Duty and Releases to Return to Work
Certification of Health Care Provider

• “Unable to perform the function of his or her position” means one or more essential functions of the position
• Employer cannot contact employee’s health care provider for any reason other than to authenticate medical certification
  – Stricter than FMLA
Second Opinions

• Stricter standard than FMLA
  – “Good faith, objective reason” to doubt validity of medical certification
  – Only for employee’s own serious health condition
  – May not ask employees to provide additional information
Fitness-for-Duty Exams and Releases to Return to Work

• **Fitness for Duty Exam**
  – Employer may not require as a condition for return
  – Must be job-related and consistent with business necessity

• **Release to Return to Work**
  – Must have a uniform policy
  – Must not be CBA prohibiting
  – For intermittent/reduced leave schedules, only entitled to one every 30 days if reasonable safety concerns exist
Posters/Notices for CFRA and PDL

- CFRA notice (7/1/15)
  - Replaces former Notice B

- PDL notice (4/1/16)
  - Replaces former Notice A
Employer Handbook

• Employers who publish an employee handbook that describes other leaves must include a description of the updated CFRA rules in the next edition
  – May include both PDL and CFRA leave requirements in a single description
California Paid Leave Laws

- Paid Sick Leave
- Paid Family Leave
- Paid Leave Interaction with family-friendly laws
  - Kin Care Leave
  - FSPA
Paid Sick Leave

- Effective on 1/1/2015 (full effect 7/1/15)
- Accrue 6 and use up to 3 paid sick days/year
- Qualifying reasons:
  - Diagnosis, care or treatment of an existing health condition of an employee or employee’s family member
  - Preventive care for an employee or employee’s family member
  - For the victim of domestic violence, sexual assault or stalking to attend to medical/legal needs
  - “Family member” means child, parent, spouse, registered domestic partner, grandparent, grandchild, or sibling
- Can coincide with CFRA
Paid Family Leave (PFL)

• 6 weeks of partial wage replacement to care for a seriously ill family member or for bonding
  – Family includes siblings, in-laws, grandparents, grandchildren
  – Can run concurrently with CFRA

• New laws increase wage replacement rate
  – AB 908
    ▪ Eliminates 7-day waiting period, effective January 1, 2018
    ▪ Increases wage replacement rate to 60-70%
  – San Francisco ordinance will require employer to make up the difference, bringing 6-week wage replacement to 100% of wage up to the threshold
Paid Leave and CFRA

• For employee’s own serious health condition
  – Employer may require employees to use accrued paid sick leave concurrently with CFRA
  – Employee may use STD or LTD concurrently with CFRA leave

• For other leaves
  – Employer may allow employee to use paid sick leave concurrently with CFRA

• If employee uses paid leave under circumstances that don’t qualify for CFRA, leave not counted against CFRA entitlement
Paid Leave and CFRA

• Not “unpaid leave,” and employer cannot make employee use accrued sick, vacation or PTO:
  – Any form of disability payment
  – Paid Family Leave

• If employee is receiving partial wage replacement during CFRA leave, may mutually agree to have employer-provided paid leave run concurrently
Kin Care Leave

• Law allows employees who accrue sick leave to take half of annual accrual to:
  – Care for ill family member
    ▪ Does not have to be CFRA/FMLA qualifying illness
    ▪ children, parents, spouses, or registered domestic partners, grandparents, grandchildren, and siblings
  – Attend to medical/legal needs if a domestic violence, sexual assault or stalking

• May run concurrently with CFRA/FMLA
Family-School Partnership Act

• Employers with 25 or more employees must allow parents or guardians up to 40 hours of leave per year to participate in certain school-related activities
  – Up to 8 hours in a calendar month
  – Employees must use available paid vacation, personal leave or compensatory time off (unless prohibited by CBA)
Parting Thoughts

- Other kinds of protected absence
- Rapid change
- Written leave policies
Questions?

A Q&A document has been prepared to address the questions asked during this webinar. You can download this document, and the presentation slides, by clicking the link provided on Keenan’s website under the On-Demand Webinar Section.

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Thank you for your participation!

Keenan