Paid Family Leave

California Should Incentivize Additional Leave Instead of Adding Mandates

California has championed the issue of paid family leave for the past decade, being the first state in the nation to implement a paid family leave program. The National Conference of State Legislatures has highlighted California as one of the states providing the most family-friendly programs and protected leaves of absence.

Despite the significant advances in California on this issue, as well as the myriad family-friendly leaves California offers, there continues to be a push for additional family leave and protections. As part of his 2019 budget proposal, Governor Gavin Newsom committed to expanding California's Paid Family Leave program with the goal of ensuring that all newborns and newly adopted babies can be cared for by a parent or a close family member for the first 6 months of life. Since Governor Newsom is focused on providing care for newborns, this article covers leave laws related to maternity, paternity and baby bonding leave.

The California Chamber of Commerce certainly supports a work/family balance, and several distinct laws already ensure protections for maternity, paternity and baby bonding leave in the Golden State. The leaves of absence provided under these various laws is not the concern. The main issue of contention is leaving it to plaintiffs' attorneys to determine whether the leave was offered appropriately or administered by including a private right of action. If the Paid Family Leave program were to create new stringent, mandatory, protected leaves of absence imposed on California employers, it could disrupt the workplace and create an avenue for costly litigation.

LEAVE OF ABSENCE OPTIONS

Below is a brief overview of each type of leave currently provided in California. State Disability Insurance (SDI) and Paid Family Leave (PFL) are state-run programs that do not provide job protection but do provide wage replacement during the leave. Generally, the other leaves listed provide job protection during the leave, but the leave is unpaid. During these unpaid leaves of absence, however, an employee has access to wage replacement from SDI/PFL.

• **State Disability Insurance (SDI)**. Established in 1946, the California SDI program is a partial wage replacement insurance plan for California employees that is state-mandated and funded through employee payroll deductions. SDI provides short-term, financial benefits to eligible employees who suffer a loss of wages when unable to work due to a non-work-related illness or injury or when medically disabled due to pregnancy or childbirth.

The usual disability period for pregnancy is up to four weeks before the expected delivery date and 6 to 8 weeks after delivery, depending on the type of delivery. SDI is not a job-protected leave of absence. Employees unable to work because of a non-work-related disability may also be eligible for job-protected leave under the federal Family and Medical Leave Act (FMLA), California Family Rights Act (CFRA), New Parent Leave Act (NPLA) and or Pregnancy Disability Leave (PDL.

• **Paid Family Leave (PFL)**. PFL is a wage replacement program within the SDI program, funded through employee payroll deductions and administered by the Employment Development Department (EDD). PFL covers employees at organizations of any size. Currently, PFL provides employees with partial wage replacement for up to 6 weeks in any 12-month period while absent from work for care of a seriously ill or injured family member, bonding with a minor child within 1 year of the child's birth, or placement in connection with foster care or adoption.

On June 27, 2019, Governor Newsom signed SB 83, which will extend the duration of PFL benefits from the current 6-week limit to 8 weeks starting July 1, 2020.

• **California Family Rights Act (CFRA) and Family and Medical Leave Act (FMLA)**. CFRA and FMLA leaves apply to employers with 50 or more employees and provide a qualifying employee with 12 weeks of job-protected, unpaid leave during a 12-month period for his/her own medical condition or the medical condition of his/her spouse, child or parent, or for the birth, adoption or foster care placement of a child. CFRA and

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FMLA leaves do not apply to all employers. Specific requirements must be met for CFRA and FMLA leaves to apply to both the employee and the employer.

Although CFRA and FMLA often overlap so that the two leaves run concurrently, there are significant instances in which the two leaves may not run concurrently. 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 disability, and then an additional 12 weeks of protected leave under CFRA for bonding after the baby is born.

• **Pregnancy Disability Leave (PDL)**. PDL applies to employers with 5 or more employees and provides up to 4 months of job-protected leave for pregnancy, childbirth or related conditions. This leave runs concurrently with FMLA, but not CFRA. Therefore, an employee could take up to 4 months for pregnancy disability/FMLA leave, and still have another 12 weeks of job-protected leave under CFRA for bonding with a new child or to care for the employee's/family members' serious medical condition. Generally, an employee who is on PDL can receive wage replacement through SDI.

