California has numerous labor and employment regulations that far exceed those mandated at the federal level. A clear example of this is California’s multiple protected leaves of absence available to employees. Although other states may have one or two similar leaves of absence, the California Chamber of Commerce is unaware of any other state that imposes the list of protected leaves of absence available in California.

Each leave independently may not seem to impose a significant burden on businesses; however, the cumulative impact of administering all the available protected leaves in California while still managing a productive and profitable business concerns employers. The CalChamber understands that employees have personal needs that must be considered. Such needs, however, must be balanced with an employer’s ability to manage its workforce. Accordingly, any new proposed leave of absence for employees should be considered in light of the existing leaves of absence that employers already are required to provide in California.

**Federal Leave Laws**

**FMLA**

Under the 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 their 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 expanded the definition of “serious injury or illness” for current service members and veterans to include pre-existing injuries that were aggravated by 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 5 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.

FMLA is a “protected” leave of absence, meaning an employer cannot terminate and/or retaliate against an employee as a result of the employee requesting or taking a leave of absence pursuant to this law. Additionally, an employer must maintain the employee’s position or a similar position to which the employee may return at the conclusion of his/her leave.

**USERRA**

The Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA) also requires employers of any size to provide an employee up to five years of protected leave for military service. The employee must be a member of “uniformed services,” including the Army, Navy, Air Force, Marine Corps, Coast Guard, Army National Guard or Air National Guard, and engaged in active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard, or absences for fitness for duty examinations.

The five years is calculated according to the cumulative amount of time the employee spends in the uniformed
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military service. The new expansions of FMLA also requires an employer to consider all periods of absence from work due to or necessitated by covered service under USERRA when determining whether the employee is eligible for FMLA.

ADA

The Americans with Disabilities Act (ADA) applies to employers with 15 or more employees and requires an employer to reasonably accommodate a qualified employee with a disability. A reasonable accommodation may include a protected leave of absence from work, the duration of which is dependent upon the disability.

California Leave Laws

CFRA

In addition to complying with federal leave laws, California employers are required to comply with state-specific leave laws, including 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 medical 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 6 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 after the baby is born for bonding.

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 would likely run concurrently. If the service member is the “next of kin,” however, 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 Protected Leaves

Other California protected leaves of absence include:

- 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 member’s 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 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 an organ. This leave is explicitly excluded from running concurrently with FMLA or CFRA.
- 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 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.
- Civil Air Patrol: This leave requires any employer with 10 or more employees to provide no less than 10 days per calendar year of unpaid leave for an employee who is responding to an emergency operational mission of the California Wing of the Civil Air Patrol. If it is only a single emergency operational mission, only three days of leave is required.
- Victims of Crime Leave: This leave applies to any employer and requires the employer to provide an indefinite amount of leave to an employee who is a victim of crime as defined in statute, or has an immediate family member who was a victim of crime in order to attend judicial proceedings.
- Volunteer Firefighting, Reserve Peace Officer, and Emergency Rescue Personnel Leave: This leave applies to employers with 50 or more employees and requires the employer to provide an employee who is a volunteer firefighter, reserve peace officer, or emergency rescue personnel with up to 14 days of leave per year to engage in fire, law enforcement, or emergency rescue training.
- Voting Leave: This leave applies to all employers and requires employers to provide employees with as much time off as needed to vote. A maximum of two hours of time off to vote is paid.
- Jury Duty/Witness Leave: This leave applies to all employers and requires employers to provide any employee called upon for jury duty or subpoenaed as a witness time off
from work for the duration of the employee’s civil service on a jury or witness.

• Fair Employment and Housing Act (FEHA): FEHA requires all employers with five employees or more to reasonably accommodate employees who have a disability. A reasonable accommodation can and may include a leave of absence, the duration of which depends upon the employee’s disability.

