Law Offices of Mary L. Topliff
Workplace Wave

# Navigating the Interplay of California and Federal Family and Medical Leaves of Absence Laws: Some Employer Compliance Action Steps

**By Mary L. Topliff, Esq.**

This summer, I had the honor of speaking at the Society for Human Resource Management's Annual Conference in New Orleans. I presented the topic, "Leaves of Absence and Other Time Off Challenges in California." I will be presenting a variation on this topic at the Society for Human Resource Management's Legislative Conference in San Diego in October.

The following article includes a summary of the presentation, focusing on the interplay between the federal Family and Medical Leave Act (FMLA) and California laws, such as the California Family Rights Act (CFRA) and the Pregnancy Disability Act (PDA). With the recent amendments to the FMLA and its regulations, there are even greater differences between federal and California law in the scope of coverage and application. Challenges abound since the California regulations have not been updated to reflect either agreement or disagreement on a variety of detailed administration issues covered by the FMLA regulations.

The following presents a summary of employer action steps in selected areas to ensure compliance with these intertwining laws. Keep in mind that the disability accommodation laws (the Americans with Disabilities Act and the California Fair Employment and Housing Act) and workers' compensation statutes provide yet additional areas of overlap, which are beyond the scope of this article.

## September 2009

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**Public Speaking**

10/19/09
Navigating the Maze of California's Leave of Absence Laws
SHRM 2009 California Legislative Conference
San Diego, CA

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**1. Set Up a Mechanism for Tracking Time Off that Accounts for Different Types of Leave**

The basic eligibility requirements under FMLA and CFRA are that an employee has worked for 12 months for the employer, has worked at least 1,250 hours in the 12-month period preceding the leave of absence and the employee works within a 75-mile radius of 50 employees.

An employee's leave of absence may be covered by one or more laws. Typically, when two laws apply to the same type of leave, the individual's legal rights under the laws run concurrently. However, if FMLA applies to a leave but CFRA does not, then the employee's leave time under CFRA does not run and can be used for another type of leave at a later time.

**A. Which Laws Apply to Scenarios Regarding Basic Employee Eligibility Requirements under FMLA/CFRA:**

- Employee works within a 75-mile radius of a location with 50 or more employees (FMLA and CFRA apply)
- Employee works within 75 miles of 50 employees, but the 50 employees are located in various small offices (CFRA only)
- Employee has a gap in service of less than 7 years such that previous service applies towards the 12 month eligibility rule, unless the break in service is due to National Guard or Reserve military service obligations or a written agreement, including a collective bargaining agreement, reflecting the employer's intent to rehire the employee after the break in service (FMLA and CFRA)
- Employee has gap in service of more than 7 years such that previous service applies towards the 12 month eligibility rule (CFRA only)

**B. Which Laws Apply to Scenarios Regarding Different Types of Leaves under FMLA/CFRA/PDA:**

- Employee's own "serious health condition" other than pregnancy (FMLA and CFRA)
- Employee's pregnancy (PDA and FMLA)
- "Serious health condition" of parent, child, or spouse (FMLA, CFRA)
- "Serious health condition" of registered domestic partner, child of registered domestic partner (CFRA)
- New baby bonding (FMLA, CFRA)
- Qualifying exigency for national guard, Ready Reserve, retired military called for contingency operation (FMLA, California Military and Veteran's Code for time off during spousal rest and recuperation time)
- Military servicemember injured in line of duty (FMLA includes parent, spouse and next of kin family member and up to 26 weeks in a single 12-month period, CFRA includes parent or spouse up to 12 weeks)

**2. Customize Forms for Eligibility and Designation Notices**

The updated FMLA regulations require two written notices to employees who have requested to take FMLA leave. An Eligibility Notice is to be provided to the

employee within five business days from the employee's request to take FMLA leave or from the date that the employer received sufficient information that the leave may be for an FMLA-qualifying reason. The Eligibility Notice lets employees know that they meet the basic eligibility criteria (e.g., length of service, hours worked and work location) and if they do not, then one reason why they are not eligible. It also discloses requirements regarding medical certification, use of vacation/sick/paid time off banks, insurance premium payment information, and job reinstatement information, including the key employee exception. The Department of Labor posting, "Rights and Responsibilities under the FMLA" must also be provided to the employee requesting an FMLA leave.

Under the FMLA, employers are required to provide a Designation Notice that lets the employee know that the leave is being designated as FMLA leave, the leave request is being denied or additional information is required. If the employer requires a fitness for duty certification before the employee can be reinstated, this requirement must be included on the notice. This notice must be provided within five business days from the date that the employer has received sufficient information to make this determination, which is usually when the employer has received the employee's health care provider certification form. If there are deficiencies in the information provided by the employee, the employer then provides a seven-day period for the employee to fix the problem as identified on the Designation Notice.

