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June 2, 2014

Via Email (FEHCouncil@dfeh.ca.gov)
Fair Employment and Housing Council
c/o Phyllis W. Cheng, Director
Department of Fair Employment and Housing
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758

Re: Comments Regarding Proposed Family Care and Medical Leave Regulations

Dear Council:

The following comments are submitted as part of a collaborative effort between this firm and Holly Sutton and Doug Dexter, partners at Farella, Braun & Martel, LLP. Our respective clients span both large and smaller employers in a wide variety of industries for which we regularly provide counseling advice. In addition, I have taught two on-going classes on leaves of absence for over ten years for the Northern California Human Resources Association, which has over 3,000 members from Bakersfield to the Oregon border. We offer these comments from our vantage point of counseling clients and educating HR practitioners on the legal and practical implications of leave of absence compliance.

Many of the proposed changes are welcome and helpful clarifications that will ease the challenges employers face in administering leaves of absence while complying with the Family and Medical Leave Act ("FMLA"), the California Family Rights Act ("CFRA") and the California Pregnancy Disability Leave provisions of the Fair Employment and Housing Act ("PDL"). The following comments and suggestions are listed in the order in which the pertinent regulations appear in the Proposed Amendments to the California Family Rights Act Regulations, and abbreviated references to section numbers are used for brevity.

1. Article 11, §11087(d), Definition of Covered Employer. To ensure clarity regarding whether an employer is a "successor in interest," we recommend that this section explicitly incorporate the FMLA regulations' definition of this term found at 29 C.F.R. §825.107.

2. Article 11, §11087(r), Definition of Serious Health Condition. The addition of the reference to "treatment for substance abuse," suggests that any such treatment would automatically be considered a "serious health condition." However, the FMLA regulation, at 29 C.F.R. §825.119, provides that substance abuse "may" qualify as a "serious health condition"

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provided other conditions are met. It would be more clear to incorporate the FMLA regulation provision either by cross-referencing it or by including its provisions in Section 11087(r).

The proposed addition to the definition of "inpatient care" in Section 11087(r)(1) to include "any subsequent treatment in connection with such inpatient care" appears duplicative of Section 11087(r)(2) and thus, unnecessary. The proposed addition that "inpatient care" means "any period of incapacity," is unclear. This appears to belong in a separate subsection or sentence.

In order to avoid confusion and the potential for creating two separate health care provider certification forms for FMLA and CFRA if different definitions of "serious health condition" are used, we suggest that the CFRA regulations incorporate the FMLA definition of "serious health condition" in Sections 11087(r) and (r)(1).

3. Article 11, §11089(d)(3), Right to Reinstatement: Permissible Defenses. The proposed addition that the "employer has the burden of proving that the employee fraudulently obtained CFRA leave[,]" goes well beyond the corresponding FMLA regulation at 29 C.F.R. Section 825.216(d), which does not set forth any prerequisite that the employer provide proof of such fraud. Moreover, the FMLA regulation clarifies that the employee would not be entitled to continuation of health insurance benefits, which is omitted from the proposed CFRA regulation. Furthermore, the proposed language conflicts with CFRA's other provisions requiring the employee to provide sufficient information to establish his or her entitlement to CFRA leave. We thus recommend that the proposed language be stricken.

4. Article 11, §11090(e)(1), Computation of Time Periods. The proposed addition to the second sentence, "or to otherwise work a hardship on the employee" is vague and would allow an employee to simply object to an otherwise appropriate transfer by stating that it would be a hardship. The regulations already include the standards for compliance when transferring an employee during an intermittent leave. We propose striking the aforementioned phrase.

5. Article 11, §11090(e)(4), Computation of Time Periods. The proposed addition would constitute a drastic departure from the FMLA regulations and case law interpreting it that provide a safe harbor exception to the salary requirement for overtime exempt employees who are taking partial days off covered by FMLA. California employers have assumed over the years that the safe harbor exception applied to legally protected time off, such as CFRA. Disallowing the exception would mean that an employee taking partial days of intermittent leave under CFRA would be required to be paid for this time off in order to comply with the overtime exemption salary requirement. Thus, overtime exempt employees would reap a benefit not found in CFRA, namely, paid leave. This would also create inequities for nonexempt employees who would not be paid during their CFRA leave.

We urge the Council to adopt the following language: "(4) Employers may reduce exempt employees' pay for CFRA intermittent leave or a reduced work schedule as described in 29 C.F.R. §825.206." Alternatively, if the Council does not have jurisdiction to make this determination, we propose omitting this subsection altogether.

6. Article 11, §§11091(a)(1)(B) and (a)(6), Requests for CFRA Leave. The proposed addition that employees must consent to retroactive designation of leave as CFRA leave is in conflict with the FMLA regulation addressing retroactive designation, at 29 C.F.R. §825.301(d), which provides that such designation is appropriate so long as it does not cause harm to the employee or if the employer and employee mutually agree. Moreover, proposed subsection (a)(1)(B) conflicts with subsection (a)(6), which specifies that approval of leaves by the employer is "deemed retroactive to the date of the first day of the leave." Requiring an employee's consent to the beginning date of the leave will create two different standards under FMLA and CFRA, causing significant compliance difficulties for employers. FMLA's standard for retroactive designation provides a workable solution that continues to be geared towards protecting employees by prohibiting actions that would cause harm to the employee. We urge the Council to adopt the language of 29 C.F.R. §825.301(d).