Paid Sick Leave

In 2014, Assemblymember Lorena Gonzalez (D-San Diego) introduced AB 1522, which mandated that employers provide employees with paid sick leave in California. AB 1522 is applicable to all employees who have worked in California for more than 30 days. If an employer does not have a policy that provides otherwise, an employee accrues one hour of paid sick leave for every 30 hours worked. An employer can cap the employee’s accrual of paid sick leave to 6 days or 48 hours each year, and may limit the employee’s use of paid sick leave to three days or 24 hours.

Due to the anti-retaliation provisions included in AB 1522, paid sick leave is a protected leave of absence. Specifically, AB 1522 prohibits an employer from discriminating or retaliating against an employee who requests or exercises his or her right to use accrued paid sick days.

AB 1522 also creates a rebuttable presumption of unlawful retaliation if any adverse employment action is taken against an employee within 30 days of the employee’s cooperation in an investigation regarding the employer’s policy and practice of implementing paid sick leave, filing a complaint with the Labor Commissioner, or of opposing any practice or policy that violates the paid sick leave law.

Within hours of AB 1522 passing the Legislature, Governor Edmund G. Brown Jr. released a public statement that supported AB 1522. Shortly thereafter on September 10, 2014, Governor Brown signed AB 1522, making California only the second state in the country to require employers to provide employees with paid sick leave.

In order to respond to some of the questions left lingering after the passage of AB 1522, Assemblymember Gonzalez introduced AB 304 in 2015 that was the “clean-up” bill to AB 1522. After months of negotiations on the various provisions of the bill, the key components of AB 304 were as follows:

• grandfathering of existing paid time off policies that accrue in a different manner other than hours worked, yet provide at least the same amount of annual leave;
• delayed front-loading paid sick leave policies for newly hired employees;
• clarification of how to calculate paid sick leave; and
• specifying the employee must work for 30 days for the employer before the employee is eligible to accrue paid sick leave.

AB 304 was signed into law and went into effect immediately as it included an urgency clause.

Paid Sick Leave Initiative

On November 3, 2015, the California State Council of Service Employees (SEIU) filed an initiative with the Attorney General’s Office entitled “Raise California’s Wage and Paid Sick Days Act of 2016.” The proposed initiative increases the minimum use of paid sick days from 3 days a year to 6 days a year.

Burden of Leaves of Absence on Employers

A protected leave of absence, such as those set forth above, 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. 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 absences provide for “intermittent” leave, which allows the employee to take sporadic leaves of absences in 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 absences, but still would be required to provide a statutory leave of absence to another employee, thereby making management of the workforce extremely difficult.

• Finally, each protected leave of absence brings with it a potential threat of litigation. 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 employer’s stated reason for the termination or discipline.

Recent Legislation

• AB 1522 (2014) (Gonzalez; D-San Diego) mandates paid sick leave for all employees who have worked in California for more than 30 days.

• AB 304 (2015) (Gonzalez; D-San Diego) clarifies provisions of the paid sick leave law.

• AB 357 (2015) (Chiu; D-San Francisco) sought to include a protected leave of absence for employees to attend
appointments at the county human services agency. This bill is on the Inactive File in the Assembly.

- **AB 2030 (2014)** (Campos; D-San Jose) would have turned the current unpaid school activities leave into a paid leave of absence. This bill failed to pass out of policy committee.

- **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 federal law, which would have created the potential for a 24-week mandated leave of absence. This bill was vetoed by the Governor.

- **SB 579 (2015)** (Jackson; D-Santa Barbara) clarifies the basis for an employee to take the existing school activities leave and amends the family members under the existing kin care law to mirror the family members under the paid sick leave law. This bill was signed by the Governor.

Given the pattern of the Legislature over the last several years, a bill for some issue-specific type of employee leave will likely be introduced in 2016. Many legislators are sympathetic to the need for employees to take time off from work for personal issues, such as to care for extended family members with a serious medical condition.

**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 personal needs. Although such leaves certainly do not address every potential personal situation that may arise, this does not mean that additional, statutory protected leaves of absences 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. The new paid sick leave mandate already has created another burden on all California employers, especially small employers with a limited workforce.

California cannot jeopardize the growth of the business community by burdening employers with any additional, mandatory leaves of absences that the employer must accommodate regardless of its existing business needs.

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