

Family Leave in California

Individual Employer/Employee Arrangements Preferable to More Mandates

Summary

California often is recognized as one of the most family-friendly states given its myriad of employment leaves of absence and protections. With the recent signing of SB 63 (Jackson; D-Santa Barbara), which goes into effect on January 1, 2018 and provides a new protected leave of absence, California may be the most family-friendly state. Despite the state already being a leader on this issue, however, expanding or creating more family-friendly workplace policies continues to be an active area of legislation. 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 Medical Leave Act

Under the federal Family and Medical Leave Act (FMLA), all employers with 50 or more employees within a 75-mile radius are required to provide eligible employees with up to 12 weeks of medical leave per calendar year to:

- care for his/her 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.

California Family-Related Leaves of Absence

California Family Rights Act

In addition to complying with the 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 to provide an employee up to 12 weeks of protected leave per calendar year to:

- care for his/her 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 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,” 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 of Absence:

In addition to FMLA and CFRA, California also has an extensive list of other family-related protected leaves of absences 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.

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- **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 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.
- **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.
- **SB 63 (2017) (Jackson; D-Santa Barbara)/New Parent Leave Act:** This provides a 12-week protected 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 signed by Governor Edmund G. Brown Jr. and goes into effect January 1, 2018. The Fair Employment and Housing Council will be promulgating regulations in 2018 to implement the provisions of SB 63.

Protected Leaves of Absence

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

Expected Activity in 2018

Given the pattern of the Legislature over the last several years, a bill to either expand an existing leave of absence, such as paid sick leave, or to create a new leave of absence will be introduced. 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. Additionally, such bills usually are identified as one of the priorities of the California Women's Legislative Caucus, which creates a difficult political dynamic for legislators as well.

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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