• **New Parent Leave Act (NPLA)**. The NPLA requires employers with 20 or more employees to provide eligible employees with up to 12 weeks of unpaid, job-protected leave to bond with a newborn child, or a child placed through adoption or foster care. NPLA is available only to employees who are not subject to both the federal FMLA and the state CFRA. NPLA leave does not run concurrently with PDL. Thus, after utilizing PDL, an eligible employee is entitled to 12 weeks of NPLA leave, for a potential combined total of 7 months of job-protected leave.

BURDEN OF LEAVES OF ABSENCE ON EMPLOYERS

All these leave laws interact with one another, but they must be patchworked together by employers in order to determine the proper amount and type of leave an employee may take. While most of these leave laws are not limited to time off for childbirth, maternity leave provides a good example of the complexity of these laws. With regards to pregnancy-related leaves of absence, one employee could utilize SDI, PFL, PDL, NPLA or CFRA and FMLA—all for one pregnancy.

For example, a mother may be eligible for PDL because she is disabled by pregnancy/childbirth; then, after she is no longer disabled by pregnancy/childbirth, she may be placed on FMLA and/or CFRA leave. Before placing the employee on FMLA and/or CFRA leave, the employer needs to confirm that the employee is actually eligible for FMLA and/or CFRA leave and that FMLA and/or CFRA applies to that specific employer. In addition, the employer must remember that PDL runs concurrently with FMLA; however, it does not run concurrently with CFRA. If the employee is not eligible for FMLA and/or CFRA, the employer needs to confirm whether NPLA applies. During this time, the employee can utilize SDI and then PFL for wage replacement.

Besides the burden of keeping track of the applicable leaves and providing extensive job protection when necessary, a leave of absence, especially if job-protected, imposes several other burdens on employers:

• First, each protected leave of absence brings with it a potential threat of litigation. For example, 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.

• Second, 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.

• Third, 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 on the specific situation of the employee.

• Fourth, an employer must track the employee's time while 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 absence in time increments as small as 30 minutes.

• Finally, an employer must 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.

In addition to the leaves discussed above, California also has the following list of additional protected leaves of absence: military spouse leave, organ donation leave, bone marrow leave, paid sick leave, school activities leave, school appearance leave, domestic abuse/sexual assault/stalking leave, and kin care.

EXPECTED ACTIVITY IN 2020

The issue of PFL was one of the first topics of interest in 2019 for Governor Newsom and many legislators. As previously mentioned, Governor Newsom approved the expansion of PFL from 6 weeks to 8 weeks. (*See* SB 83, Committee on Budget and Fiscal Review, 2019.) Currently, the administration has a task force considering different options to increase participation in the PFL program and to phase in additional program expansions.

Senator Hannah-Beth Jackson (D-Santa Barbara) also sought to expand job-protected leaves of absence with SB 135. The bill, a CalChamber job killer, would have made significant changes to CFRA, such as: lowering the employee threshold from 50 to 5; expanding the scope of individuals an employee can take leave for, including a "designated person" of the employee's choosing; and increasing the duration of protected leave an employee could take by creating a potential of 10 months of job-protected leave for pregnancy-related conditions for large employers and seven months for small employers.

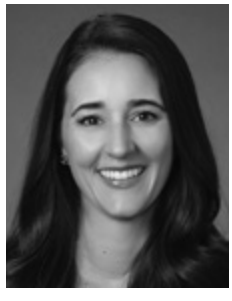
SB 135 proposed an aggressive change to CFRA that would have greatly impacted small businesses and provided extensive job-protected leaves beyond baby bonding, maternity and paternity leave. The bill was placed on the Senate Inactive File at the author's request. However, considering the administration's interest in PFL, and 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 2020.

CALCHAMBER POSITION

The CalChamber certainly supports work/family balance; however, any new proposed leave of absence for employees should be considered in light of the existing leaves of absence employers already are required to provide in California. Although 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 workforce demands 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 and workforce needs.

Finally, adding a private right of action as the enforcement mechanism for each leave of absence simply increases litigation, adds unnecessary costs to employers and primarily benefits trial attorneys instead of the employee.



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