

Amendments to the California Family Rights Act Take Effect

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On July 1, 2015, amendments revamping the California Family Rights Act (“CFRA”) went into effect. CFRA is a regulation that provides employees with up to 12 workweeks of leave within a 12-month period for a qualifying event, such as a serious health condition or family care leave. CFRA covers employers who employ 50 or more employees within a 75-

mile radius, and employees who have worked for the employer for at least 12 months and at least 1,250 hours during the 12-month period immediately preceding the leave.

The amendments have been implemented to bring CFRA closer to the federal Family Medical Leave Act (“FMLA”). However, the two acts still differ in several notable areas. Any employer dealing with a CFRA leave request, or wondering how to revamp its company policies to achieve CFRA compliance, should work with a knowledgeable employment lawyer to ensure that all aspects of this complicated law are followed correctly. The following key updates to CFRA have been made:

Covered employers: The definition has been expanded to include successors-in-interest and joint employers.

Test for Joint employers: The entire relationship is “to be viewed in its totality based on the economic realities of the situation.” A joint

employment relationship generally will be considered to exist in situations including, but not limited, to:

A) Where there is an arrangement between employers to share an employee’s services or to interchange employees;

B) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or

C) Where the employers are not completely disassociated with respect to the employee’s employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

Worksite: The definition of worksite has been expanded to include “either a single location or a group of contiguous locations.” For employees without a fixed worksite (such as employees who work from

home), the worksite is deemed to be: 1) the worksite to which employees are assigned as their home base; 2) the worksite from which their work is assigned; or 3) the worksite to which they report.

Covered Employees: An employee who is ineligible for CFRA leave at the start of a leave (because they have not met the requisite 12 months) may still become eligible while on a leave, because leave to which the employee is otherwise entitled counts toward length of service for coverage purposes. Once an employee on leave becomes CFRA eligible, the employer should document that portion as CFRA leave.

Spouse: The definition now includes registered domestic partners and same-sex partners in marriage.

Intermittent Leave: Employees must now be allowed to use intermittent leave in one-hour increments.

Guarantee of Reinstatement: The employee is entitled to reinstatement; even if he or she has been replaced, the employee's position has to have been restructured to accommodate the employee's absence. If the employee is no longer qualified for the position because of his or her inability to attend a necessary course, renew a license, fly a minimum number of hours, or other non-qualifying reason as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon returning to work.

Rights on Return: The employee is entitled to the same, or a comparable, position that is equivalent (virtually

identical) to the employee's former position in terms of pay, benefits, shift, schedule, location, and working conditions, including privilege, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which entails largely equivalent skill, effort, responsibility, and authority.

Equivalent Benefits: Equivalent benefits include benefits resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in levels that may have taken place during the period of CFRA leave affecting the entire workforce, unless otherwise elected by the employee.

Positions Cannot Be Eliminated Because of Absence: While employers still have the right to refuse to reinstate if the employer can prove by a preponderance of the evidence that the employee would have lost their job had they been present at work (for example, if there were layoffs), the employer cannot meet this burden if the employee has been replaced, or his or her position has been restructured to accommodate the employee's absence.

However, if a shift or overtime has been eliminated, an employee is not entitled to work that shift or overtime upon reinstatement.

Key Employee: Employees paid on a salary basis and among the highest 10% of the workforce are considered key employees. "Workforce" is measured within 75 miles of the employee's worksite at the time that a leave request is made. The amendments provide more detailed

requirements for an employer's defense of refusal to reinstate a key employee upon return from CFRA leave.

New Requirements

Initial Notice: Employers that believe they may deny reinstatement to a key employee must inform the employee at writing at the time of the leave request or commencement of the leave (if earlier): 1) that he or she is a key employee, and 2) that there is the potential for non-reinstatement and loss of health benefits in the event that the employer determines that reinstatement "will result in substantial and grievous economic injury to its operations."

Employers that fail to give this notice lose the right to deny the employee reinstatement, even if such injury will in fact occur.

Notice of Intent Not to Reinstatement and Opportunity for Early Return: Additional written notice is required to the employee as soon as the employer makes a good faith determination based on the facts available that substantial and grievous economic injury would occur if the employee is reinstated. The employer "should ordinarily be able to give such notice prior to the employee starting leave" and must "explain the basis for the employer's finding." If the employee's leave has already begun, the employer "must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return."

Chance to Return: A key employee

given notice that the employer intends to deny reinstatement has the right at the end of his or her leave to request that he or she be reinstated. The employer must reassess whether the reinstatement would result in substantial and grievous economic injury based on the facts at that time, and if so, must notify the employee in writing.

Notice Requirements: All notices, except the initial key employee notice, must be delivered “in person or by certified mail.”

Fraudulently Obtained CFRA Leave: The regulations now contain the express defense that an employee who fraudulently obtains or uses CFRA leave is not protected by CFRA’s job restoration or maintenance of health benefit provisions. The employer has the burden of proving this defense.

Computation of Time: The 12 month period may be measured as: 1) the calendar year; 2) any fixed 12-month leave year; 3) the 12-month period measured forward from when the employee’s CFRA leave begins; or 4) a rolling 12-month period measured backward from the date the employee’s CFRA leave begins. The employer must designate one of these methods. Otherwise, the method most favorable to the employee will be used. If an employer changes its measuring period, it must provide 60 days’ notice to employees.

Measuring Twelve Workweeks: When an employee’s schedule varies from week to week, a weekly average of the hours scheduled over the 12-month period prior to the commencement of the CRFA leave is used to calculate the entitlement.

Required Overtime: For employees who are required to work overtimes but cannot for a CFRA-qualifying reason, the non-worked overtime can be counted against the CFRA entitlement.