In Subsection (a)(6), additional clarification regarding the timing of the employer's response to an employee's CFRA leave request would be useful. FMLA requires employers to provide an Eligibility Notice within five business days from the employee's request for leave and an Approval/Designation Notice within five business days from the employer's receipt of the employee's health care provider certification (or other required certification) form. Employers cannot approve the vast majority of leave requests until they receive properly completed certification forms (typically, the health care provider certification). Thus, the language of subsection (a)(6) should be expanded upon to clarify that the employer's designation notice should occur within five business days from the employer's receipt of the properly completed certification form. This would further render this subsection consistent with the provision of subsection (b)(3), allowing the employer to deny CFRA protections if the employee fails to timely return the certification form.

7. Article 11, §§11091(b)(2)(A), Requests for CFRA Leave: Medical Certification. The proposed edit that the employer must "establish" reason to doubt the validity of the certification in order to obtain a second opinion constitutes a significant and unnecessary expansion since the prior regulations and the FMLA regulatory counterpart refer only to the employer having reason to doubt the validity. It is unclear to whom the employer would be establishing this reason. We propose that the prior word, "has" be reinserted and the word, "establishes" be stricken.

8. Article 11, §11091(b)(3), Requests for CFRA Leave: Medical Certification. Employers frequently receive medical certifications that are incomplete or overly vague, which makes

administering leaves quite difficult. It is not uncommon for employers to make repeated requests spanning several weeks or even months before they receive one completed form. The FMLA regulations, at 29 C.F.R. §825.307, recognize and address these practical challenges by clarifying that employees must either obtain a fully completed certification directly from their health care provider or they may authorize the employer to contact the health care provider directly. This is helpful for both employees and employers and we propose that the Council adopt 29 C.F.R. §825.307 in this regard.

Proposed subsection (b)(3) states that the same rules apply to recertification. However, it is unclear whether this means that the specific provisions of the FMLA regulation on this topic, 29 C.F.R. §825.309, are being rejected by the Council or whether this means that employees have 15 days to submit recertifications following their employer's request to so provide.

9. Article 11, §11092(b)(2), Terms of CFRA Leave, Paid Leave. The proposed additional language does not address the impact of an employee's receipt of wage replacement benefits pursuant to State Disability Insurance (SDI) and Paid Family Leave (PFL) during a CFRA leave. Nearly all private sector employees file for either SDI or PFL benefits during a medical or family leave covered by CFRA. This subsection addresses only private short-term and long-term disability insurance plans. It is unclear whether the Council's omission of any reference to SDI and PFL was intentional and if so, what impact that is intended to have on the interplay with an employee's CFRA leave as well as the coordination of employees' paid time off, vacation and/or sick leave benefits with their receipt of SDI or PFL benefits.

10. Article 11, §11092(c)(6)(B), Terms of CFRA Leave, Provision of Health Benefits. The proposed additional language that the employer must be able to "show" that the employee would have been laid off before ending group health plan coverage constitutes a significant and unnecessary expansion since the FMLA regulatory counterpart states that the obligation ends if the employment would have ended. It is unclear to whom the employer would be "showing" this and this subsection is more limited in scope than the FMLA counterpart. We propose that the wording of 29 C.F.R. §825.209(f) be adopted.

11. Article 11, §11093(c)(1) and (e), Relationship between CFRA Leave and Pregnancy Disability Leave; Relationship between CFRA Leave and Non-Pregnancy Related Disability Leave. The proposed additional language in subsection (c)(1) appears unnecessary because employers are already legally required to comply with FEHA's disability accommodation provisions.

Subsection (e) is entitled "Disability Leave," however, it references "disability leave under Government Code section 12945," which relates to pregnancy disability leave and

"Section 11064 et seq. of the regulations," which relates to disability discrimination and accommodations (i.e., non-pregnancy related). The import of this proposed subsection is thus unclear. If the intent is to establish that a CFRA leave is distinct from additional time off provided as a reasonable accommodation upon the conclusion of an employee's CFRA leave, then this is a welcome clarification.

12. Article 11, §11094(a), Retaliation and Protection from Interference with CFRA Rights. The proposed phrase, "refusing to authorize CFRA leave" could encompass circumstances in which an employer is well within its rights to do so, for example, because the employee failed to provide a completed medical certification. Thus, we propose that this phrase be expanded to: "refusing to authorize CFRA leave without legal justification."

13. Proposed language of Certification of Health Care Provider. It would be helpful for the Council to publish this certification form as a separate document that can be easily downloaded for employers to use.

Thank you for the opportunity to provide comments on the proposed regulations. If the Council requires any further clarification, please feel free to contact me.

Very truly yours,

Mary L. Topliff

cc: Doug Dexter, Esq.
Holly Sutton, Esq.