

Family Leave in California One of Long List; Cumulative Burden on Employers

A paid family leave mandate under federal law was one of the topics of interest in the 2016 presidential debate that both the Republican and Democratic candidates supported. California has championed this issue for the past decade as the first state in the nation to implement a paid family leave program. Despite the significant advances in California on this issue, however, as well as the myriad of family-friendly leaves California offers, there continues to be a constant push for additional family leave and protections. While the California Chamber of Commerce certainly supports a work/family balance, new stringent, mandatory, protected leaves of absence imposed on California employers can disrupt the workplace and create an avenue for costly litigation. Accordingly, any new proposed leave of absence for employees should be considered in light of the existing leaves of absences employers already are required to provide in California.

Federal Law: Family and Medical Leave Act

Under the federal Family and Medical Leave Act (FMLA), all employers with 50 or more employees are required to provide eligible employees with up to 12 weeks of medical leave per calendar year to:

- care for their own serious injury or illness;
- care for the serious injury or illness of a family member, defined as a child, spouse or parent; or
- bond with a newborn or adopted child.

FMLA also provides an employee up to 26 weeks of leave to care for an ill or injured military service member who is his/her spouse, son, daughter or next of kin.

Recently, the U.S. Department of Labor (DOL) expanded the leave protections under FMLA for veterans with a serious medical condition, as well as the definition of “serious injury or illness” for current service members and veterans to include pre-existing injuries that were *aggravated* by their service in the line of duty or active duty. The recent expansions also expanded the definition of “qualifying exigency leave” and increased the amount of time off from five days to 15 days. These new expansions went into effect on March 8, 2013.

In June 2014, the DOL proposed new regulations to revise the definition of “spouse” under FMLA to recognize same-sex marriages. The DOL issued a final rule on March 27, 2015 that revised the definition of “spouse” to include the individual to whom the employee entered into marriage as defined and recognized by the laws of the state where the marriage took place as opposed to the laws of the state where the individual resides. The purpose of this language was to grant employees who enter into same-sex marriages the same federal rights as others, regardless of whether the state where the employee resides or works recognizes same-sex marriages.

California Family-Related Leaves of Absence

California Family Rights Act

In addition to complying with FMLA, California employers also are required to comply with state-specific leave laws, including the California Family Rights Act (CFRA). CFRA closely resembles FMLA and also requires employers with 50 or more employees to provide an employee up to 12 weeks of protected leave per calendar year to:

- care for their own serious medical condition;
- care for the serious medical condition of a family member, defined as a child, spouse or parent; or
- bond with a newborn or adopted child.

Although CFRA and FMLA often overlap so that the two leaves run concurrently, there are significant differences where the two leaves do not run concurrently, which provide a California employee up to six months of protected leave. For example, any pregnancy-related disability is considered a “serious medical condition” under FMLA, but not CFRA. Accordingly, a pregnant employee in California can take 12 weeks of leave under FMLA for pregnancy-related conditions, and then an additional 12 weeks of protected leave under CFRA for bonding after the baby is born.

Another deviation between FMLA and CFRA is leave to care for an injured military service member. If the service member is the son, daughter or spouse of the employee, then the employee’s leave under CFRA and FMLA likely would run concurrently. If the service member is the “next of kin,” only FMLA leave would be triggered, providing a California employee with up to 26 weeks of leave under FMLA and an additional 12 weeks of leave under CFRA.

Other California Family-Related Protected Leaves

In addition to FMLA and CFRA, California also has an extensive list of other family-related protected leaves of absence for employees, as follows:

- **Pregnancy Disability Leave:** This leave applies to employers with five or more employees and provides up to four months of protected leave. This leave runs concurrently with FMLA, but not CFRA. Therefore, an employee could take up to four months for pregnancy disability/FMLA leave, and still have another 12 weeks of protected leave under CFRA for bonding with a new child or to care for the employee’s/family members’ serious medical condition.
- **Military Spouse Leave:** This leave applies to employers with 25 or more employees and allows an employee to take up to 10 days to spend time with a military spouse who has been deployed in military conflict.
- **Organ Donation Leave:** This leave applies to employers with 15 or more employees and provides eligible employees with up to one month of *paid* protected leave in a year to

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California-Required/Protected Family-Related Leaves of Absence for Employers of 50 or More (Maximum Times Per Calendar Year)