Intermittent Leave: If an employee physically cannot use intermittent leave, work a reduced schedule or modified shifts, then the entire period the employee is absent may be designated as CFRA leave and count against the employee’s entitlement. If the employee can perform other aspects of his or her work, those duties must shorten the time designated as CFRA leave.

Responding to Leave Requests: Employers must now respond within 5 business days of the request (the old requirement was 10 calendar days).

Employer’s Responsibility to Determine CFRA-qualifying: Even if the employee mentions vacation, paid time off, or resignation in his or her notice, the employer is responsible to determine if the employee’s request is CFRA-qualifying.

Medical Certification: Employers may not contact health care providers for any reason other than to authenticate a medical certification. If an employer doubts a certification, the employer must first have a “good faith, objective reason” before requiring a second health care provider’s opinion. An employer may require an employee to acquire a release to return-to-work from a health care provider, but may not do so for each absence taken in an intermittent leave. An employer may not require an employee to undergo a fitness-for-

duty exam as a condition of return from CFRA leave. Any such exam must be job-related and consistent with business necessity.

Paid Leave: Employers may now require employees to use accrued vacation time or other paid accrued time off during the otherwise unpaid portion of the CFA leave. An employee may elect, or an employer may require, an employee to use an accrued sick leave he or she is eligible to take during the otherwise unpaid portion of a CFRA leave, if the leave is for the employee’s own serious health condition or any other reason if mutually agreed between the employer and employee.

An employee taking leave for his or her own serious health condition may also substitute leave taken pursuant to a short- or long-term disability leave plan, as determined by the terms and conditions of the employer’s leave policy, during the otherwise unpaid portion of the CFRA leave. This disability leave runs concurrently with CFRA leave and may continue longer if permitted by the plan. An employee receiving such payments is not on “unpaid leave,” and therefore an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

An employee receiving Paid Family Leave to care for the serious health condition of a family member or to bond with a new child is similarly not on “unpaid leave” and the employer may not require the employee to use paid time off, sick leave, or accrued vacation.

The employer may not count paid leave against an employee’s CFRA leave unless the employee has taken

the paid leave under circumstances that qualify as CFRA leave.

Group Health Plan Coverage:

Regarding an employee's health coverage during CFRA leave, the employer must maintain coverage until a) the employee's CFRA leave entitlement is exhausted; b) the employer can show that the employee would have been laid off and the employment relationship terminated for lawful reasons during the CFRA period; or c) the employee provides unequivocal notice of intent not to return to work.

Employee's Duty to Pay Premiums:

If the employee must pay premiums for his or her group health coverage, the employer must provide advance written notice of the terms and conditions under which premium payments must be made.

1) If CFRA leave is paid, the employee's share must be paid by the method normally used during any paid leave, unless a voluntary agreement between the employer and employee dictates otherwise.

2) If CFRA leave is unpaid, the employer may require that payment be made to the employer or insurance carrier, but no additional charge may be added for administrative expenses.

3) Unless the policy provides otherwise, an employer's obligation to maintain health benefits ceases under CFRA if an employee's premium payment is more than 30 days late. To drop coverage, an employer must provide written notice 15 days before coverage is to cease.

Pregnancy Leave: Time spent on

pregnancy disability leave does not count toward the 12 weeks of continued insurance coverage required by CFRA. Employers must provide continued health insurance coverage for employees taking CFRA baby bonding time after pregnancy disability leave.

Light Duty for Employees Who Only Need Intermittent Leave But Cannot Take It Due to Nature of Their Jobs:

If an employee's job makes it physically impossible to take intermittent leave (e.g. pilot, flight attendant, train conductor, or laboratory employee who cannot leave and reenter a sealed "clean room"), the employee can return to work if he or she is able to perform "other aspects of the work that are not physically impossible, such as administrative duties."

Seniority: CFRA leave shall not constitute a break in service or cause the employee to lose seniority, even if other leave constitutes a break in service for the purposes of establishing longevity or seniority.

Change in Health Plan: If the employer changes health plans during a CFRA leave, the employer must give written notice to the employee that he or she is subject to the new plan.

Inpatient Care/Continuing Treatment: The inpatient care and continuing treatment component of "serious health condition" have been expanded to include substance abuse treatment and hospital admission without an overnight stay, so long as an overnight stay was anticipated.

Disability Leave: The rights to CFRA leave and disability leave are

separate and distinct. If an employee has a disability and cannot return to work following CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA.

Protection from Retaliation and Interference with CFRA Rights:

The prohibition on retaliation and interference with rights is expanded. "Interfering with" is further defined to include refusing to authorize CFRA leave and discouraging an employee from using such leave. It also protects prospective employees against such retaliation. Employees cannot waive their rights under CFRA, and employers cannot induce employees to waive their rights.

Employers also may not act to avoid responsibilities under CFRA by, for example:

1) Transferring employees from one worksite to another to keep worksites below the 50-employee threshold;

2) Changing the essential functions of the job to preclude leave;

3) Reducing employee hours available to work to avoid employee eligibility; and

4) Terminating an employee when it anticipates an otherwise eligible employee will be asking for a CFRA-qualifying leave in the future.

Notice Posting: Employers must post a notice of the new provisions

and information concerning the procedures for filing complaints of violations in conspicuous places where it can be readily seen by both employees and applicants. E-posting is acceptable, but the text must be large enough to be easily read and translated into every language spoken by at least 10% of the workforce.

Handbooks: Handbooks must be updated to include a description of CFRA leave if it describes other types of leave.

New Certification of Health Care Provider Form: The law contains a new Certification of Health Care Provider form that is optional but recommended for use.

These are only some of the many changes to CFRA. To ensure compliance with these complicated legal requirements, work with a qualified employment attorney with expertise in this field.

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