The Department of Labor has issued sample notice forms that employers may use to comply with the FMLA requirements. The Eligibility and Designation Notices can be completed at the same time if the employee provides the health care certification at the time that the leave is requested.

The California regulations for CFRA and PDA require only one notice in response to an employee's request to occur within 10 business days. The notice would inform the employee whether the time off is being designated as CFRA or CFRA/FMLA and whether it is paid or unpaid.

Employers who comply with the FMLA notices within the time frames required will likely be considered in compliance with the California timing requirement. Although not explicit in the regulations, the California notice requirement would appear to assume that the notice is provided after the employer has received the requisite medical certification form upon which to determine whether the leave request is approved.

California employers should be aware that the Department of Labor forms relate only to FMLA. They do not address the different types of leave provided by California or other state laws, nor to employer policies that may provide additional leaves of absence. Tailoring these forms to the employer's specific policies will provide more clarity to employees while complying with federal and state laws.

**3. Observe California's Stricter Medical Information Privacy Requirements**

The updated FMLA regulations provide employers with greater latitude in denying FMLA leave to employees who fail to timely provide adequate and complete medical certifications. The regulations also allow employers to contact directly an employee's health care provider when clarification is needed after the employee has had a 7-day period to provide the clarification or fix any deficiencies. If the employee does not provide a sufficient medical privacy release for the health care provider to communicate with the employer and the employer has insufficient information to grant the leave, the employer is authorized to deny the FMLA leave.

The California CFRA and PDA regulations specify that employers may not ask for a medical diagnosis and are silent on the employer's ability to communicate directly with the health care provider and deny the leave request. It is feasible for an employee to specifically authorize an employer to communicate directly with the health care provider; however, the employer must be careful to comply with the California Confidentiality of Medical Information Act.

As with the Notice forms, the Department of Labor has provided forms that may be used by health care providers, with separate forms for an employee's own medical issue and for a family member's illness. These forms include a variety of medical information that would not appear to be authorized under California law. For example, the CFRA regulations state that employees have provided sufficient information for their employer to make a determination that CFRA does or does not apply if they provide the date on which the serious health condition began, the probable duration of the condition and a statement that the employee is unable to work at all or is unable to perform an essential function of the position.

Unfortunately, the Fair Employment and Housing Commission has not provided a stand-alone sample health care provider certification form. The sample language can be found in an appendix to the CFRA regulations. The FEHC has stated that the 1994 version of the FMLA Certification of Health Care Provider form may be used so long as the health care provider does not disclose the employee's diagnosis without consent.

**4. Carefully Comply with Medical Recertification Requirements**

Employees often provide medical certifications that provide open-ended periods of time off, usually because their medical condition is one that tends to flare up unpredictably, such as migraine headaches. Or, a medical certification might provide that the employee needs to take 30 days off and several months later, the employee needs additional time off for the same reason.

How often an employer may require the employee to submit a medical recertification differs under the FMLA and CFRA. The updated FMLA regulations

provide much more detail regarding recertifications. Employers may require recertification every 30 days where the minimum duration of the leave is 30 days or less for pregnancy, chronic or permanent/long-term conditions. If the duration of the leave is longer than 30 days, the employer may require recertification more frequently if circumstances have changed or the employer has reason to doubt the validity of the certification. In any event, recertification may be required every six months. Each new 12-month period allows the employer to obtain a new certification.

The California regulations are more limited. Recertification may be required only when the time period originally estimated by the health care provider has expired. This would appear to mean that a medical certification that provided "as needed" time off due to a flare-up condition would not be subject to recertification because the time period would never expire.

Employers with California employees who wish to engage in a recertification process should seek legal counsel.

**5. Observe FMLA's Stricter Requirements Regarding the Application of Paid Time Off**

For employers with California employees who are eligible to receive State Disability Insurance, Paid Family Leave, workers' compensation disability pay or other disability insurance benefits, the employers' ability to require the use of sick, vacation or PTO time is limited by the updated FMLA regulations, but not the California regulations. The FMLA regulations describe the employee's receipt of such wage replacement benefits as the equivalent of paid leave and as such, the employer may not require the use of the employee's accrued sick, vacation or PTO time. The employee may elect to use their paid time off credits.

The California regulations, however, clearly allow an employer to require the use of sick and vacation/PTO time during a CFRA leave and sick time during a PDA leave. For leaves that are covered by both FMLA/CFRA or FMLA/PDA, employers will incur less risk by having employees elect to use their sick, vacation or PTO time while they are receiving SDI, PFL or other disability insurance benefits.

For more information on these issues, contact the author at topliff@joblaw.com.