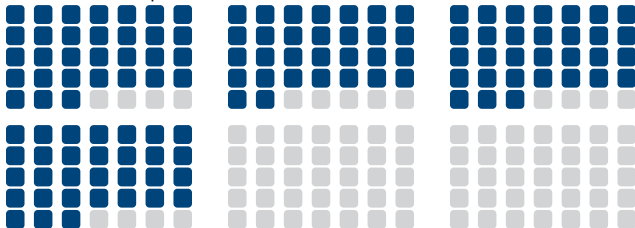
Care for Sick/Injured Military Member
26 Weeks
(12 weeks overlap with FMLA)



FMLA
12 Weeks



Pregnancy Disability
4 Months
(12 weeks overlap with FMLA)



CFRA
12 Weeks



Organ Donation
1 Month



Spouse of Military Member
10 Days



Bone Marrow Donation
1 Week



School Activities
40 Hours



Time Depends on Situation

- Paid Sick Leave/Kin Care
- School Appearance
- Domestic Abuse/Sexual Assault/Stalking Leave

donate an organ. This leave is explicitly excluded from running concurrently with FMLA or CFRA.

- **Bone Marrow Leave:** This leave applies to employers with 15 or more employees and provides eligible employees with up to one week of *paid* protected leave in a year to donate bone marrow. This leave is explicitly excluded from running concurrently with FMLA or CFRA.

- **Paid Sick Leave/Kin Care:** California is one of only five states that mandate employers provide employees with paid sick leave. Under California law, an employer is required to provide its employees with one hour of paid sick leave for every 30 hours worked. California also requires an employer to allow an employee to utilize accrued paid sick leave to care for a child (biological, adopted, foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis); a biological, adoptive, or foster parent, stepparent, or legal guardian of an employee, employee’s spouse or registered domestic partner, spouse, registered domestic partner, grandparent, grandchild, or sibling.

- **School Activities Leave:** This leave applies to employers with 25 or more employees and provides eligible employees with up to 40 hours of leave per year to participate in school activities with their children. It was amended in 2015 by SB 579 (Jackson; D-Santa Barbara) to specify and expand the circumstances under which school activities leave can be utilized.

- **School Appearance Leave:** This law applies to all employers and requires them to provide employees with time off in order to appear at school on a child’s behalf with regard to school suspension.

- **Domestic Abuse/Sexual Assault/Stalking Leave:** This leave applies to any employer with 25 employees or more and requires an employer to provide an indefinite leave of absence to an employee who is seeking services or medical attention as a result of domestic violence, sexual assault, or stalking.

Burden of Leaves of Absence on Employers

A protected leave of absence, such as FMLA and CFRA, imposes several burdens on employers other than just the extensive time off of work.

- First, there is an administrative burden of obtaining the necessary documentation from an employee to certify the need for the leave. Generally, each separate leave has a unique list of acceptable documentation an employee can provide to justify the leave. FMLA and CFRA are especially document-intensive as employers may obtain proper certification from medical providers regarding the basis for the employee’s leave, as well as the duration. This documentation can be ongoing depending upon the specific situation of the employee.

- Second, an employer must track the employee’s time out on leave. This may seem straightforward; however, many of these leaves of absence provide for “intermittent” leave, which allows the employee to take sporadic leaves of absences in time increments as small as 30 minutes.

- Third, an employer has to allow the qualified employee to take the protected leave, regardless of the employer's current business condition. For example, an employer could already have several employees out on other protected leaves of absence, but still would be required to provide a statutory leave of absence to another employee, thereby making management of the workforce extremely difficult.

- Fourth, many of the protected leaves of absence require the employee to be returned to either the exact same position or a comparable position upon the conclusion of the leave. This requirement often causes a dispute regarding what is "comparable," if the exact same position is unavailable.

- Finally, each protected leave of absence brings with it a potential threat of litigation for denying, interfering with, discriminating against, or retaliating against an employee who requested or took the leave. If an employee is terminated or disciplined in proximity to a recent request or taking of a leave of absence, there is a significant risk of a lawsuit claiming retaliation or wrongful termination. Basically, the allegation is that the personnel action taken against the employee was a result of the employee's leave of absence, rather than the reason stated by the employer for the termination or discipline. Litigation damages can include back pay, compensatory damages, statutory penalties, injunctive relief, declaratory relief, punitive damages, and attorney's fees.

Paid Family Leave Program

California's Paid Family Leave Program (PFL), the first in the country, was established in 2002, and provides qualified employees with six weeks of wage replacement while an employee is out from work for one the following approved reasons:

- bond with a new child (birth, adoption, foster); or
- care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner.

The wage replacement is approximately 55% of the employee's wages/income level. In April 2016, however, Governor Edmund G. Brown Jr. signed AB 908 (Gomez; D-Los Angeles), which will increase the wage replacement level to approximately 60%–70%, depending on the employee's income, starting January 1, 2018.

AB 908 was intended to address the financial burden employees suffer when taking a leave of absence from work to encourage more employees to utilize the program. As stated by AB 908 author Assemblymember Jimmy Gomez: "For many workers, California's current Paid Family Leave program is simply an illusion. It is unrealistic to expect a worker who is already living paycheck to paycheck on 100 percent of their salary to use a program for 6 weeks at nearly half of their wages. That's why I authored AB 908, to fix this inequity and ensure all who pay into this vital program can afford to use it, regardless of their income." AB 908 did not receive any opposition from the business community.

In 2011, Eileen Appelbaum and Ruth Milkman released

a study titled "Leaves That Pay," and focused on the success of California's PFL. The study surveyed 253 worksite establishments. Although the study's conclusion was overall supportive of PFL and highlighted its success with regard to the number of men and women taking leave, the study did make some interesting notes regarding impact on employers. Of the 253 establishments interviewed, 13.1% of the employers reported that they had incurred additional hiring and training expenses as a result of PFL. Additionally, small employers reported having the most significant challenges with covering work and job duties while employees were out on leave.

In July 2015, a study commissioned by the Employment Development Department (EDD), which administers PFL, indicated "[t]hrough its first 10 years, EDD approved 1.8 million PFL claims for \$4.6 billion in benefit payments with 90% of claims for bonding and 10% for caring."

California Family Leave Laws Compared to Other States

In comparison to other states, California is certainly a leader in family-friendly laws. As indicated above, California was the first state to implement PFL, a wage-replacement program while an employee takes leave for family-related reasons. In addition, California was the second state to enact a paid sick leave mandate. California also is one of the only states that has a separate leave of absence for employees disabled by pregnancy, in addition to leave to bond with a new child.

In a July 2016 publication by the National Conference of State Legislatures comparing family-friendly laws in all states ("State and Family Medical Leave Laws"), California was one of only 10 states that has a specific protected leave of absence for "school-related" activities. Another study, "The Status of Women in the States: 2015 Work & Family," ranked California No. 2 for work and family policies that support workers keeping their jobs and also caring for their family members.

Recent Legislation

- **SB 406 (2015)** (Jackson; D-Santa Barbara) would have expanded the California Family Rights Act to include five new family members that are not covered under FMLA, which would have created the potential for a 24-week mandated leave of absence. Opposed by the CalChamber as a job killer, this bill was vetoed by the Governor.

- **SB 579 (2015)** (Jackson; D-Santa Barbara) clarified the bases for an employee to take the existing school activities leave and amended the family members under the existing kin care law to mirror the family members under the paid sick leave law. The CalChamber removed opposition due to amendments. This bill was signed by the Governor.

- **SB 1166 (2016)** (Jackson; D-Santa Barbara) would have created a new 12-week leave of absence applicable to employers with 10 or more employees for bonding with a new child. This bill failed in the Assembly Labor and Employment Committee.

The CalChamber opposed this bill as a job killer.

• **SB 654 (2016)** (Jackson; D-Santa Barbara) would have created a new six-week leave of absence applicable to employers with 20 or more employees within a 75-mile radius for bonding with a new child. The CalChamber opposed this bill as a job killer. The bill was vetoed by the Governor.

Expected Activity in 2017–2018

Given the pattern of the Legislature over the last several years, a bill for some issue-specific type of employee family-related leave will likely be introduced in 2017. Many legislators are sympathetic to the need for employees to take time off from work for personal issues regarding caring or bonding with family members.

CalChamber Position

As set forth above, California already has an extensive list of protected leaves of absences available to employees for a wide range of family-related needs. While such leaves certainly do not address every potential personal situation that may arise, this does not mean that additional, statutory protected leaves of absence are necessary in California. Rather, the CalChamber believes that such individual issues are more appropriately addressed between an employer and employee, taking into consideration the needs of the employee and the business needs of the employer. California cannot jeopardize the growth of

the business community by burdening employers with any additional, mandatory leaves of absence that the employer must accommodate regardless of its existing business needs.



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